



CONSERVATION LAW FOUNDATION

November 30, 2009

Joseph T. Fontaine
Emission Reduction Trading Programs Manager
State of New Hampshire
Department of Environmental Services
Air Resources Division
P.O. Box 95
29 Hazen Drive
Concord, NH 03302-0095

Re: Comments on DES's Preliminary Determination Regarding PSNH's Request for Clean Power Act Bonus Carbon Dioxide Allowances

Dear Mr. Fontaine:

Conservation Law Foundation ("CLF") appreciates the opportunity to provide these comments on the New Hampshire Department of Environmental Services' ("DES" or the "Department") Response to Public Service Company of New Hampshire ("PSNH") Regarding Request for Bonus Carbon Dioxide Allowances, amended by DES as of October 2009 (hereinafter, "Preliminary Determination").

CLF generally supports the Department's approach and provides the following specific comments on the Preliminary Determination.

DES Appears to Lack Discretion To Award Any Bonus Allowances to PSNH

As PSNH itself observed in its submissions to DES prior to New Hampshire's adoption of Regional Greenhouse Gas Initiative implementing legislation, there presently is no national regulatory cap and trade program in place in the United States, and "there is essentially no existing market for domestic GHG emissions allowances." *See* PSNH Request for Bonus CO₂ Allowances at 7. No such market existed at the time PSNH made the Northern Wood Power Project ("NWPP"), Smith Hydro, Merrimack Turbine, and Newington Station expenditures for which it now seeks bonus allowances. There is a significant legal question whether, on those facts, PSNH is entitled to receive *any* bonus allowances.

The Clean Power Act ("CPA") mandated that ". . . the department shall provide emissions allowances to PSNH equivalent to the amount of such allowances that *could*

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have been purchased at market prices by the same dollar amount as the expenditure made.” See 125-O:5, III (emphasis supplied). It is clear from the statutory language that the value of the bonus allowances must be established based on the allowance price *at the time of the expenditure*; no such market existed, however, at the time PSNH voluntarily undertook to invest in these projects. The plain language of the statute requires no interpretation and CLF believes that DES likely lacks discretion to award any allowances to PSNH given that the conditions contemplated by the Legislature did not exist at the time the expenditures were incurred.

Need to Clarify Why Merrimack and Newington Allowance Allocations Were Omitted From DES’s Original Decision

On April 2, 2009, DES issued a decision titled “Final Response to PSNH Regarding Request for Bonus CO₂ Allowances.”¹ That decision allocated 4,095,352 allowances for the NWPP and 122,727 allowances for Smith Hydro. The Merrimack Turbine and Newington Lighting projects were not referenced. That omission raises questions about why those two additional projects were not addressed in DES’s April 2, 2009, “Final Decision,” and whether PSNH’s submissions requesting allowances for the Merrimack and Newington projects were fully complete by the statutory deadline of September 9, 2008. See 125-O:24, III (setting deadline for submission of ninety days from the effective date of HB 1434 [June 11, 2008]). To the extent that deadline was not fully satisfied, those projects are not eligible for allowances, and DES lacks discretion to award any. DES should clarify why the Merrimack and Newington projects were not addressed in its original “Final Decision.”

Market Value of CO₂ Allowances and Market Assessment

To the extent DES has discretion to award any allowances to PSNH, CLF agrees with DES that the allowance price used to determine the number of CPA allowances to be allocated to PSNH pursuant to 125-O:5,III should be based on the allowance price determined by the European Union Emissions Trading Scheme (“EU ETS”).

First, the CPA anticipated that all emission reductions and other compliance activities would take place within a regulated cap and trade system. See 125-O:1.VI (“Specifically, market-based approaches, such as trading and banking of emission reductions within a cap-and-trade system allow sources to choose the most cost-effective ways to comply with established emission reduction requirements.”); 125-O:3.II (“The integrated, multi-pollutant strategy shall be implemented in a market-based fashion that allows trading and banking of emission reductions to comply with the overall statewide annual emissions caps established under RSA 125-O:3.III.”). The plain text of the CPA evidences no legislative intent to permit the bonus allowance price to be tied to a voluntary market, such as the Chicago Carbon Exchange (“CCX”). Rather, the language leaves no doubt

¹ See http://des.nh.gov/organization/divisions/air/tsb/tps/aetp/documents/response_to_psnh_co2.pdf.

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that the New Hampshire legislature intended that trading and banking, and the necessary pricing of allowances that permits those activities, take place in a market driven by a mandatory cap and trade system.

Prior to the passage of RGGI, the EU ETS was the only market designed for a mandatory cap and trade program, and DES appropriately has identified the allowance price determined by that market as the price to be applied for purposes of allocating CPA 125-O:5, III allowances to PSNH.

Second, because it is the product of a voluntary market, the CCX allowance price is not comparable to an allowance price determined in a regulated market, such as that envisioned by the CPA.² To apply the CCX price as PSNH has requested would therefore produce an artificially low allowance price for conversion. Where a mandatory carbon cap is in place, an increase in allowance demand and therefore price is reasonably anticipated. PSNH seeks to use the allowance price determined by a voluntary market for allowances it earned under a regulatory framework with a mandatory cap. It is an apples to oranges comparison that has no basis in the CPA or elsewhere, and DES rightly rejected PSNH's request.

The fact that PSNH bonus allowances cannot be traded into existing markets, such as the EU ETS, is irrelevant. NH DES correctly observes that the precedent established by NH DES pursuant to NH Env-A 3200, in connection with NO_x allowance trading, applies here. PSNH would not be prohibited from purchasing EU ETS allowances, retiring them, and receiving from NH DES an equivalent number of CO₂ allowances for deposit in PSNH's account. Further, PSNH's objection to applying the EU ETS price on this ground is inconsistent with its position in favor of applying the CCX price—PSNH also would be prohibited from trading into the CCX market since its Schiller station participates in the Massachusetts renewable energy certificate ("REC") program. Under CCX rules, REC-eligible projects must forego sale of credits into REC programs to register with CCX.³

² PSNH asserts that the CCX is "an established, reputable, verified, domestic, GHG credit trading market . . ." See PSNH Request for Bonus CO₂ Allowances at 4 (Apr. 16, 2007). Nineteen public interest and environmental advocacy organizations, including Clean Water Action New Hampshire, Conservation Law Foundation, Environmental Defense, Natural Resources Defense Council, and New Hampshire Public Interest Group, criticized the CCX in an August 1, 2006 open letter. See Letter from Clean Water Action Alliance of Massachusetts *et al.* (Aug. 1, 2006), available at <http://www.plentymag.com/images/features/feature6extra.pdf>. The organizations urged states and cities not to join the CCX because, among others, CCX (i) permits companies to exempt emissions from new units, thereby creating the very real possibility that "companies [will] meet their greenhouse gas emissions targets on paper without actually delivering new emission reductions above and beyond the business-as-usual scenario"; (ii) has no additionality requirement for offsets; and (iii) was created in a closed, non-transparent process with little input from governments and environmental interests.

³ These rules ensure that investments in renewables are not double-counted by being credited in two systems.

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We support DES's determination that the allowance price for costs incurred by PSNH in connection with the projects is the price at which the allowances were trading at the time PSNH incurred the expenses, on a month-to-month basis. *See generally*, Revised Table III. It is clear from the statutory language that the value of the bonus allowances is to be established based on the allowance price *at the time of the expenditure* and therefore any forecasting of future CO₂ markets would be inappropriate. *See* 125-O:5.III. DES's adoption of a volume-weighted averaging method to determine allowance prices for the months in the relevant time period appears to be within its discretion.

Because there is no tenable basis for PSNH's request to base the CPA bonus allowance price on the allowance price determined by the CCX, we support the Department's denial of PSNH's request to receive 35 million or more bonus allowances pursuant to 125-O:5, III for conversion to RGGI allowances. Moreover, an award of such magnitude would result in (1) significantly diminished incentive for further reductions of CO₂ emissions from PSNH fossil fuel sources under the CPA and RGGI; (2) a significant decrease in demand for carbon allowances within the RGGI market; and (3) substantial frustration of a key RGGI purpose—generation of funding and support for much needed New Hampshire energy efficiency programs that will reduce carbon emissions from power plants by decreasing power demand.

Thank you for this opportunity to comment.

Sincerely,



Melissa A. Hoffer
Vice President, CLF
Director, New Hampshire Advocacy Center