A.8469 (Kelles)

STAFF CONTACT : Ken Pokalsky | Vice President | 518.694.4460

BILL

A.8469 (Kelles)

SUBJECT

Economy Wide Greenhouse Gas "Cap and Invest" Program Requirements and Restrictions

DATE

March 05, 2024

OPPOSE

The Business Council is generally supportive of the use of a "cap and invest" program as part of New York's strategy to implement mandates of the Climate Leadership and Community Protection Act, and we have been working closely with the Department of Environmental Conservation and NYSERDA in their rule development process.

However, we oppose this legislation that would impose unworkable or unnecessary restrictions on a state cap and invest program (and note that a proposal with similar concerns was included in the Senate's one-house budget resolution for SFY 2024). Major concerns include:

- It categorically prohibits any third-party trades of emission allowances, a restriction not found in any other similar program, including the Regional Greenhouse Gas Initiative applicable to in-state electric power generators, or the California or Washington GHG cap and trade programs. We see no need for such restrictions, especially considering existing statutory provisions precluding adverse impacts on disadvantaged communities. However, this prohibition will make compliance more difficult, as it will limit regulated facilities' access to necessary allowances outside of the state's quarterly auctions. It could also impair compliance if facilities significantly "over-purchase" allowances in a given compliance period, resulting in a statewide shortage of available allowances. This proposal also makes no provision to allow for "bidding associations," contemplated in the DEC/NYSERDA cap and invest proposal, which would allow for limited coordination among smaller auction participants.
- It includes several separate mandates intended to avoid disproportionate impacts on disadvantaged communities. We believe those protections are already embedded in the CLCPA, including in its Section 7.3 mandates applicable to all state agency actions. In part, this bill's mandates are inconsistent, i.e., in its definition of a "cap and trade program" it requires "a lower cap for emission within [DACs] and within a five-mile radius" of DACs, while elsewhere it demands that DEC set facility-specific emission cap for all

individual sources located in or proximate to "or otherwise contributing to the pollution in" a DAC. It also directs the state to establish facility-specific emission caps for every source in and around a DAC. While DEC is considering the use of facility-specific caps under its NYCI rulemaking, we believe this approach is unnecessarily restrictive, and ignores overall GHG and co-pollutant emission reductions that will be achieved through other state mandates. (The existing definition of "best available control technology" set forth in ECL §19-0903.3 defines BATC as "an emission limitation or equipment standard based on the maximum degree of reduction which . . . is achievable on a case-by-case basis taking into account energy, economic, environmental and health impacts and other costs related to the source.")

- While it authorizes a program for reduced cost allowance sales to "energy intense/trade exposed" (EITE) facilities, it imposes unreasonable criteria for this program. It mandates that an EITE, to qualify for reduced cost allowances "use best available technology" for the control of greenhouse gas emission, with no definition of what qualifies as a BAT, nor any timetable for BAT compliance. In addition, it precludes use of "alternate fuel consumption" for BAT compliance, which seems to prohibit investments that result in more efficient combustion, which may be the best available technology option for some process energy uses. The bill also fails to indicate the extent to which economic feasibility is taken into account in the designation of activity-specific BAT standards It also requires an EITE to enter into a "contractual commitment . . . to avoid leakage," and to continue to meet "economic development or economic maintenance requirements" imposed by the DEC. It also requires the DEC on a case-by-case basis to determine the necessary reduced cost necessary to "avoid leakage." We believe these requirements set up an overly complex and prescriptive EITE mechanism.
- In directing the DEC to establish the cap and invest program through regulation, the bill states that the program will use "emission reduction methods adopted an implemented by the [DEC] and [NYSERDA]." This suggests that the state will dictate specific mechanisms and strategies to be used by regulated facilities subject to emission limits under the cap and invest program. This is beyond the regulatory capabilities of the state.
- We support the linking of a New York cap and invest program with comparable programs adopted by other jurisdictions, but believe several amendments to the CLCPA are necessary to achieve this goal. While A.8469 authorizes such linkages, it imposes unworkable limitations, including the prohibition of any measure that would impinge on meeting mandates of ECL Article 75, which among other things sets forth the statewide GHG emissions

caps for 2030 and 2050. However, the linkage of jurisdiction-specific cap and trade programs recognize that global warming requires broadly applicable programs, and if the combined GHG emissions of participating jurisdictions are reduced, the application of jurisdiction-specific GHG caps make little sense.

Many see the use of cap and trade programs as a more economically-efficient method to promote emission reductions compared to traditional “command and control” regulatory approaches. However, A.8469 would strip away much of the compliance flexibility typically found in cap and trade programs, and in our view would result in a program that produces neither improved environmental outcomes nor economic efficiencies.

For these reasons, we oppose adoption of A.8469.