

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11961

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Isabel Kain, Shamus Miller, James Coakley, Olivia Gieger,  
Conservation law Foundation and Mass Energy Consumer Alliance

Plaintiffs-Appellants

v.

Department of Environmental Protection

Defendant-Appellee

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On Appeal from Judgment of the Superior Court  
in Suffolk County

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BRIEF OF THE ASSOCIATION TO PRESERVE  
CAPE COD

AMICUS CURIAE

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### Issue Presented

Did the Department of Environmental Protection ignore its statutory obligation "to promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions" not later than January 1, 2012 with an effective date of January 1, 2013 as mandated by G.L. ch. 21N §§ 3 (d) and 16.

### Interest of Amicus

The Association to Preserve Cape Cod (APCC) seeks leave to file the accompanying brief as amicus curiae. APCC is a member-supported, nonprofit organization of 5,000 individual members. APCC's goal is to protect Cape Cod's environment and natural resources, which are essential for protecting human health and quality of life, and which are at the core of our coastal economy. APCC is Cape Cod's leading advocate for preserving the Cape's water resources, wetlands, natural resources, open space and way of life.

The case at bar is particularly concerning to APCC and the Cape population in general. While Massachusetts outperforms other states in promoting lower emissions, that does not mean that Massachusetts is excelling or doing all that can be done to reduce aggregate emissions. We are reminded of the adage "Thank God for Mississippi" in attempting to compare states and state actions. The question in this case is not how Massachusetts compares to other states but how the Department has carried out its legal obligations.

Cape Cod is ground zero for the impacts of climate change and global warming. Leigh Phillips, US northeast coast is hotspot for rising sea levels, NATURE, June 24, 2012. Indeed our namesake, the cod fish, is in dramatic decline as a direct result of ocean warming. Waters in the northwest Atlantic have warmed 99% faster than the rest of the world's oceans in the past decade. A rapid warming of the Gulf of Maine off the eastern United States has made the water too warm for cod, pushing stocks towards collapse despite deep reductions in the number of fish caught. Without a cooler ocean, cod will be unsustainable in waters around Cape Cod

even with draconian management measures. Andrew J. Pershing, Michael A. Alexander, Christina Hernandez, Lisa A. Kerr, Arnault LeBris, Katherine E. Mills, Janet A. Nye, Nicholas R. Record, Hillary A. Scannell, James D. Scott, Graham D. Sherwood, Andrew C. Thomas, Slow adaptation in the face of rapid warming leads to collapse of the Gulf of Maine cod fishery, SCIENCE, Oct 29, 2015 (online).

Global warming also causes the ocean to undergo thermal expansion; that is, increase in volume as ocean waters warm in response to global warming. This is one important cause of rising sea levels. As the ocean continues to expand and rise in response to global warming, more of the Cape will be submerged and eroded. Another factor affecting sea level rise is melting of the Greenland and Antarctic ice sheets. Taking these causes of sea level rise into account, as well as an accelerated rate of sea level rise in the Northeast, scientists have pegged Cape Cod and the Northeast as a global hotspot for sea level rise with estimates exceeding a 2 meter (6.6 feet) rise by the year 2100. For most of Cape Cod Bay this means the old high tide line becomes the new low

tide line. For Nantucket Sound and Martha's Vineyard Sound it means that current extreme high tides will become everyday low tide.

The results of the Department of Environmental Protection's (hereinafter Department) actions and inactions related to greenhouse gas emissions will be experienced first and foremost on Cape Cod. As Justice Breyer stated during oral argument in Massachusetts v. EPA, 549 U.S. 497 (2007),

Suppose, for example, they regulate this and before you know it, they start to sequester carbon with the power plants, and before you know it, they decide ethanol might be a good idea, and before you know it, they decide any one of 15 things, each of which has an impact, and lo and behold, Cape Cod is saved.

With increasing frequency and cost, APCC devotes much of our energy and resources toward undoing poor practices of the past and lapses in the present that directly and adversely impact our water, our natural resources, our economy, our quality of life, our safety and our health.

APCC has a 47-year history of pragmatic, science-based environmental advocacy that recognizes the implications and consequences of



taking the easy path instead of the smart path. As such, APCC believes our legal and practical perspective would be of assistance to the Court.

#### Statement of the Case

APCC believes that Department's Nature of the Case contained in its brief at 2 is overly narrow and challenges basic tenets of statutory construction. Any statutory interpretation must examine the section in totality of an act. Most importantly Section 3 (d) cannot be read without considering Section 16. Section 16 is the implementation of Section 3 (d) which is the heart of this case.

#### Argument

- I. This case is a simple question of statutory construction which the Department and Superior Court got wrong.

The sole question before the Court is the meaning of Sections 3 (d), and 16 of the Global Warming Solutions Act, ch. 298 of the Acts of 2008 and codified as G.L. ch. 21N. This Court reviews cases of statutory construction de novo. New England Forestry Foundation, Inc. v. Bd. of

Assessors of Hawley, 468 Mass. 138, 149 (2014).

"Although we generally defer to an agency's interpretation of a statute that it is charged with administering, an "incorrect interpretation of a statute . . . is not entitled to deference."

Atlanticare Medical Center v. Comm'r of the Div. of Medical Assistance, 439 Mass. 1, 6 (2003) quoting Massachusetts Hosp. Ass'n v. Department of Med Sec., 412 Mass. 340, 345-346 (1992). The Department's interpretation of Section 3 (d) is clearly erroneous.

However you approach the Department's interpretation, the reasoning is flawed. The Department argued before the Superior Court that the legislature intended only "aspirational goals" under Section 3 (d)<sup>1</sup>. Superior Court decision at 5. The legislature used both the words "goal" and "regulations" in the Act and not interchangeably<sup>2</sup>.

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<sup>1</sup> The Department appears to have abandoned this argument.

<sup>2</sup> It is difficult to imagine any scenario where the words goal and regulations could be interchangeable. Regulation has specific legal meaning and is defined as "the act or process of controlling by rule or restriction" Black's Law Dictionary (8<sup>th</sup> ed.) More interesting is that in the context of the Act the department did not even establish aspirational goals for "declining annual

"The department shall monitor and regulate emissions of greenhouse gases with the goal of reducing those emissions." G.L. ch. 21N § 2. In crafting Section 3 (d) the legislature utilized the phrase "shall promulgate regulations" and did not utilize "shall establish goals."

The second flaw is failure by the Department to differentiate between "shall promulgate regulations" in Section 3 (d) and "may adopt regulations" in Section 7 (b). The legislature intended specific action in Section 3 (d) and provided both the Secretary and the Department broad discretion in Section 7 (b). The department has no statutory authority to ignore promulgating regulations.

The third flaw is the failure to consider the timing imposed by the legislature. According to the Act these are the deadlines for various actions:

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aggregate emission limits for sources and categories of sources that emit greenhouse gas emissions." G.L. ch. 21N § 3 (d).

1. Promulgate regulations pursuant to Section 2 of the Act not later than January 1, 2009. G.L. ch. 21N § 10.
2. Establish Statewide Greenhouse Gas Emissions level: 1990 Baseline and 2020 Business As Usual Projection not later than July 1, 2009. G.L. ch. 21N § 14.
3. Publish the first state greenhouse gas emission inventory not later than December 31, 2010. G.L. ch. 21N § 13
4. Adopt a 2020 statewide emissions limit and a plan to achieve that limit pursuant to section 4 of the Act not later than January 1, 2011. G.L. ch. 21N § 15
5. Adopt the 10-25 percent reduction below 1990 levels not later than January 1, 2011.  
Id.
6. Promulgate regulations pursuant to Section 3 (d) not later than January 1, 2012 which are effective January 1, 2013 and expire on December 31, 2020.

Thus, there is a long and logical process to be followed prior to adopting the Section 3 (d) regulations. The 3 (d) regulations are the last

step in reaching the 2020 limits. The Section 3 (d) regulations logically flow from the work that came before and are part of a well-designed legislative plan to meet the goal of reducing emissions.

The fourth flaw is that the legislature required a year between promulgating the Section 3 (d) regulations and the date of effectiveness. You do not require a year to contemplate aspirational goals. You do not need a year to implement regulations that already exist. You do need a year to prepare, educate and implement regulations which change or challenge conventional operating procedures. A year to implement regulations is a long time in the framework of regulatory law and connotes that the legislature envisioned a challenging implementation.

The fifth flaw is that the regulations expire on a date certain. Aspirational goals do not need to formally and legally expire.

The sixth flaw is that the Department overlooks or minimizes the phrase "sources or categories of sources" in its interpretation. When the Secretary published the Statewide Greenhouse Gas Emissions Level: 1990 Baseline and

2020 Business As Usual Projection required by G.L. ch. 21N § 14, there was a delineation of both categories, e.g. Energy with a dozen subcategories, Industrial processes, Agriculture, and Waste as well as a list of gases that are monitored in the EPA-created State Greenhouse Gas Inventory Tool (SGIT), e.g. carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride<sup>3</sup>. At a minimum, the regulations should have targeted all the categories and subcategories as well as all of the gases in the SGIT tool.

The seventh flaw is that the Department believes a "desired level" is incompatible with a regulatory environment. As acknowledged in the Statewide Greenhouse Gas Emissions Level: 1990 Baseline and 2020 Business As Usual Projection required by G.L. ch. 21N § 14, greenhouse gas emission is a moving target. There is a "range of uncertainty in emissions given the variability inherent in GHG drivers such as economic activity

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<sup>3</sup> The gases are important because the department focused on only one sulfur hexafluoride.

and fuel prices."<sup>4</sup> Id. at 5. Moreover, there are proactive carbon sinks such as forests than can be promoted through a regulatory scheme to reduce "aggregate" emissions. Id. at 12. A desired aggregate level makes sense in terms of the many moving puzzle pieces.

The eighth flaw is that the Department failed to consider that there are multiple points of regulatory intervention to control "aggregate" emissions. Demand, efficiency, waste (leakage), treatment and discharge are all regulatory targets for aggregate reductions.

The ninth flaw is that while we can make substantial gains in certain areas, e.g. SF<sub>6</sub>, if we don't effectively deal with "aggregate" emissions,

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<sup>4</sup> Additionally there are other variables. For example the Pilgrim Nuclear Power Station, when operating, generates between 2 and 12 percent of the Commonwealth's electricity on any given day. This energy is considered to be non-greenhouse gas emitting power. The plant has been announced to be closed during the subject regulatory time period. Closure will have a negative impact on aggregate greenhouse gas emissions unless the power is replaced with an alternative non-greenhouse gas emitting source of energy. Even more problematic is that the plant's reliability has decreased and the plant has been downgraded by the Nuclear Regulatory Commission largely because of unscheduled shutdowns adding to the aggregate greenhouse gas emissions. A desired level is about as best we can do.

we will fail to effectively mitigate greenhouse gas emissions. For example, if we improve vehicle emissions overall through efficiency improvements but drive more miles because the price of gasoline falls below \$2.00 per gallon, aggregate emissions can actually increase.

The tenth flaw is that good actions and intentions do not mean that the Department has complied with the statute. No one argues that SF<sub>6</sub> regulations are not valuable in the goal to reduce emissions. Gas insulated switchgear (GIS) leak elimination is a positive step in arresting greenhouse gas emissions with no readily apparent downside. The problem is that, as written, they do not address overall aggregate emissions across the categories and subcategories identified by the Secretary in publishing the Statewide Greenhouse Gas Emissions Level: 1990 Baseline and 2020 Business As Usual Projection. GIS regulations are at best a minor contributor to aggregate emissions.

The eleventh flaw is that the Department must obfuscate the meaning of aggregate to justify its inaction. Aggregate means "formed by combining into



a single whole or total."<sup>5</sup> Black's Law Dictionary (8<sup>th</sup> ed.). In its argument before the Superior Court the Department seems to have ignored the importance of "aggregate" in the phrase "declining annual aggregate emission limits." Before this Court they use aggregate improperly. See, e.g. Department brief at 8 where aggregate vehicle emissions is substituted.

The twelfth flaw is, assuming that it relies on the SF<sub>6</sub> regulations as addressing one of the "sources or categories of sources," the Department forgot to identify regulations dealing with carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (PFC) or perfluorocarbons (PFC) which are the other gases identified in the EPA SGIT.

The thirteenth flaw is that the Department failed to consider that "annual aggregate emission limits" must be different than "Statewide greenhouse gas emissions" and/or "Statewide greenhouse gas emissions limit" which are both specifically defined in the Act. G.L. ch. 21N § 1.

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<sup>5</sup> Ironically an alternate meaning of aggregate is a greenhouse gas emitting form of paving material.

The use of aggregate implies a net result. The Statewide Greenhouse Gas Emissions Level: 1990 Baseline and 2020 Business as Usual Projection provides a map to determine aggregate emissions.

The fourteenth flaw is that none of the relied upon regulatory programs cited by the Department, i.e. SF6, RGGI and LEV, expire in 2020. The legislature mandated specific sunset provisions for aggregate emission standards presumably to actually reach the 2020 greenhouse gas emissions limit. The relied upon programs have no sunset provisions.

The fifteenth flaw is that the Department misconstrues the legislative purpose of including a sunset provision. See, Department brief at 13. The purpose of promulgating aggregate limits is to insure the 2020 greenhouse gas emission limit is actually met. The legislature did not want an aspirational goal for 2020; it wanted success.

II. There is measurable harm being caused by the Department's failure to act.

Despite the legislature emphatically rejecting business as usual and the Department recognizing that business as usual will not achieve required

reductions by 2020, the Department embraced business as usual by its failure to regulate aggregate reductions in the three succeeding years from issuing its business as usual analysis. See, Statewide Greenhouse Gas Emissions Level: 1990 Baseline and 2020 Business As Usual Projection required by G.L. ch. 21N § 14.

There is measurable harm to the Department's failure to act. Every unregulated emission adds to the problem and complexity of reducing impacts. Every inch the sea rises has an impact across a broad reach of society. APCC is in the process of completing a modelling study of the impact of sea level rise on Cape Cod's freshwater aquifer with the U.S. Geological Survey (USGS). Simply stated, the aquifer has and will continue to rise and shift in direct relation to sea level, resulting in inundation from below. Combining this inundation from below with rising sea level that will cause overland flooding of the land's surface, the Cape can expect to experience an increase in frequency and extent of flooding of roads, basements, septic systems, stormwater systems and other infrastructure located in low-lying coastal areas.

Failure of septic systems and stormwater systems will lead to more groundwater pollution.<sup>6</sup>

As the ocean acidifies from greenhouse gas emissions, shellfish and corals will decline in size and shell thickness, leading to decreased sustainability of these economically and ecologically important species. Coastal erosion will accelerate from more severe and frequent storms and storm surges, leading to more property damage and more damage to natural resources.

Leaking pipes, lights left on, over lighting, inefficient equipment, and waste management in general are all low hanging fruit that are easy regulatory targets in which to address aggregate emissions. According to a Cornell University report, our ideas about heating and cooling in the workplace are not in line with actual workplace productivity. Reducing air conditioning loads in the summer so that temperatures are in the 75 to 76 degree range not only reduces energy demand, reduces greenhouse gas emissions and reduces cost,

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<sup>6</sup> APCC marketed the grant proposals for the sea level aquifer study with the following title, "Honey did you ever notice the toilet flushes better at low tide?"

it increases productivity, reduces workplace errors and saves about \$2.00 per worker in the insurance industry per day. Alan Hedge, Wafa Sakr, Anshu Agarwal, Thermal Effects on Office Productivity, PROCEEDINGS OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY ANNUAL MEETING Vol 49 No. 8 (2005).

III. An effective remedy is a challenge.

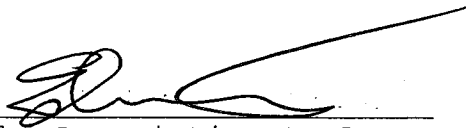
The biggest challenge that this case presents is how to craft an effective remedy that serves the public interest and meets the 2020 greenhouse gas emissions. By the time the case is decided, Massachusetts will have lost four years of potential aggregate greenhouse gas emission reductions - greater than business as usual. The legislature expressly did not want business as usual. G.L. ch. 21N § 3A. Crafting a regulatory environment for greenhouse gas emission reductions is challenging. As a democratic society we cannot allow government to avoid difficult or challenging work. While the Court can order the Department to expeditiously promulgate regulations, hastily written regulations can be counterproductive. We recommend the Court appoint a master to oversee the

process.<sup>7</sup> Massachusetts needs the Department to do its job and save Cape Cod.

Conclusion

For the foregoing reasons the decision of the Superior Court should be overturned. The Court should appoint a master to oversee promulgation of regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions retroactive to an effective date of January 1, 2013.

Respectfully submitted,



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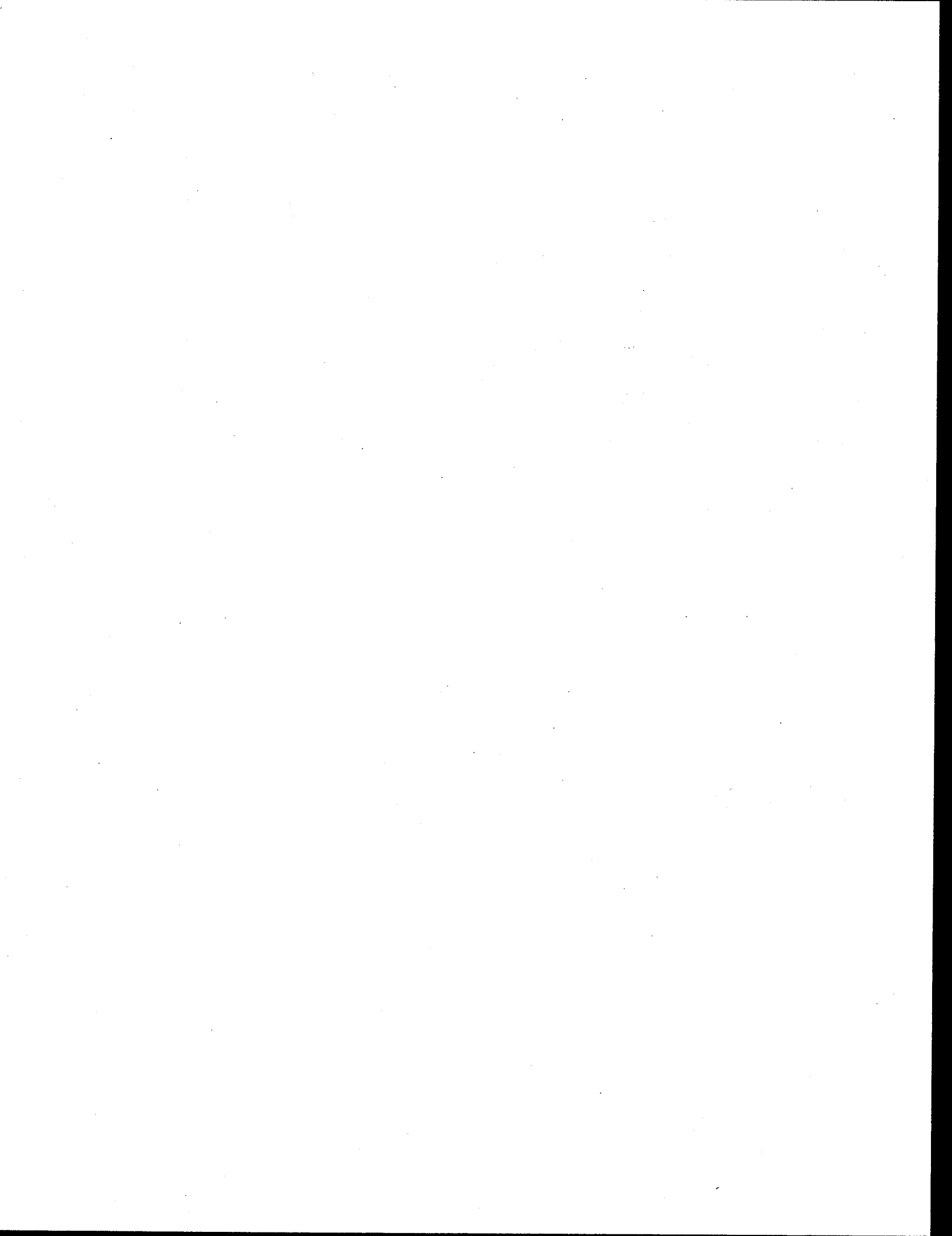
<sup>7</sup> The Federal District Court served this function in the Boston Harbor Cleanup and it worked well.

Brief Certification

In accordance with the Mass, R. App. P 16(k) I  
certify the brief complies with relevant rules for  
filing briefs with the Court.

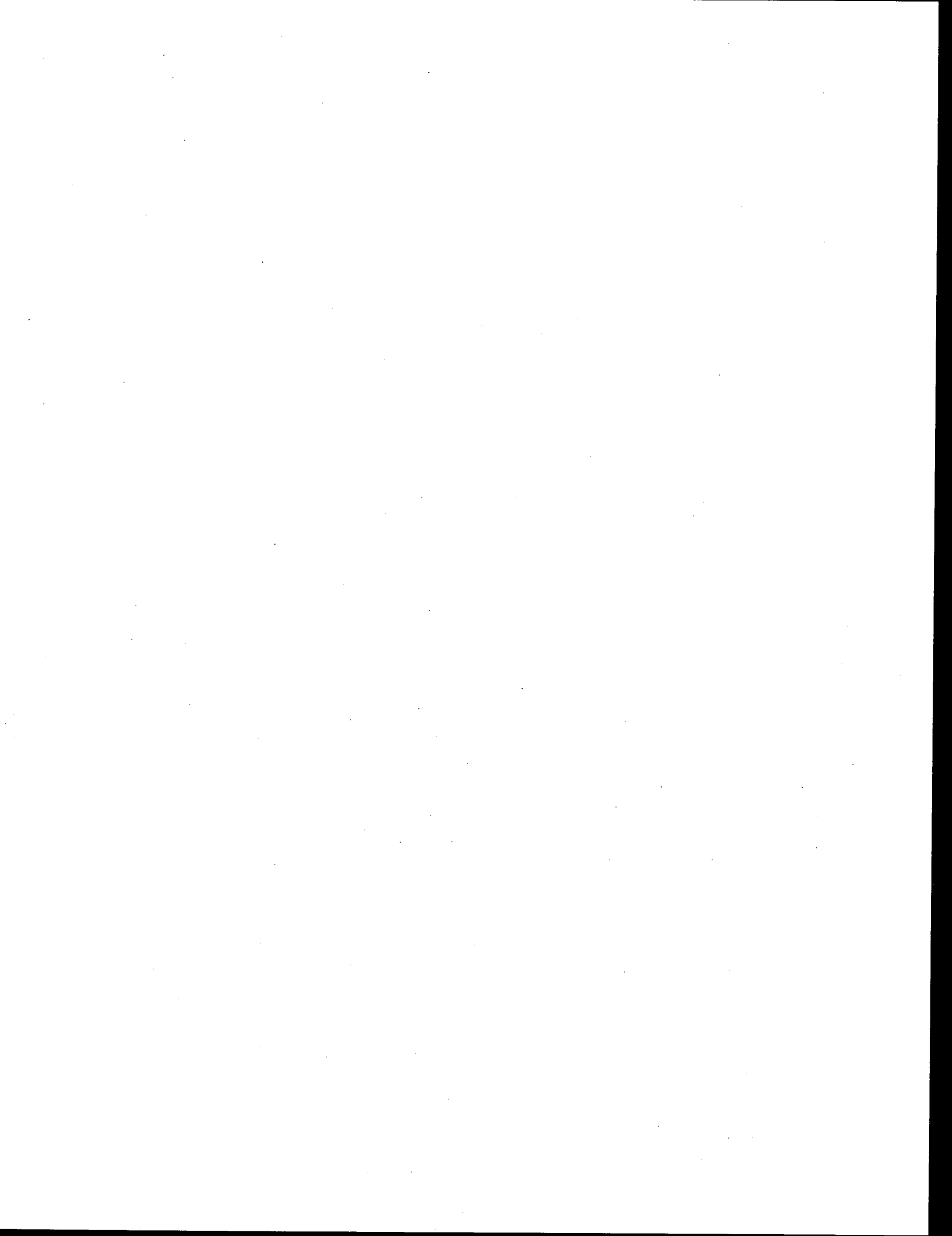
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Edward J. DeWitt, BBO# 630955





## ADDENDUM





Print

**Acts****2008****Chapter 298** AN ACT ESTABLISHING THE GLOBAL WARMING SOLUTIONS ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:*

**SECTION 1.** Section 19 of chapter 6A of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by striking out subsection (f) and inserting in place thereof the following 2 subsections:-

(f) The secretary shall collaborate with other state agencies to reduce greenhouse gas emissions to achieve the greenhouse gas emission limits established in chapter 21N.

(g) Nothing in this chapter shall be construed to confer any powers or impose any duties upon the secretary with respect to the foregoing agencies and authorities except as expressly provided by law.

**SECTION 2.** Section 1 of chapter 16 of the General Laws, as so appearing, is hereby amended by striking out subsection (d) and inserting in place thereof the following 2 subsections:-

(d) The commissioner shall collaborate with other state agencies to reduce greenhouse gas emissions to the limits established in chapter 21N.

(e) The commissioner may promulgate rules and regulations to effectuate the purposes of this chapter.

**SECTION 3.** Section 2 of chapter 21A of the General Laws, as so appearing, is hereby amended by adding the following clause:-

(30) consistent with chapter 21N, oversee state agency efforts to address and diminish the impacts of climate change by coordinating state agency actions to achieve the greenhouse gas emissions limits established in chapter 21N.

**SECTION 4.** Section 8 of said chapter 21A, as so appearing, is hereby amended by inserting after the second paragraph the following paragraph:-

The department of environmental protection shall assist in the implementation of chapter 21N.

**SECTION 5.** Section 16 of said chapter 21A, as so appearing, is hereby amended by adding the following paragraph:-

Any person who fails to comply with or otherwise violates chapter 21N shall be liable for a civil

administrative penalty not to exceed \$25,000 for each day the violation continues.

**SECTION 6.** The General Laws are hereby amended by inserting after chapter 21M the following chapter:-

Chapter 21N.

CLIMATE PROTECTION AND GREEN ECONOMY ACT.

Section 1. As used in this chapter the following words shall have the following meanings unless the context clearly requires otherwise:-

"Allowance", an authorization to emit, during a specified year, up to 1 ton of carbon dioxide equivalent.

"Alternative compliance mechanism", an action undertaken by a greenhouse gas emission source that achieves the equivalent reduction of greenhouse gas emissions over the same time period as a direct emissions reduction, that is approved by the department, and that is real, permanent, quantifiable, verifiable and enforceable.

"Carbon dioxide equivalent", the amount of carbon dioxide by weight that would produce the same global warming impact as a given weight of another greenhouse gas, based on the best available science, including from the Intergovernmental Panel on Climate Change.

"Department", the department of environmental protection.

"Direct emissions", emissions from sources that are owned or operated, in whole or in part, by an entity or facility including, but not limited to, emissions from factory stacks, manufacturing processes and vents, and company owned or company-leased motor vehicles.

"Direct emissions reduction", a greenhouse gas emission reduction action made by a greenhouse gas emissions source at that source.

"Emission", emission of a greenhouse gas into the air.

"Emissions reduction measures", programs, measures, standards, and alternative compliance mechanisms authorized pursuant to this chapter, applicable to sources or categories of sources that are designed to reduce emissions of greenhouse gases.

"Entity", a person that owns or operates, in whole or in part, a source of greenhouse gas emissions from a generator of electricity or a commercial or industrial site including, but not limited to, a transportation fleet.

"Executive office", the executive office of energy and environmental affairs.

"Facility", a building, structure or installation located on contiguous or adjacent properties of an entity.

"Greenhouse gas", any chemical or physical substance that is emitted into the air and that the department may reasonably anticipate will cause or contribute to climate change including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

"Greenhouse gas emissions limit", an authorization, during a specified year, to emit up to a level of greenhouse gases specified by the secretary, expressed in tons of carbon dioxide

equivalents.

"Greenhouse gas emissions source", a source, or category of sources, of greenhouse gas emissions with emissions that are at a level of significance, as determined by the secretary, that its participation in the program established under this chapter will enable the secretary to effectively reduce greenhouse gas emissions and monitor compliance with the statewide greenhouse gas emissions limit.

"Indirect emissions", emissions associated with the consumption of purchased electricity, steam and heating or cooling by an entity or facility.

"Leakage", the offset of a reduction in emissions of greenhouse gases within the commonwealth by an increase in emissions of greenhouse gases outside the commonwealth.

"Market-based compliance mechanism", (i) a system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit greenhouse gases; or (ii) greenhouse gas emissions exchanges, banking, credits and other transactions governed by rules and protocols established by the secretary or the regional greenhouse gas initiative, that result in the same greenhouse gas emissions reduction, over the same time period, as direct compliance with a greenhouse gas emissions limit or emission reduction measure adopted by the executive office pursuant to this chapter.

"Person", an agency or political subdivision of the commonwealth, a state, public or private corporation or authority or an individual, trust firm, joint stock company, partnership, association or other entity or group thereof or an officer, employee or agent thereof.

"Secretary", the secretary of energy and environmental affairs.

"Statewide greenhouse gas emissions", the total annual emissions of greenhouse gases in the commonwealth, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in the commonwealth, accounting for transmission and distribution line losses, whether the electricity is generated in the commonwealth or imported; provided, however, that statewide greenhouse gas emissions shall be expressed in tons of carbon dioxide equivalents.

"Statewide greenhouse gas emissions limit", the maximum allowable level of statewide greenhouse gas emissions in a given year, as determined by the secretary.

Section 2. (a) The department shall monitor and regulate emissions of greenhouse gases with the goal of reducing those emissions. The department shall adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this chapter. The regulations shall: (1) establish a regional greenhouse gas registry and reporting system for greenhouse gas emission sources; provided, however, that in establishing the greenhouse gas registry and reporting system, the department may collaborate with other states or a regional consortium; (2) annually require the owner or operator of any facility that is required to report air emissions data to the department pursuant to Title V of the federal Clean Air Act and that has stationary emissions sources that emit greenhouse gases to report annually to the regional registry direct stack emissions of greenhouse gases from such sources; (3) require the owner or operator of a facility that has stationary emissions sources that

emit greenhouse gases in excess of 5,000 tons of greenhouse gases per year in carbon dioxide equivalents to report annually to the regional registry direct emissions of greenhouse gases from such sources; provided, however, that the department shall develop a simplified estimation form to assist facilities in determining who shall report emissions and shall consider, on an annual basis, requiring the expansion of reporting to the regional greenhouse gas registry; (4) provide for the voluntary reporting of emissions of greenhouse gases to the regional greenhouse gas registry by entities and facilities that are not required to submit information pursuant to clauses (2) and (3); provided, however, that the greenhouse gas emissions reported shall be of a type and format that the regional greenhouse gas registry can accommodate; (5) require reporting of greenhouse gas emissions from generation sources producing all electricity consumed, including transmission and distribution line losses from electricity generated within the commonwealth or imported from outside the commonwealth; provided, however, that this requirement shall apply to all retail sellers of electricity, including electric utilities, municipal electric departments and municipal light boards as defined in section 1 of chapter 164A; (6) ensure rigorous and consistent accounting of emissions and provide reporting tools and formats to ensure collection of necessary data; and (7) ensure that greenhouse gas emissions sources maintain comprehensive records of all reported greenhouse gas emissions.

(b) The department shall: (1) consult with the secretary on periodic review and updates of emission reporting requirements, as necessary; and (2) review existing and proposed state, federal and international greenhouse gas emissions reporting programs and make reasonable efforts to promote consistency among the programs established pursuant to this chapter and other programs and to streamline reporting requirements on greenhouse gas emissions sources.

(c) The department shall triennially publish a state greenhouse gas emissions inventory that includes comprehensive estimates of the quantity of greenhouse gas emissions in the commonwealth for the last 3 years in which data is available.

Section 3. (a) The department shall, pursuant to chapter 30A, determine the statewide greenhouse gas emissions level in calendar year 1990 and reasonably project what the emissions level will be in calendar year 2020 if no measures are imposed to lower emissions other than those formally adopted and implemented as of January 1, 2009. This projection shall hereafter be referred to as the projected 2020 business as usual level.

(b) The secretary shall, in consultation with the department and the department of energy resources, adopt the following statewide greenhouse gas emissions limits: (1) a 2020 statewide emissions limit and a plan to achieve that limit pursuant to section 4; (2) an interim 2030 emissions limit accompanied by plans to achieve this limit in accordance with said section 4; provided, however, that the 2030 interim emissions limits shall maximize the ability of the commonwealth to meet the 2050 emissions limit; (3) an interim 2040 emissions limit accompanied by plans to achieve this limit in accordance with said section 4; provided, however, that the 2040 interim emissions limit shall maximize the ability of the commonwealth to meet the 2050 emissions limit; and (4) a 2050 statewide emissions limit that is at least 80 per cent below

the 1990 level.

(c) Emissions levels and limits associated with the electric sector shall be established by the executive office and the department, in consultation with the department of energy resources, based on consumption and purchases of electricity from the regional electric grid, taking into account the regional greenhouse gas initiative and the renewable portfolio standard.

(d) The department shall promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions.

Section 4. (a) The secretary shall adopt the 2020 statewide greenhouse gas emissions limit pursuant to subsection (b) of section 3 which shall be between 10 per cent and 25 per cent below the 1990 emissions level and a plan for achieving said reduction. The secretary shall consult with all state agencies and regional authorities with jurisdiction over sources of greenhouse gases on all elements of the emissions limit and plan that pertain to energy-related matters including, but not limited to, electrical generation, load based-standards or requirements, the provision of reliable and affordable electrical service and statewide fuel supplies, to ensure the greenhouse gas emissions reduction activities to be adopted and implemented by the secretary are complementary, non-duplicative and can be implemented in an efficient and cost-effective manner. The 2020 statewide emissions limit and implementation plan shall comply with this section.

(b) The secretary shall analyze the feasibility of measures to comply with the emissions limit established in subsection (a). Such measures shall include, but not be limited to, the electric generating facility aggregate limit established pursuant to section 12, direct emissions reduction measures from other sectors of the economy, alternative compliance mechanisms, market-based compliance mechanisms and potential monetary and nonmonetary incentives for sources and categories of sources that the secretary finds are necessary or desirable to facilitate the achievement of reductions of greenhouse gas emissions limits.

(c) The secretary shall consider all relevant information pertaining to greenhouse gas emissions reduction goals and programs in other states and nations.

(d) The secretary shall evaluate the total potential costs and economic and noneconomic benefits of various reduction measures to the economy, environment and public health, using the best available economic models, emissions estimation techniques and other scientific methods.

(e) The secretary shall take into account the relative contribution of each source or source category to statewide greenhouse gas emissions and shall recommend a de minimis threshold of greenhouse gas emissions below which emissions reduction requirements shall not apply.

(f) The secretary shall identify opportunities for emissions reduction measures from all verifiable and enforceable voluntary actions.

(g) The secretary shall conduct public hearings on the proposed 2020 emission limit and implementing plan. The secretary shall conduct a portion of these workshops in regions that have the most significant exposure to air pollutants, including, but not limited to, communities

with minority populations, communities with low-income populations, or both.

(h) The secretary shall update its plan for achieving the maximum technologically feasible reductions of greenhouse gas emissions at least once every 5 years, including the plans to implement the 2030, 2040 and 2050 statewide emission limits.

Section 5. The secretary shall monitor the implementation of regulations relative to climate change and shall, every 5 years, publish a report which shall include recommendations regarding such implementation. The report shall include, without limitation: (i) whether regulations or other measures undertaken, including distribution of emissions allowances, are equitable and minimize costs and maximize the total benefits to the commonwealth and encourage early action to reduce greenhouse gas emissions; (ii) whether activities undertaken to comply with state regulations and efforts disproportionately impact low-income communities; (iii) whether entities that have voluntarily reduced their greenhouse gas emissions prior to the implementation of this chapter receive appropriate credit for early voluntary reductions; (iv) whether activities undertaken pursuant to the regulations complement, and do not interfere with, efforts to achieve and maintain federal and state ambient air quality standards and reduce toxic air contaminant emissions; (v) consider overall societal benefits, including reductions in other air pollutants, diversification of energy sources and other benefits to the economy, environment and public health; (vi) whether state actions minimize the administrative burden of implementing and complying with these regulations; (vii) whether state actions minimize leakage; (viii) consider the significance of the contribution of each source or category of sources to statewide emissions of greenhouse gases; (ix) whether greenhouse gas emissions reductions achieved are real, permanent, quantifiable, verifiable and enforceable; and (x) recommendations for future policy action. The report shall be filed with the clerk of the house of representatives, the clerk of the senate, the chairs of the house and senate committees on ways and means, the chairs of the joint committee of telecommunications, utilities and energy and the chairs of the joint committee on the environment, natural resources and agriculture.

Section 6. In implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that reduce energy use, increase efficiency and encourage renewable sources of energy in the sectors of energy generation, buildings and transportation.

Section 7. (a) The secretary, in consultation with the executive office of administration and finance, may consider the use of market-based compliance mechanisms to address climate change concerns; provided, however, that prior to the use of any market-based compliance mechanism, to the extent feasible and in furtherance of achieving the statewide greenhouse gas emissions limit, the secretary shall: (1) consider the potential for direct, indirect and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution; (2) design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air



pollutants, with particular attention paid to emissions of nitrous oxide, sulfur dioxide and mercury; and (3) maximize additional environmental and economic benefits for the commonwealth, as appropriate.

(b) The secretary may adopt regulations governing how market-based compliance mechanisms may be used by regulated entities subject to greenhouse gas emissions limits and mandatory emissions reporting requirements to achieve compliance with their greenhouse gas emissions limits.

(c) The executive office and the department may work with the participating regional greenhouse gas initiative states and other interested states and Canadian Provinces to develop a plan to expand market-based compliance mechanisms such as the regional greenhouse gas initiative to other sources and sectors necessary or desirable to facilitate the achievement of the greenhouse gas emissions limits.

(d) The executive office shall monitor compliance with and enforce any rule, regulation, order, emissions limitation, emissions reduction measure or market-based compliance mechanism adopted by the executive office or department pursuant to this chapter. The department may impose a civil administrative penalty pursuant to section 16 of chapter 21A for a violation of any rule, regulation, order, emissions limitation, emissions reduction measure or other measure adopted by the executive office pursuant to this chapter.

Section 8. The secretary shall convene an advisory committee to advise the executive office in overseeing the greenhouse emissions reduction measures. The advisory committee shall consist of representatives from the following sectors: commercial, industrial and manufacturing; transportation; low-income consumers; energy generation and distribution; environmental protection; energy efficiency and renewable energy; local government; and academic institutions.

Section 9. Nothing in this chapter shall affect the authority of the public utility commission or the obligation of an electrical utility to provide customers with safe and reliable electric service. Nothing in this chapter shall preclude, prohibit or restrict the construction of a new facility or the expansion of an existing facility subject to regulation under this chapter, if all applicable requirements are met and the facility is in compliance with regulations adopted pursuant to this chapter.

**SECTION 7.** Section 61 of chapter 30 of the General Laws is hereby amended by inserting after the first paragraph, as appearing in the 2006 Official Edition, the following paragraph:-

In considering and issuing permits, licenses and other administrative approvals and decisions, the respective agency, department, board, commission or authority shall also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.

**SECTION 8.** Nothing in this act shall restrict the secretary of energy and environmental affairs from adopting greenhouse gas emissions limits or emissions reduction measures prior to January 1, 2011, that are consistent with general or special laws or rules or regulations, imposing those limits prior to January 1, 2012, or providing early reduction credit, where appropriate, nor shall this act prevent the imposition of more stringent limits on emissions.

**SECTION 9.** Notwithstanding any general or special law to the contrary, the secretary shall convene an advisory committee to analyze strategies for adapting to the predicted impacts of climate change in the commonwealth. The advisory committee shall be chaired by the secretary, or his designee, and comprised of representatives with expertise in the following areas: transportation and built infrastructure; commercial, industrial and manufacturing activities; low income consumers; energy generation and distribution; land conservation; water supply and quality; recreation; ecosystems dynamics; coastal zone and oceans; rivers and wetlands; and local government.

The committee shall file a report of its findings and recommendations regarding strategies for adapting to climate change not later than December 31, 2009.

**SECTION 10.** Notwithstanding any general or special law to the contrary, the executive office of energy and environmental affairs shall promulgate regulations pursuant to section 2 of chapter 21N of the General Laws not later than January 1, 2009.

**SECTION 11.** Clauses (2) and (3) of the third sentence of subsection (a) of said section 2 of said chapter 21N shall take effect not later than April 15, 2009.

**SECTION 12.** Clauses (4) and (5) of said third sentence of said subsection (a) of said section 2 of said chapter 21N shall be implemented not later than July 1, 2009.

**SECTION 13.** The first inventory required pursuant to subsection (c) of said section 2 of said chapter 21N shall be published not later than December 31, 2010.

**SECTION 14.** Subsection (a) of section 3 of said chapter 21N shall be implemented not later than July 1, 2009.

**SECTION 15.** Clause (1) of subsection (b) of said section 3 of said chapter 21N shall be implemented not later than January 1, 2011.

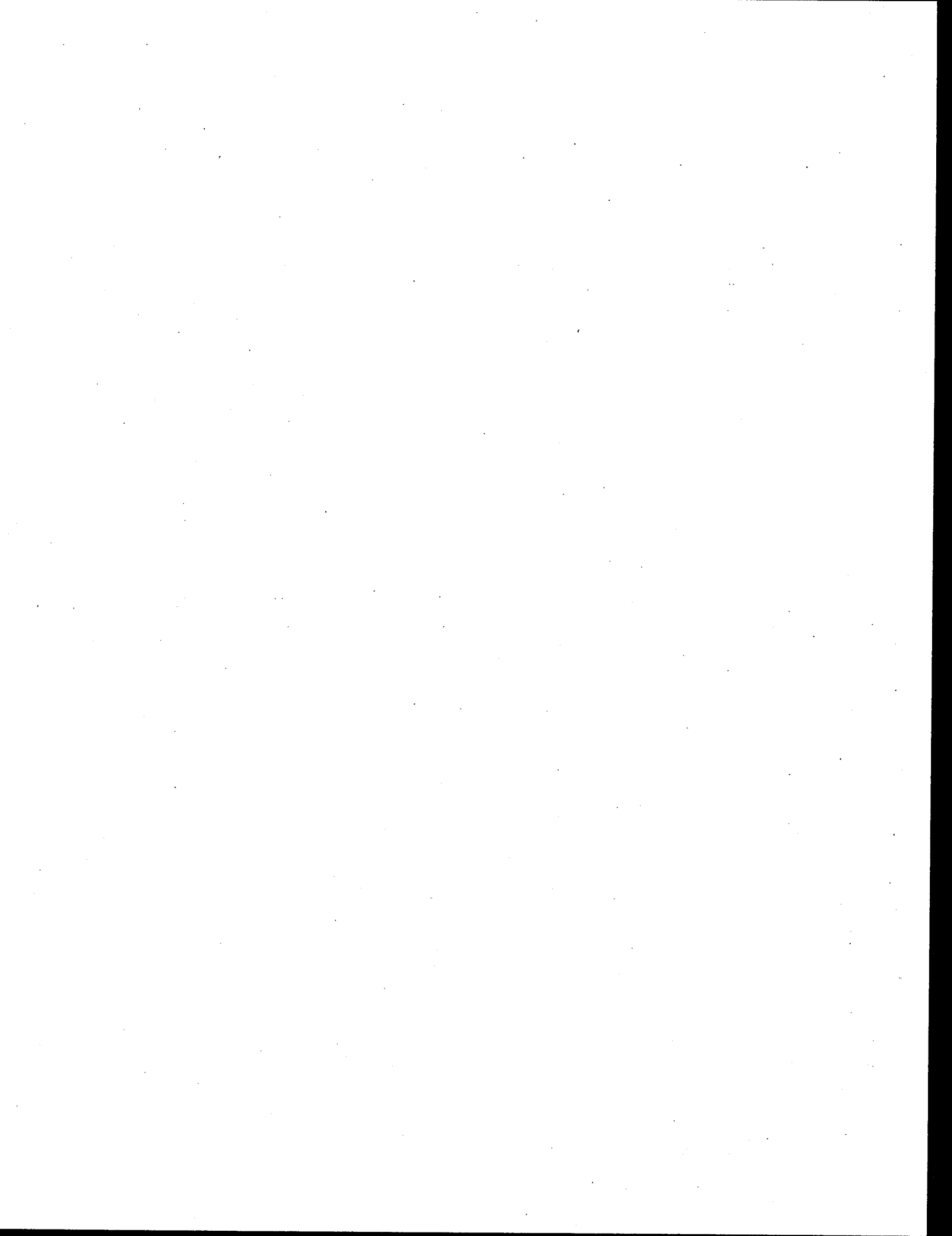
**SECTION 16.** The department of environmental protection shall promulgate regulations pursuant to subsection (d) of said section 3 of said chapter 21N not later than January 1, 2012, which regulations shall take effect on January 1, 2013, and shall expire on December 31, 2020.

**SECTION 17.** The 2020 statewide greenhouse gas initiative required to be adopted pursuant to subsection (a) of section 4 of said chapter 21N shall be adopted not later than January 1, 2011.

**SECTION 18.** Notwithstanding any general or special law to the contrary, the executive office of energy and environmental affairs shall publish the report required pursuant to section 5 of said chapter 21N not later than January 1, 2014.

*Approved August 7, 2008*

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NOTIFY

14

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 14-02551

ISABEL KAIN & others,<sup>1</sup>  
Plaintiffs,

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
Defendant.

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFFS'  
MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiffs, four private citizens and two nonprofit organizations, allege in their two-count Complaint that the defendant, Massachusetts Department of Environmental Protection ("DEP" or the "Department"), has failed to perform statutorily mandated duties under a particular subsection of the Global Warming Solutions Act – namely, G. L. c. 21N, § 3(d). The plaintiffs now move for a declaratory judgment on the pleadings and/or the issuance of a writ of mandamus to DEP. The Department opposes the plaintiffs' motion, and requests entry of a declaratory judgment in its favor. The Court held a hearing on March 9, 2015 and heard extensive arguments. For the reasons set forth below, the plaintiffs' motion will be DENIED, and a declaratory judgment shall enter in favor of the defendant.

BACKGROUND

The following background facts are taken from the allegations in the Complaint and the

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<sup>1</sup> Shamus Miller, James Coakley, Olivia Geiger, Conservation Law Foundation, and the Energy Consumers Alliance of New England d/b/a Mass Energy Consumers Alliance

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exhibits attached thereto, which the Court accepts as true for purposes of the present Rule 12(c) motion. See Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 596 (2010).

The Court reserves certain facts for later discussion.

Enacted in 2008, the Global Warming Solutions Act (“GWSA” or the “Act”) is a legislative scheme designed to address the effects of climate change in the Commonwealth by promoting “green” economic initiatives and reducing greenhouse gas emissions.<sup>2</sup> The GWSA imposes certain duties on various Massachusetts executive offices and agencies. For example, the Act requires the Secretary of Energy and Environmental Affairs (the “Secretary”) to adopt a statewide greenhouse gas emissions limit for the year 2020. See G. L. c. 21N, § 3(b). A separate but related section of the law provides the algorithm by which the Secretary’s 2020 emissions limit must be calculated. Id. at § 4(a). The GWSA provision at issue in the present case (“Section 3(d)”) specifically provides as follows:

“The department shall promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions.”

G. L. c. 21N, § 3(d).<sup>3</sup> Regulations issued by DEP pursuant to § 3(d) were to be instituted by January 1, 2012, take effect on January 1, 2013, and expire on December 31, 2020. See St. 2008, c. 298, § 16. The statutory deadline for issuing § 3(d)-compliant regulations came and went in January, 2012, without any Department action taken pursuant to this subsection.

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<sup>2</sup> “Greenhouse gas” is defined under the Act to include “any chemical or physical substance that is emitted into the air and that the [DEP] may reasonably anticipate will cause or contribute to climate change including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.” G. L. c. 21N, § 1.

<sup>3</sup> G. L. c. 21N, § 1, the general definition section of the GWSA, provides that “department” refers to the Massachusetts Department of Environmental Protection, the defendant in this case.

In November, 2012, a group of Massachusetts residents – including some of the plaintiffs in the case at bar – submitted to the Department a rulemaking petition seeking regulations that would strictly control greenhouse gas emissions, citing the DEP's authority under § 3(d).<sup>4</sup> Various environmental advocacy organizations, as well as multiple health care and business interests, supported the petition. At that time, the Department had promulgated a number of regulations pursuant to authority granted in other GWSA provisions, but had not yet expressly taken action under § 3(d).

DEP held a public hearing on June 13, 2013 to consider and discuss the petition. Shortly after the hearing, DEP issued a written statement in response to the petitioners' demands, outlining the Department's decisions and the reasons therefor. In broad compass, DEP's position was that it had complied with all requirements of the GWSA, including those set forth in § 3(d). The DEP statement listed specific regulatory schemes the Department had established to reduce greenhouse gases and combat climate change, including prescribed limits on sulfur hexafluoride (SF<sub>6</sub>) leaks, a regional cap and trade market to manage carbon dioxide (CO<sub>2</sub>) emission allowances, and a Low Emission Vehicle (LEV) program addressed to automobile emissions. The Department asserted that such initiatives (singly or in combination) fulfilled the § 3(d) mandate. DEP took no further action at that time.

On August 11, 2014, the plaintiffs filed their Complaint with this Court. The plaintiffs seek a declaratory judgment or, in the alternative, a writ of mandamus, asserting that DEP has failed to meet its statutory mandate to issue regulations compliant with § 3(d) of the GWSA.

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<sup>4</sup> The petition also requested that the Department take additional actions independent of § 3(d), such as preparing a plan to ensure that statewide fossil fuel carbon dioxide emissions are reduced by 6% per year. These companion requests are not implicated in the case at bar.

DEP counters that it has satisfied the requirements of § 3(d), fairly construed, and therefore requests that a declaratory judgment to this effect enter in its favor as a matter of law.

### **DISCUSSION**

The parties agree that the pleadings present no disputes of material fact, and that the sole question presented for decision in this matter turns entirely on statutory interpretation. Judgment on the pleadings is thus proper under Mass. R. Civ. P. 12(c). See Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181, 1182 (1989); see also Commonwealth v. Richards, 426 Mass. 689, 691 (1998) (a matter of statutory interpretation presents a “pure issue of law”).

#### **I. Standard of Review**

“The duty of statutory interpretation is for the courts, but an administrative agency’s interpretation of a statute within its charge is accorded weight and deference. Where the agency’s statutory interpretation is reasonable, the court should not supplant its judgment.” Dowling v. Registrar of Motor Vehicles, 425 Mass. 523, 525 (1997), quoting Massachusetts Medical Soc’y v. Commissioner of Ins., 402 Mass. 44, 62 (1988). Such deference is required even where the statutory language may be ambiguous. See Alliance to Protect Nantucket Sound v. Department of Pub. Utils., 461 Mass. 166, 182 (2011). In the present case, it is the plaintiffs’ ultimate burden to show that (1) DEP’s interpretation of the GWSA is invalid and (2) the Department’s actions taken thereunder are insufficient as a matter of law to meet the mandate of the statute. See Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481 (2006).

#### **II. G. L. c. 21N, § 3(d)**

With a legislative enterprise as broad and complex as the GWSA, “there are likely to be casual overstatements and understatement, half-answers, and gaps in the statutory provisions.



As practice develops and the difficulties are revealed, the courts are called on to interweave the statute with decisions answering the difficulties and composing, as far as feasible and reasonable, an harmonious structure faithful to the basic designs and purposes of the Legislature.” Mailhot v. Travelers Ins. Co., 375 Mass. 342, 345 (1978) (discussing interpretation and application of Massachusetts “no fault” insurance statutory scheme). Various factors may be relevant to statutory interpretation, but the most important is legislative intent. See Quincy City Hosp. v. Rate Setting Comm’n, 406 Mass. 431, 449 (1990).

Here, the parties offer two competing interpretations of § 3(d). The plaintiffs argue that its language reflects a legislative intent for DEP to issue strict, numerical, enforceable limits – what they characterize as “mandatory restraints” – on greenhouse gas emissions for sources or categories of sources of greenhouse gases. DEP, on the other hand, focuses on the phrase “a desired level of” in § 3(d), and asserts that the law mandates only that the Department establish aspirational or “target” emissions levels for sources or categories of sources of greenhouse gas emissions. DEP further maintains that it has satisfied such mandate through its development of three separate regulatory schemes: the SF<sub>6</sub> leakage limits, the CO<sub>2</sub> allowances market, and the LEV program.

Upon review, the Court has determined that it need not decide which (if either) party’s reading of § 3(d) is correct in this regard; because, under either construction of the statute, and according the agency the deference to which it is entitled by law, DEP has fulfilled the essential mandate of § 3(d). The plaintiffs argue that § 3(d) imposes a six-part mandate on any action taken by the Department. In their view, such action must be a (1) declining, (2) annual, (3) aggregate, (4) regulation, which places (5) limits (and not merely reduction targets) on (6)

sources or categories of sources of greenhouse gas emissions. Ultimately, and even conceding *arguendo* the plaintiffs' reading of the statute, it is evident that DEP has in substance met all six elements – in its SF<sub>6</sub> regulations, through the CO<sub>2</sub> emissions market, and with the Department's LEV program. The Court regards the plaintiffs' various quarrels with the regulatory actions of DEP as hypertechnical and overly exacting, and concludes the Department is in fact substantially fulfilling the legislative expectations of the GWSA in a reasonable manner.

*A. SF<sub>6</sub> Regulations*

DEP has regulated SF<sub>6</sub> gas emissions in the Commonwealth since April, 2014. The Department's regulations proscribe excessive leakage of SF<sub>6</sub> from electrical power system equipment insulated with SF<sub>6</sub> gas, known as gas-insulated switchgear, or GIS. See 310 C.M.R. § 772. The Legislature considers SF<sub>6</sub> a "greenhouse gas" falling under the coverage of the GWSA. See G. L. c. 21N, § 1. DEP's expressly stated purpose behind the SF<sub>6</sub> regulations is to reduce greenhouse gas emissions. See 310 C.M.R. § 772(1).

The SF<sub>6</sub> regulatory scheme provides maximum annual rates of allowable SF<sub>6</sub> gas leakage for GIS in Massachusetts.<sup>5</sup> The Department has established a calendar of decreasing rate limits – beginning with a 3.5% leakage rate allowed in 2015, and ending with a 1.0% leakage rate allowed in 2020. The SF<sub>6</sub> regulations also require any newly-manufactured GIS to comply with the 2020 emissions rate of 1.0%. The rates themselves are calculated by dividing the total amount, in pounds, of SF<sub>6</sub> gas leaked by a facility over the previous year by the total SF<sub>6</sub> gas capacity of all active GIS equipment in the facility. Non-compliance by a GIS owner, lessor or

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<sup>5</sup> The within discussion of the SF<sub>6</sub> regulations derives from 310 C.M.R. § 772(1)-(9), unless otherwise noted.

operator may result in administrative penalties, including the imposition of a fine not to exceed \$25,000 for each violation. See G. L. c. 21A, § 16; G. L. c. 111, § 142A.

The plaintiffs first argue that utilization of a *rate* scheme instead of a specified numerical limit on total greenhouse gas emissions runs counter to the language of § 3(d). However, nothing in the text of § 3(d) or in the record before the Court indicates that a declining maximum permissible rate of greenhouse gas emissions is not an acceptable *limit* thereon within the intention of this provision of the statute. Through the SF<sub>6</sub> regulations, DEP has established fixed, enforceable rates of – indeed, “mandatory restraints” on – SF<sub>6</sub> leakage, which leakage limits decrease every year. This is the stated dictate of the GWSA. To say that such a scheme has not set a fixed “limit” on greenhouse gas emissions themselves cramps the language of the law beyond fair meaning. See Wheatley, 456 Mass. at 606.

Second, the plaintiffs insist that the calculation of the SF<sub>6</sub> limits does not accord with the requirements of § 3(d). G. L. c. 21N, § 1 defines a “greenhouse gas emissions limit” as “an authorization, during a specified year, to emit up to a level of greenhouse gases specified by the secretary, expressed in tons of carbon dioxide.” The plaintiffs argue that, because the SF<sub>6</sub> limits are expressed in pounds of SF<sub>6</sub> rather than tons of CO<sub>2</sub>, the regulation’s defined measure of the limit is improper. However, G. L. c. 21N, § 1 also indicates that its definitions apply “unless the context clearly requires otherwise.” Section 3(d) is just such a context. Section 3(d) is specifically directed at DEP, whereas the definition of “greenhouse gas emissions limit” is explicitly aimed at regulations issued by the Secretary of Energy and Environmental Affairs. See id. (“an authorization . . . to emit up to a level of greenhouse gases *specified by the secretary*”) (emphasis added). For this reason, the general GWSA definition of greenhouse gas emissions

limit does not, by its terms, control Department regulations issued pursuant to § 3(d), and emissions limits expressed in pounds of SF<sub>6</sub> leaked (rather than tons of CO<sub>2</sub>) is not improper. Cf. Ginther v. Commissioner of Ins., 427 Mass. 319, 324 (1998) (“Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings.”).

The plaintiffs additionally argue that the SF<sub>6</sub> regulations do not impose “aggregate” limits on emissions under § 3(d), because the rules do not restrict new sources of SF<sub>6</sub> from entering the market. Inasmuch as the Act contains no definition of “aggregate,” the Court is called upon to construe the term in accordance with its commonly understood meaning and usage. See Commonwealth v. Welch, 444 Mass. 80, 85 (2005). In this regard, the plain language of the law, considered in the light of its declared legislative purposes, is paramount. See Water Dep’t of Fairhaven v. Dep’t of Env’tl. Protection, 455 Mass 740, 744 (2010). Importantly, the meaning of the statutory language (and the resolution of any ambiguity therein) “is determined not only by reference to the language itself, but as well by the specific context in which the language is used, and the broader context of the statute as a whole.” Yates v. United States, U.S. Supreme Ct., No. 13-7451, slip op. at 7 (Feb. 25, 2015).

Webster’s New World Dictionary defines “aggregate,” in relevant part, to mean “collective, as [in] . . . taking all units as a whole.” This definition of “aggregate” accords with the general usage of the term, and the plaintiffs have not argued that any other definition applies in the context of § 3(d). Considering the word’s commonsense meaning in light of the statutory context in which it is used, the Court has little difficulty concluding that the SF<sub>6</sub> regulations prescribe “aggregate” greenhouse gas emissions limits. The SF<sub>6</sub> rules apply to all GIS owners, lessors, operators and controllers in the Commonwealth, with only narrow exceptions. See 310

C.M.R. § 7.72(3). Further, the regulations apply to all active GIS within a facility, without exception. See id. at § 7.72(5). As such, the rules impose a collective limit on all units (pounds) of SF<sub>6</sub> leaked in every facility under the regulations' authority. This would appear to be the very definition of an "aggregate" limit.

Further to the above, the SF<sub>6</sub> scheme implemented by DEP instructs that any new, active GIS must not exceed a maximum 1.0% leakage rate, the most restrictive rate imposed by the regulations. Contrary to the plaintiffs' argument, the plain language of § 3(d) does not invest DEP with the authority to go beyond placing emissions limits on known sources of greenhouse gases and prohibit entirely new and potential sources of greenhouse gases from emerging in the Commonwealth. The Court declines to read into the law a requirement that the Legislature did not explicitly enact. See Beeler v. Downey, 387 Mass. 609, 617 (1982).

For the foregoing reasons, the plaintiffs' challenge to the "aggregate" nature of DEP's SF<sub>6</sub> regulations fails the test of fair statutory construction. Accordingly, the plaintiffs have not shown that, as a matter of law, the SF<sub>6</sub> regulations do not reasonably satisfy the Department's statutory mandate under § 3(d).

*B. The Massachusetts CO<sub>2</sub> Budget Trading Program*

Pursuant to G. L. c. 21A, § 22, DEP has implemented the Massachusetts CO<sub>2</sub> Budget Trading Program (the "Program"), which tracks the model rules of the Regional Greenhouse Gas Initiative (RGGI) and applies the RGGI standards in Massachusetts. See 310 C.M.R. § 7.70; G. L. c. 21A, § 22. The plaintiffs maintain that the current version<sup>6</sup> of the Program does not fulfill the requirements of § 3(d). The Court disagrees.

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<sup>6</sup> DEP amended the Program regulations in 2013.

The RGGI is a cap and trade program involving electricity-generating facilities, such as power plants, which produce CO<sub>2</sub>. See G. L. c. 21A, § 22(a). CO<sub>2</sub> is considered a greenhouse gas under the GWSA. See G. L. c. 21N, § 1. The RGGI has created a market in which certain producers of CO<sub>2</sub> in the northeastern United States can buy and sell a limited amount of emissions allowances. See G.L. c. 21A, § 22(b). The number of allowances issued for the production of CO<sub>2</sub> in the region is determined by dividing a maximum amount of CO<sub>2</sub>, measured in tons, among the nine states participating in the RGGI. See RGGI Fact Sheet, Regional Greenhouse Gas Initiative, Inc., at [http://rggi.org/docs/Documents/RGGI\\_Fact\\_Sheet.pdf](http://rggi.org/docs/Documents/RGGI_Fact_Sheet.pdf) (last viewed Feb. 25, 2015). The maximum aggregate amount of CO<sub>2</sub> to be produced across all RGGI states decreases by 2.5% each year, through 2020. Id.

In 2007, Massachusetts became part of the RGGI. Thereafter, the Legislature charged DEP with enforcing RGGI rules in order to “reduce the total [CO<sub>2</sub>] emissions released by electric[ity] generating stations.” G. L. c. 21A, § 22(b). The Department then established the Program, incorporating the RGGI scheme into its regulations and issuing a schedule of annual declining aggregate CO<sub>2</sub> emissions limits for producers in the Commonwealth. See 310 C.M.R. § 7.70(5)(a). The base amount of CO<sub>2</sub> emissions currently allocated to Massachusetts for 2015 is 14,124,929 tons. Id. This amount declines by roughly 2.5% each year, through 2018, when the Massachusetts base budget will be 13,282,560 tons of CO<sub>2</sub>. Id.

The plaintiffs first take issue with the region-wide RGGI marketplace for buying and selling emissions allowances, because Massachusetts participants could, in theory, purchase enough allowances to exceed (collectively) the tons of CO<sub>2</sub> allotted to Massachusetts. The plaintiffs argue that such a scheme does not effectively limit the amount of CO<sub>2</sub> emitted in the

Commonwealth. This argument fails to persuade for each of two reasons. First, § 3(d) does not specifically restrict *to Massachusetts* any actions taken by the Department under § 3(d). Rather, it requires only that DEP *generally* place limits on emissions from sources or categories of sources of greenhouse gases (and the Court noting in this connection that this species of air pollution presents as a regional problem). Once again, the Court declines to read into the law a more granular emissions reduction mandate that the Legislature did not explicitly impose. See Beeler, 387 Mass. at 617. Second, based on the plain language of the statute – and according to the plaintiffs’ own proposed six-part test – § 3(d) is not so broad as to require DEP to issue regulations targeting *all* greenhouse gas emissions in the entire state. The language is much more narrowly drawn, mandating the imposition of limits on particular *sources* or *categories of sources* of greenhouse gas emissions. The Program, through the mechanisms of the RGGI, does precisely that, placing limits on the amount of CO<sub>2</sub> that can be produced by Massachusetts power plants.

The plaintiffs alternately argue that any limit placed on CO<sub>2</sub> producers through the RGGI system is illusory, because the Program makes reserve allowances, beyond the initial allotment, available for purchase under certain circumstances. See 310 C.M.R. § 7.70(1)(b) (defining CO<sub>2</sub> Cost Containment Reserves). True though that is, § 3(d) does not prohibit the Department from hewing exceptions into any set emissions limit. If § 3(d) did impose such an inflexible restriction, it would entail a departure from the manner in which DEP customarily implements hard limits. In the ordinary course, DEP’s public safety regulations allow for exceptions to generally-imposed limits or requirements. See, e.g., 310 C.M.R. § 7.08(2)(g)(4) (allowing facilities to apply for waivers from mercury emissions limit regulations if compliance not

otherwise feasible); 310 C.M.R. § 22.13 (allowing variances for public water systems that cannot meet prescribed maximum contaminant levels in drinking water); 310 C.M.R. § 30.1100 (establishing availability of waivers for certain refuse and activities not subject to hazardous waste regulations); 310 C.M.R. § 60.02(3) (providing exceptions to motor vehicle inspection requirements under air pollution control regulations). “It is not likely supposed that radical changes in the law were intended where not plainly expressed.” Wheatley, 456 Mass. at 607. Therefore, the Court finds it doubtful that the Legislature intended to impose as strict a mandate on DEP as the plaintiffs assert, especially where the law may be reasonably construed otherwise. See Molly A v. Commissioner of the Dep’t of Mental Retardation, 69 Mass. App. Ct. 267, 282 (2007) (courts should avoid an “unreasonable result when statutory language is susceptible of a sensible, workable construction”); see also Johnson’s Case, 318 Mass. 741, 746 (1945) (a statute “ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason”).<sup>7</sup>

Plaintiffs claim that any finding that the Program satisfies the requirements of § 3(d) renders the Act’s preceding section, § 3(c), redundant. Section 3(c) specifically provides:

“Emissions levels and limits associated with the electric sector shall be established by the executive office and the department, in consultation with the department of energy resources, based on consumption and purchases of electricity from the regional electric grid, taking into account the regional greenhouse gas initiative and the renewable portfolio standard.”

G.L. c. 21N, § 3(c). It is well settled that statutes must be read holistically, avoiding

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<sup>7</sup> It seems even more implausible to construe § 3(d) as inflexibly as the plaintiffs propose, in light of the arguably looser language the Legislature adopted in this particular provision of the statute (*viz.*, “... promulgate regulations establishing a *desired level* of . . . emissions limits”).



interpretations that would render a provision “inoperative or superfluous.” Wheatley, 456 Mass. at 601. However, a comparison of the language of Sections 3(c) and 3(d) reveals no threatened redundancy of the sort suggested by the plaintiffs. Section 3(c) grants the Department broad authority to establish, generally, emissions limits “associated with the electric sector.” Section 3(d), on the other hand, prescribes a much more specific type of regulation: desired levels of *declining annual* emissions limits for *sources or categories of sources* of greenhouse gases. The plaintiffs offer no concrete reason why DEP could not reasonably establish emissions limits associated with the electric sector that reflect desired levels of declining annual emissions limits — such as those promulgated through the Program — and thereby satisfy *both* statutory mandates at once.

It is certainly true that the Secretary’s office fulfills two separate GWSA directives when it issues 2020 statewide greenhouse gas emissions limits under § 3(b) (“The secretary shall . . . adopt the following [2020] statewide greenhouse gas emissions limit . . .”) and simultaneously calculates what the specific limits will be under § 4(a) (“[T]he 2020 statewide greenhouse gas emissions limit . . . shall be between 10 per cent and 25 per cent below the 1990 emissions level . . .”). These interrelated and complementary mandates for the Secretary do not render either section of the law superfluous or inoperative. The Department has reasonably fulfilled the more specific requirements of § 3(d), and done so in accordance with the broader regulatory authority granted to it in § 3(c).<sup>8</sup> For this reason and the foregoing, the plaintiffs have not carried their

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<sup>8</sup>One might say that the ability to kill two birds with one stone hardly renders the second bird redundant to the hunt.

burden to establish that DEP's action is either improper or insufficient as a matter of law.<sup>9</sup>

*C. The LEV Program*

In 1990, Massachusetts adopted California's system of regulating motor vehicle greenhouse gas emissions. See St. 1989, c. 410, enacted as G. L. c. 111, § 142K (1990). At that time, the Legislature charged DEP with setting and administering standards for motor vehicle emissions, in order to reduce air pollution from automobiles. See G. L. c. 11, § 142K (1990). Accordingly, the Department issued a set of regulations (known as the Low Emission Vehicle ("LEV") Program) which incorporated California's regulatory scheme. See 310 C.M.R. § 7.40; Cal. Code Regs., tit. 13, § 1961.3. The plaintiffs argue that DEP's revised LEV regulations, effective December, 2012, do not fulfill the requirements of § 3(d). Again, the Court does not agree.

The LEV regulations provide that all manufacturers who sell passenger cars, light-duty trucks, and medium-duty passenger vehicles must meet certain declining yearly exhaust standards. See 310 C.M.R. § 7.40(2). The exhaust standards are measured by calculating the mass of non-methane organic gas emitted from the average vehicle in a manufacturer's fleet, expressed in grams per mile. See id. at § 7.40(1); Cal. Code. Regs., tit. 13, § 1961.1. The maximum allowable average emissions decline each "model year," which Massachusetts defines as "a manufacturer's annual production period which includes January 1<sup>st</sup> of a calendar year or, if

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<sup>9</sup> Plaintiffs also argue that the purpose of the Program as promulgated by DEP is to increase state revenue, rather than to reduce greenhouse gas emissions. The Court does not agree. See 310 C.M.R. § 7.70(1)(a) (stating explicitly that the Program's purpose is "to stabilize and then reduce anthropogenic emissions of CO<sub>2</sub>, a greenhouse gas from CO<sub>2</sub> budget sources . . ."). That aside, the purpose or motivation of the agency's regulation is, in the final analysis, irrelevant to whether or not it reasonably fulfills the requirements of § 3(d).

the manufacturer has no annual production period, the calendar year.” 310 C.M.R. § 7.40(1).

The plaintiffs first assert that the LEV regulations do not fulfill the § 3(d) mandate for limits on “aggregate” emissions, because they impose *average* emissions limits for entire fleets of vehicles. The plaintiffs maintain that these regulations could satisfy the requirements of § 3(d) only if the number of vehicles per fleet were also limited, as increasing sizes of fleets will inevitably increase the total mass of exhaust fumes emitted. This argument is similar to one advanced by the plaintiffs in challenging the SF<sub>6</sub> and RGGI regulations, and it fails for similar reasons. First, § 3(d) plainly does not authorize DEP to regulate the number of vehicles manufactured and sold in Massachusetts. Section 3(d) merely instructs DEP to issue regulations that apply emissions limits to certain sources or categories of sources of greenhouse gases. The Department has appropriately done so through LEV regulations that target certain motor vehicles that emit greenhouse gases.

Second, even if DEP possessed the authority to regulate the size of motor vehicle fleets, doing so is clearly not required under § 3(d). Section 3(d) does not require DEP to limit the total amount of greenhouse gases emitted by *all* sources thereof. Rather, the Legislature has imposed *that* duty on the Secretary, through its mandate to issue the 2020 statewide greenhouse gas emissions limit. See G. L. c. 21N., § 3(b). By contrast, § 3(d) only requires that DEP set aggregate limits for specific sources of greenhouse gas emissions. Considering the more narrow purpose of § 3(d), an interpretation of “aggregate . . . emissions limit” to mean a functional limit on all greenhouse gases emitted in the Commonwealth would be unreasonable and impracticable. The Court believes that this could not likely have been intended by the Legislature. See Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 336 (1982) (“We assume the Legislature

intended to act reasonably.”).

The plaintiffs also assert that the LEV regulations, by allowing emissions limits to decline according to a manufacturer’s model year, fail to satisfy the requirement of § 3(d) that any limit must decline “annually.” The GWSA does not define “annually,” so the Court construes the term according to its commonly understood meaning and usage. See Commonwealth v. Welch, 444 Mass. 80, 85 (2005). A natural reading of § 3(d) suggests a legislative intent that any emissions limit set by DEP must decline on a *yearly basis*. The plaintiffs do not appear to disagree with such an assessment. So construed, the fact that exhaust standards promulgated under the LEV regulations could decline every model year, rather than every calendar year, would not seem to subvert the intent of the Legislature. The regulations themselves define a manufacturer’s model year to be an “annual” production period. See 310 C.M.R. § 7.40(1). Logically, this implies that a full production period is completed at least *once every 365 days*. Thus, if an exhaust standard declined every model year, it would decline successively and at least once per year. This surely comports with the Legislature’s interest in enacting a statute that requires “annual” declines in emissions limits.

For the reasons discussed above, DEP’s LEV regulations reasonably fulfill the § 3(d) requirements, even as the plaintiffs conceive them, by imposing declining annual aggregate motor vehicle exhaust limits for certain automobiles sold in the Commonwealth. The pleadings permit no fair conclusion to the contrary.

#### **IV. Requested Relief**

The plaintiffs seek issuance of a writ of mandamus to the Department or, in the alternative, a declaratory judgment in their favor. Mandamus is proper “where a public officer

owes a specific duty to the public to perform some act [or] administer some law for the public benefit which he is refusing or failing to perform or administer.” Kaplan v. Bowker, 333 Mass. 455, 460 (1956). A writ of mandamus orders a public officer to perform a specific duty theretofore ignored. See Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dep’t, 448 Mass. 57, 59-60 (2006). “Such relief is extraordinary,” Massachusetts Redemption Coalition, Inc. v. Secretary of Executive Branch of Envtl. Affairs, 68 Mass. App. Ct. 67, 69 (2007), and “not a matter of right but of sound judicial discretion,” Lutheran Servs. Ass’n of New England, Inc. v. Metropolitan Dist. Comm’n, 397 Mass. 341, 345 (1986).

In accordance with the foregoing discussion, mandamus is not appropriate under the circumstances presented in this case. The plaintiffs have failed to show, as a matter of law, that the defendant has disregarded or neglected a clear-cut duty imposed by the Legislature. Under the plaintiffs’ interpretation of § 3(d), DEP must impose declining, annual, aggregate emissions limits on certain sources or categories of sources of greenhouse gases. The determinations as to how many and which sources are to be regulated, and in what manner, however, are largely left to the discretion of the Department. Mandamus will ordinarily not issue where the subject agency has discretion in performing its duty, as the Department plainly does under § 3(d), absent demonstrated abuse of such discretion. See Locator Servs. Group, Ltd., 443 Mass. at 856-57. “This court should be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business.” Massachusetts Redemption Coalition, Inc., 68 Mass. App. Ct. at 70. Here, DEP has fulfilled the dictates of GWSA § 3(d) under *each* of three separate and independently sufficient regulatory regimes. See

ante.<sup>10</sup> Thus, because the plaintiffs have not shown that DEP has either abused its discretion or not reasonably met its obligations under § 3(d) of the statute,<sup>11</sup> mandamus shall not issue.

### CONCLUSION AND ORDER

The regulatory initiatives implemented by DEP may or may not prove effective in reducing the emission of greenhouse gases at the levels and/or in the time frames contemplated by the GWSA. If such initiatives are not successful, however, it will not be because the Department flouted the statutory directives of § 3(d) by failing to promulgate reasonable emissions regulations. And in that event, it will either be for DEP to refine its greenhouse gas programs, or for the Legislature to draft a better law. It is not, however, for this Court to rewrite the statute that the plaintiffs wished the General Court had enacted, well-intentioned though such wishes might be. See Souza v. Registrar of Motor Vehicles, 426 Mass. 227, 232 (2012) (“[W]e are not at liberty to construe the statute in a manner that might advance its purpose but contravenes the actual language chosen by the Legislature.”); DePierre v. United States, 131 S.

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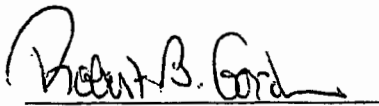
<sup>10</sup> Because § 3(d) does not dictate that DEP promulgate regulations that provide for declining emissions limits in each and every category of greenhouse gas source, compliance by even *one* of the Department’s three regulatory programs would suffice to defeat the plaintiffs’ claim in this case.

<sup>11</sup> In their Complaint, the plaintiffs move for a general declaration that DEP failed to promulgate regulations under § 3(d) before the statutory deadline of January 1, 2012. See St. 2008, c. 298, § 16. The Court expresses no opinion (and certainly intends no endorsement) respecting DEP’s course of conduct in this regard. However, this is neither a material fact in dispute in the case, nor does it present an issue of law requiring the Court’s determination. Although the Department itself acknowledges that it did not completely fulfill its § 3(d) mandate until after the deadline (see Defendant’s Opposition, at 5 n.5), the matter has since been mooted insofar as concerns the plaintiffs’ prayers for declaratory and injunctive relief. Accordingly, the Court will abjure any ruling on this particular issue. See Lockhart v. Attorney Gen., 390 Mass. 780, 782-84 (1984) (observing that courts have discretion to avoid answering insubstantial questions, ruling on undisputed matters, and issuing judgments where a decision on such matters “would be of little or no practical guidance”).

Ct. 2225, 2233 (2011) ("That we may rue inartful legislative drafting ... does not excuse us from the responsibility of construing a statute as faithfully as possible to its actual text.").

Both parties have sought a declaratory judgment in their favor, and agree that their respective submissions may be treated as cross-motions for judgment on the pleadings. For the reasons stated above, the plaintiffs' Motion for Judgment on the Pleadings is **DENIED**, and the defendant's request that the Complaint be dismissed and a declaratory judgment entered in its favor is **ALLOWED**. A judgment shall enter declaring that the Massachusetts Department of Environmental Protection has substantially satisfied the requirements of Mass. G.L. c. 21N, § 3(d).

**SO ORDERED.**

  
Robert B. Gordon  
Justice of the Superior Court

Dated: March 23, 2015

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sent  
03.24.15  
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