PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LISA THRUN, JUDITH FORD and
AVA ASHENDORFF,

Plaintiffs,

DECISION & ORDER
Index No.: 4358-11
RJI No.: 01-11-104776

-against-

ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY,

Defendants.

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Smith Valliere, PLLC
(By: Mark W. Smith, Esq., and Noelle Kowalczyk, Esq., of Counsel)
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and
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Attorneys for Plaintiffs

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McNamara, J.

In December 2005 then-Governor George Pataki signed a Memorandum of Understanding (Memorandum) with the governors of six other States. In the Memorandum the seven signatory States each committed:

> "to propose for legislative and/or regulatory approval a CO_2 Budget Trading Program (the "Program") aimed at stabilizing and then reducing CO_2 emissions within the Signatory States, and implementing a regional CO_2 emisssions budget and allowance trading program that will regulate CO_2 emissions from fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts."

The Memorandum allows for other States to sign on and also provides that any Signatory State may withdraw its participation in the program, known as the Regional Greenhouse Gas Initiative (RGGI), upon 30 days written notice. Three additional States later signed the Memorandum and in January 2012 New Jersey, one of the original Signatory States, ended its participation.

New York affirmed its participation in RGGI by promulgating regulations that implement the "CO_2 Budget Trading Program" (6 NYCRR Part 242, eff. September 24, 2008) and the "CO_2 Allowance Auction Program" (21 NYCRR Part 507, eff. October 8, 2008). The Budget Trading Program regulations were promulgated by the Department of Environmental Conservation (DEC) and the Auction Program regulations by the New York State Energy Research and Development Authority (NYSERDA). No specific legislative action was taken to authorize New York's participation in RGGI though in 2011 the Legislature passed the Power NY Act of 2011 (Environmental Conservation Law § 19-0312). The act requires major electric generating facilities, those generating 25,000 kilowatts or more of electricity, to comply with applicable DEC air quality requirements relating to offsetting of emissions and directed the Commissioner to promulgate regulations targeting reductions in emissions of carbon dioxide that would apply to major

electric generating facilities that commenced construction after the effective date of the regulations. At the time RGGI was the only state carbon dioxide emission requirement applicable to power plants in New York.

In June 2011 plaintiffs commenced this action in which they assert four causes of action; each addressed in some manner to the legality of New York's participation in RGGI. In the first cause of action plaintiffs argue that the New York RGGI program is *ultra vires* because the Memorandum was executed, and the regulations were promulgated by DEC and NYSERDA, without the consent or authorization of the Legislature. The second cause of action presents an attack on the RGGI regulations as imposing an impermissible tax not authorized by the Legislature. In the third cause of action plaintiffs contend that the RGGI program, as implemented, is arbitrary and capricious. The fourth cause of action raises the question of whether the Memorandum violates the United States Constitution, Art I, § 10, cl 3: the Compact Clause. Plaintiffs seek declaratory judgments announcing that the entry of New York State into the RGGI was *ultra vires*; that in promulgating the RGGI regulations the actions of DEC and NYSERDA were *ultra vires*, created an unlawful tax and were arbitrary and capricious; and that the RGGI Memorandum is a multistate compact which has not been authorized by the United States Congress and therefore, is void under the Compact Clause.

Defendants have moved to dismiss the complaint on the grounds that plaintiffs lack standing, that the applicable Statute of Limitations has expired, that certain claims are barred by the doctrine of laches and that certain other claims are moot. Although plaintiffs maintain that defendants have not moved to dismiss claims against the Governor and the Compact Clause claim, the notice of motion does not so limit the relief sought and the arguments made in defendants' memorandum of law do not exclude any claim from the defenses of standing and laches. At a minimum defendants specifically assert in the memorandum that all

claims should be dismissed on laches grounds.

Standing is a threshold requirement for a party seeking to challenge governmental action and requires a showing that the party has suffered an injury-in-fact meaning that the party will actually be harmed by the challenged action (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207 [2004]). The injury must be particularized and the party asserting standing must show "special damage, different in kind and degree from the community generally" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals*, 69 NY2d 406, 413 [1987]). Moreover, the harm must be shown to fall within the zone of interests, or concerns, sought to be promoted or protected by the authority under which the agency has acted (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991], citation and internal quotations omitted).

Plaintiffs contend that as electric utility rate-payers they have been harmed by having to pay increased costs passed along by electricity producers that must purchase CO_2 allowances under RGGI. Even assuming that plaintiffs could show that the cost they pay for electricity has increased because of RGGI, they have failed to show an injury distinct from the community generally. While acknowledging that RGGI impacts a large percentage of New York residents, plaintiffs maintain that as ratepayers they are distinguishable from the general public because there are members of the general public who do not pay electricity bills. The question, however, is whether the impact is felt by some, but not the community in general, and not whether, as plaintiffs' argue, that some segment of the community is not affected (see *Matter of Diederich v Lawrence*, 78 AD3d 1290 [2010], distinction between local taxpayers subjected to a tax and individuals not subjected to the tax fails). Such a strained interpretation would essentially eliminate the requirement of a distinct injury (*Id.* at 1292). Inasmuch as plaintiffs have failed to establish that as ratepayers they have suffered an injury distinct from that of the general public, they cannot assert

standing on the basis of that alleged harm.

The argument that DEC and NYSERDA usurped legislative authority in promulgating the RGGI regulations raises another concern recognized by the courts in addressing standing issues. Claims of institutional harm raised to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme require additional analysis when determining standing (see *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 814 [2003]). In instances where denial of standing would, in effect, pose an impenetrable barrier to judicial scrutiny of an action of constitutional dimensions, standing may be found (*Id.* at 814). Here, however, as defendants note, the utility companies subject to the RGGI regulations are potentially interested parties who would have standing to bring a challenge to implementation of the program. Thus, denial of standing to these plaintiffs does not shield the challenged actions from judicial review.

Though not pled in the complaint, plaintiffs assert that they have standing under State Finance Law § 123-b which provides:

> "... any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property..."

Citizen-taxpayers need not demonstrate an injury-in-fact to acquire standing to question the unlawful expenditure of state funds (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 814 [2004]). The important distinction in such matters is between "cases that present a challenge to the expenditure of money and those that use the expenditure of money as a pretense to challenge a governmental

decision (*Id.* at 814). The complaint here presents, generally, a challenge to New York's participation in RGGI and specifically challenges the authority of the Governor to sign the Memorandum and DEC and NYSERDA to promulgate the RGGI regulations. Both are essentially non-fiscal activities and consequently, section 123-b standing is not available.

Even if plaintiffs had standing, the doctrine of laches serves to bar the claims asserted. "Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity" (*Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993] [internal quotation marks and citation omitted]). An action for a declaratory judgment, such as is present here, is subject to equitable principles (*Krieger v Krieger*, 25 NY2d 364 [1969]). The Memorandum was signed in December 2005 and the New York RGGI regulations became effective in September and October 2008. Plaintiffs did not commence this action until June 2011. Defendants argue that plaintiffs' delay in bringing this action would cause multifaceted prejudice to multiple parties if New York's participation in RGGI is invalidated as a consequence of this action. Defendants maintain that numerous projects that depend on proceeds from RGGI would be lost including the Green Jobs/Green New York Program that the Legislature has directed be funded with proceeds from the sale of CO_2 allowances. In addition, the State could face numerous lawsuits from purchasers of allowances. Defendants also contend that invalidation of New York's participation in RGGI would cause significant market uncertainty regarding the validity and value of New York issued CO_2 allowances held by out-of-state power generators and third-party investors. Defendants also point out the in-state power companies have made operational decisions and capital improvement planning decisions in reliance on having to meet a continuing compliance obligation. Power companies

have made investments in their physical plants designed to reduce CO_2 emissions and in that way avoid the cost of having to purchase CO_2 allowances. Defendants contend that invalidation of New York's participation in RGGI would be prejudicial to these companies whose business models and strategic plans would be disrupted.

Plaintiffs' have not offered any reason for the delay in bringing the action. They argue, however, that any claim of prejudice is either curable by an award of prospective relief only or is undermined by the fact that the Memorandum provides that any Signatory State could withdraw from the agreement by providing 30 days notice. An award of prospective relief would not address all of the claimed prejudice such as disruption to the strategic plans of in-state power generators. And, while the possibility that New York could voluntarily withdraw from participation in RGGI has always existed, the risk of withdrawal based on a political decision is different in kind and degree from the risk posed by an end to participation based on legal reasons. The two risks present different considerations to those making decisions based on New York's participation in RGGI. The potential for harm to economic interest caused by the delay in bringing this action is sufficiently prejudicial to the interest of adverse parties to bar the action (see *Matter of Schulz v State of New York*, 81 N.Y.2d 336 [1993]).

Accordingly, it is

ORDERED, that the motion to dismiss each cause of action in the complaint is granted on the grounds that plaintiffs lack standing to raise the claims and the claims are barred by the doctrine of laches.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for defendants. A copy of the decision and order and the supporting papers have been

delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER

Dated: Saratoga Springs, New York
June 12, 2012

Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated September 2, 2011;
2. Affidavits Submitted in Support of Point IV of Defendants' Motion to Dismiss consisting of:: affidavit of Michael Sheehan; affidavit of John G. Williams; affidavit of Pallas Lee VanSchaick; affirmation of Assistant Attorney General Michael J. Myers; affidavit of Kenneth L. Kimmell; affidavit of Daniel C. Esty; affidavit of Collin P. O'Mara; affidavit of Robert M. Summers, Ph.D.; affidavit of Douglas L. McVay; affidavit of Justin Johnson; affidavit of Robert D. Teetz; and affidavit of Scott Lorey;
3. Memorandum of Law in Support of Defendants' Motion to Dismiss dated September 2, 2011, with Exhibits A and B annexed thereto;
4. Affidavit of Lisa Thrun, sworn to November 30, 2011, with Exhibit 1 annexed thereto;
5. Affidavit of Judith Ford, sworn to November 29, 2011;
6. Affidavit of Ava Ashendorff, sworn to November 30, 2011;
7. Affidavit of Christopher S. Friend, sworn to December 1, 2011, with Exhibits 1 and 2 annexed thereto;
8. Affidavit of Daniel M. Engert, sworn to November 30, 2011, with Exhibits 1 and 2 annexed thereto;
9. Affidavit of John Syracuse, sworn to November 30, 2011, with Exhibits 1 through 4 annexed thereto;
10. Appendix of Affidavits of New York Ratepayers in Opposition to Defendants' Motion to Dismiss, Volumes 1 through 3;
11. Affirmation of Mark W. Smith, Esq., dated December 2, 2011, with Appendices of Exhibits 1 through 47;
12. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss dated

December 2, 2011; and

13. Reply Memorandum of Law in Support of Defendants' Motion to Dismiss dated January 13, 2012, with Exhibit 1 annexed thereto.