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**House of Representatives**  
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 Harrisburg

**RECEIVED**  
 Jan 12 2021  
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**Independent Regulatory  
 Review Commission**

ENVIRONMENTAL RESOURCES AND  
 ENERGY COMMITTEE  
 CHAIRMAN

January 12, 2021

Independent Regulatory Review Commission  
 333 Market Street  
 Harrisburg, PA 17101

Dear Commissioners:

As members of the House Environmental Resources and Energy Committee, we write to you to express our disapproval of proposed Environmental Quality Board (EQB) Regulation #7-559 (IRRC # 3274).

The Committee voted today, January 12<sup>th</sup>, in favor of sending you this letter disapproving of the regulation regarding the Regional Greenhouse Gas Initiative (RGGI). As the standing House Committee with legislative oversight over the Department of Environmental Protection (DEP), it is our role to ensure that regulations proposed by DEP through the EQB are consistent with the intent of the Acts on which they are based and proposed in a manner consistent with the law, a standard which this regulation utterly fails. As you can see from the number of comments already submitted, while this committee has commented on regulations before, none has been as controversial as this one. This is because by proposing this regulation, DEP has entirely surpassed their authority as a regulatory agency and is attempting to usurp the General Assembly's proper role as policymakers.

We could easily discuss for many pages the tremendous amount of harm that this regulation will have on our businesses, constituents, and communities by directly eliminating thousands of jobs across the Commonwealth, completely destroying an industry, devastating communities, making Pennsylvania less competitive, and by raising electricity prices in the Commonwealth. As this ground has been extensively covered by other commenters, we as the standing committee, have chosen to focus on comments primarily on DEP's lack of legal authority to promulgate this regulation.

While the Department cites the Air Pollution Control Act (APCA) as its authority for the regulation, the APCA fails to grant such authority without the involvement of the legislature. The APCA provides that DEP may "formulate" interstate air pollution control agreements, it gives the Department no ability to execute them. In fact, the statute explicitly requires that such an agreement be submitted to the General Assembly for its consideration.

Furthermore, while DEP claims that RGGI's auction mechanism would impose a "fee", which it has the authority to do under the APCA, the regulation would actually impose a "tax" as this term has been defined under Pennsylvania case law. Pennsylvania courts have consistently held that under the Constitution of Pennsylvania, the authority to tax rests solely with the General Assembly. Under

Pennsylvania case law, an action of government is defined as a “tax” if it is a revenue-producing measure. On the other hand, regulatory “fees” are intended merely to cover the cost of administering a regulatory scheme. Whether a government action is defined as a “tax” or a “fee” turns on the amount of income that is generated and the percentage of that income allocated to covering the program’s administrative costs.

RGGI’s auction mechanism clearly represents a “tax” under these definitions. The auction is designed to raise significant revenue, in fact, it has raised over 3 billion dollars to date. RGGI states have allocated less than 6% of the auction revenue toward administering the program. Instead, these states have used the vast majority of the revenue to support policy initiatives or to prop up the state’s budget through transfers to their general funds. Thus, the revenue generated by the auction must be defined as a “tax” which can only be imposed by the General Assembly.

Administrative agencies can only exercise power and authority which has been conferred to them by the General Assembly. Pennsylvania courts have consistently held that this legislative delegation must be clear and unmistakable, or else the power does not exist. In order to accept the Department’s authority to promulgate this rulemaking, you would have to stretch the APCA well past its breaking point in several different places. You will not find in the act text stating that the Department may promulgate regulations to join RGGI. You will not find in the act text stating that the Department may promulgate regulations to adopt a cap and trade system. You will not even find in the act text stating that the Department may promulgate regulations to govern carbon emissions generally.

Every other state in RGGI received specific authorization to join the initiative from their legislature except for New York. Unlike Pennsylvania, however, New York’s legislature has specifically and explicitly authorized the regulation of carbon dioxide. Carbon dioxide is unlike other conventional pollutants, in that the inhalation of it or direct exposure to it in typical atmospheric concentrations is not dangerous. A strong argument can be made that carbon dioxide does not fit under the definition of “air pollution” within the APCA. Pennsylvania would be alone among the RGGI states if it proceeds without specific legislative authority for this rulemaking.

Even if carbon dioxide was to be considered within the definition of “air pollution” under the APCA, the act only allows DEP to promulgate regulations for the “prevention, control, reduction and abatement” of air pollution. The adoption of RGGI would have an entirely negligible impact on the concentration of ambient carbon dioxide in the atmosphere. The contribution of Pennsylvania’s power plants to worldwide greenhouse gas emissions is negligible. Additionally, as demonstrated by modeling conducted by the Department itself, in addition to others, Pennsylvania joining RGGI will result in “leakage” as power plants in neighboring states will generate more electricity and thus more carbon dioxide emissions after our entry. This means that the overall reduction in emissions seen if Pennsylvania joins RGGI will be miniscule, failing the APCA’s standard of any meaningful “prevention, control, reduction and abatement” of air pollution.

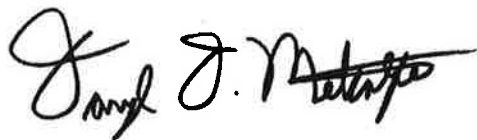
One final point about the APCA is that it clearly requires that DEP hold in-person public hearings in regions impacted by a regulation before it can be adopted. DEP has refused to comply with this portion

of the law, instead holding 10 virtual hearings. A motion was made during the EQB meeting to require that DEP comply with the law, but this motion was rejected. DEP has shown a contempt for the law and proper process throughout the development of this rulemaking and has rejected required engagement with communities and industry who will be devastated by this regulation at every turn.

In addition to our comments regarding DEP's lack of legal authority for this rulemaking, we lend our support to many of the other comments that have been offered. We urge you to consider the comments of small business owners throughout the state, both those whose livelihoods will be directly impacted when power plants close, and those who will be harmed by an increase in energy prices. We urge you to consider the comments of unions throughout the state who are fighting hard to protect their jobs and to keep Pennsylvania competitive as a state. We urge you to consider the comments of individuals in communities that will be devastated by the regulation. We urge you to consider the impact that this regulation will have on low-income Pennsylvanians who will struggle to pay the increased energy bills that they will be faced with. We urge you to consider the comments of those who have noted that there could not be a worse time to propose this regulation when the economy has been harmed so drastically by the COVID-19 outbreak.

This proposed regulation is unacceptable and DEP has failed to comply with the law and the Constitution of Pennsylvania when developing it. DEP's description of its statutory authority in the regulatory analysis form is woefully inadequate and does not begin to address any of the legal deficiencies with the regulation. The bottom line is that this regulation is such a significant policy decision that it must be made by the General Assembly and not by the executive branch of government. Moving forward with this regulation will only condemn the state to a protracted and expensive legal battle in attempting to defend it. We therefore ask IRRC to disapprove this regulation in its proposed form since the provisions of the regulation are plainly unreasonable. We urge the EQB and DEP to withdraw this proposed regulation. We, the undersigned members of the House Environmental Resources and Energy Committee, write this letter to draw your attention to our concerns and disapproval of this proposed regulation and respectfully ask for your consideration.

Sincerely,



Daryl D. Metcalfe, Chairman  
Environmental Resources & Energy Committee



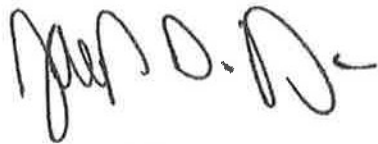
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Rep. Kathy Rapp  
65<sup>th</sup> Legislative District



Rep. Paul Schemel  
90<sup>th</sup> Legislative District



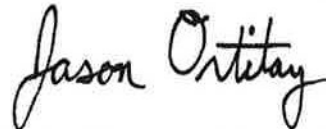
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