



House of Representatives
Commonwealth of Pennsylvania
Harrisburg

January 14, 2021

Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Re: Regulation #7-559: CO2 Budget Trading Program

Dear Commissioners:

We are writing in regard to the Department of Environmental Protection's (Department) proposal to establish the Commonwealth's participation in the Regional Greenhouse Gas Initiative (RGGI), Regulation #7-559: CO2 Budget Trading Program. We believe that the Department's proposal to join RGGI is not in the public interest because it:

1. Has no statutory authority and is inconsistent with the intent of the General Assembly.
2. Unconstitutionally implements a revenue-raising tax.
3. Is such a substantial policy issue that it must be reviewed by the General Assembly.
4. Relies on unaccepted data.
5. Is unneeded.
6. Is not the least costly or least intrusive method of accomplishing its goals.
7. Will have severely adverse effects on the economy of Pennsylvania.

For these reasons, which we will expound upon below, we are requesting that the Commission faithfully execute its oversight responsibilities in accordance with the law and that the Commission urge the Department to withdraw its proposal.

1. As you know, the Regulatory Review Act (RRA) lays out the criteria that the Commission must use to review proposed regulations. In order to determine if a regulation is in the public interest *"the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based."*¹ We strongly assert that there is no statutory authority for the Department's regulatory scheme to participate in RGGI.

¹ 71 P.S. § 745.5b (a).

We believe that the Department knows this regulation flatly contradicts the intention of the General Assembly and is therefore intentionally trying to circumvent the General Assembly by means of regulation. As evidence, we present the following:

A. While we recognize that the Air Pollution Control Act (APCA) does permit the Department to “*formulate interstate air pollution control compacts or agreements,*” it explicitly requires the purpose of formulating them be for submission to the General Assembly.² Since this proposed regulation is not formulated for submission to the General Assembly, it violates the requirements of the APCA.

B. The APCA gives the Department the authority to regulate air pollution, however the Department errs by misreading the intent of the General Assembly, which defined air pollution in the APCA as “*The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic, hazardous or radioactive substances, waste or any other matter in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.*”³ Because CO₂ is naturally occurring, not inimical to humans or animals, and is in fact beneficial to plant life, it is not an air pollutant. Therefore, the General Assembly did not intend to give the Department the authority to regulate carbon dioxide under the APCA. Furthermore, as was pointed out by the Chairman of the House Environmental Resources and Energy Committee, “*every other state that has joined RGGI has either received explicit approval to do so from their legislature, or their legislature has expressly authorized the regulation of carbon dioxide.*” Since carbon dioxide is not an air pollutant, nor has the PA General Assembly expressly authorized its regulation, the Department has no statutory authority to implement this regulation.

C. We maintain that Section 6.3(a) of the APCA only authorizes regulatory fees meant to cover the costs of administering the APCA. In Table 7 of the Regulatory Analysis Form (RAF), the Department estimates to raise \$2,347,809,950 in revenue from auction proceeds from 2022 to 2030. RGGI will not cost \$2.3 billion to administer. Indeed, this revenue that the Department raises for itself will go to the Department’s various non-RGGI projects – projects that are not even included in this proposal. According to the Department, they plan “*to develop a draft plan for public comment outlining reinvestment options.*”⁴ Not only does this proposal unlawfully raise billions of dollars, but alarmingly it provides no specifics on what it will be spent on. The Department does not specifically tell us how much of the auction proceeds in Pennsylvania will go to administering RGGI, but according to the testimony of Anthony Holtzman, “*... the RGGI signatory states had directed less than 6% of the proceeds toward the program’s administration.*”⁵ The APCA was not meant to be used as a pretext for raising revenue for

² 35 P.S. § 4004 (24).

³ 35 P.S. § 4003 (definition of Air Pollution).

⁴ RAF p.19.

⁵ See page 3 of testimony of Anthony R. Holtzman, Esq. to the House Environmental Resources and Energy Committee on July 21, 2020.

projects outside of administering the APCA. The exorbitant amount of revenue the Department seeks to raise through RGGI removes all doubt that this is not a simple regulatory fee to cover administrative costs. It is, in fact, a new tax.

2. Only the General Assembly has the power to tax.⁶ Therefore, the Department's attempt to enact a \$300+ million/year shadow-tax is odious to the PA Constitution's requirement that all revenue must be raised by the General Assembly,⁷ which is directly accountable to the citizens of Pennsylvania.

3. Not only is this proposed regulation inconsistent with the agency's statutory authority, nor does it conform to the intention of the General Assembly, but it also "*represents a policy decision of such a substantial nature that it requires legislative review.*"⁸ It is inconceivable that the legislature, in passing the APCA, intended to permit an agency of the executive branch to unilaterally join what would be tantamount to the third largest economy in the world⁹ without authorization from this Commonwealth's elected representatives. As the Supreme Court Justice Antonin Scalia once remarked: policymakers do not hide elephants in mouseholes.¹⁰ The legislature did not envision this \$300+ million/yr. program when considering the APCA and, as noted above, every other state that has joined RGGI did so with the approval of their Legislature. Therefore, this proposal is of such a substantial policy decision that it must be reviewed by the General Assembly. Further, we think it is important to note that this is not an issue that the General Assembly has been ignoring. Rather, the General Assembly produced bi-partisan legislation¹¹ that would provide a legitimate and statutorily authorized process to impose a carbon tax on electric generation, manufacturing or other industries operating in the Commonwealth, or to enter into any multi-state program, such as RGGI, that would impose such a tax. However, the Governor vetoed this legislation, and we believe the Department's submission of this proposed regulation attempts to bypass the role of the General Assembly and usurps its constitutionally prescribed decision-making authority in this matter.

4. Next, the RRA requires the Commission to consider "*whether acceptable data is the basis of the regulation.*"¹² Throughout the RAF, the Department repeatedly claims that the Commonwealth is experiencing and will experience adverse impacts from climate change (warming) caused by CO₂. These claims are not universally accepted and neglect to mention any counterclaims from the scientific community. Many respected scientists who accept anthropogenic climate change also dispute the magnitude of the change, whether the effects will be universally deleterious, and whether the earth's natural carbon cycles will simply absorb and ameliorate the changes.

In support of this, consider that other experts point out the following:

A. That higher CO₂ levels and temperatures actually have tangential benefits. Such as:

https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2020_0056_0001_TSTMNY.pdf. 6% is also the Department's estimate to cover "programmatic costs" in RAF p. 34.

⁶ Ibid., pages 2-3.

⁷ Pa. Const. art. III, §10.

⁸ 71 P.S. § 745.5b (b) (4).

⁹ See section 10 of the RAF.

¹⁰ Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001) p.7 "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions— it does not, one might say, hide elephants in mouseholes."

¹¹ H.B. 2025 of 2019-20 had bipartisan co-sponsorship and passed both chambers with strong bipartisan support.

¹² 71 P.S. § 745.5b (b) (3) (v).

1. Agronomically, higher crop yields – and crop yields that are less dependent on synthetic fertilizers that use a high amount of energy to manufacture.
 2. Economically, warmer temperatures mean lower demand for energy (including fossil fuel generated energy) for winter heating. This will result in lower emissions but also economic advantages that are most beneficial to those who spend a higher portion of their income on heating bills.
- B. That environmentally, the earth’s various natural carbon cycles are feedback loops that respond and adjust to higher CO₂ concentrations and its corresponding warmer weather.
1. The organic carbon cycle removes CO₂ from the atmosphere as organic organisms, through photosynthesis, convert CO₂ and water into carbohydrates and oxygen.
 2. The carbonate-silicate cycle (aka the earth’s thermostat) removes CO₂ from the atmosphere when it combines with rain to form carbonic acid, which then increases the rate of silicate weathering. The carbon compounds from silicate weathering then flow to the ocean and get used by marine organisms to build shells, which then get buried in the ocean sediments as a carbon sink for millennia. The feedback loops in these natural cycles increase their response as carbon concentrations increase. Thus, the data the Department relies on is one-sided, not universally accepted, and obfuscates various counter-conclusions.

The Department also predicts dire health consequences resulting from increased CO₂ and climate change, citing the World Health Organization’s expectation of an additional 250,000 deaths per year between 2030 and 2050. In contrast with the WHO’s predictions, the report issued by the Nongovernmental International Panel on Climate Change entitled *Climate Change Reconsidered: Biological Impacts*,¹³ which details the findings of dozens of peer-reviewed studies, notes that premature deaths from illness and disease are far more prevalent during colder seasons and colder climate eras rather than during warmer seasons and warmer eras. The report states, “*Warmer temperatures lead to a net decrease in temperature-related mortality, including deaths associated with cardiovascular disease, respiratory disease, and strokes.*”¹⁴ In fact, one study suggests that “*3% to 7% of the gains in longevity experienced by the U.S. population over the past three decades are due to the secular movement toward warmer states in the West and the South, away from the colder states in the North.*”¹⁵ In short, there is compelling evidence that the mortality rate in colder weather climate areas is greater than in warmer climate areas.

To be sure, climate change may require various adaptations, but this has been the case for the whole story of life on planet earth. Every species must adapt to the dynamic environment of this planet. To be clear, we are not saying we oppose greenhouse gas abatement efforts or claim that climate change will not have any negative effects on Pennsylvania. We are stating, however, that we are concerned with the Department’s illegitimate attempt to circumvent the General Assembly in order to enact RGGI through the regulatory process and assert that they are doing so based on data that is not universally accepted.

¹³ <https://www.heartland.org/template-assets/documents/CCR/CCR-IIb/Chapter-7-Human-Health.pdf>.

¹⁴ Ibid., 955.

¹⁵ Ibid., 972.

5. Another criterion that the RRA requires the Commission to consider is the *“need of the regulation.”*¹⁶ As the Department notes: *“Since 2005, this Commonwealth’s electricity generation has shifted from higher carbon-emitting electricity generation sources, such as coal, to lower and zero emission generation sources, such as natural gas, wind and solar. At the same time, overall energy use in the residential, commercial, transportation, and electric power sectors has reduced.”*¹⁷ More specifically, Pennsylvania has reduced carbon dioxide emissions by more than 28% (10 million fewer tons) between 2009 and 2016. This trend will likely continue as domestically produced natural gas usage increases and the requirements of the Alternative Energy Portfolio Standard¹⁸ gets fully implemented and because of new technological breakthroughs (especially nuclear) in energy generation. While we are looking forward, another reason we are skeptical of the need for this regulation is because president-elect Joseph Biden has proposed a \$2 trillion climate plan¹⁹ to reach net-zero greenhouse gas emissions by 2050. If this plan is implemented, then it will obviate the need for this proposed regulation. Therefore, we believe it is more prudent to wait and see what technological and federal administrative and legislative developments transpire before committing to this massive regulatory undertaking that will have tremendous impacts on an economic sector that is crucial to the vitality of the Commonwealth’s economy.

6. Another criterion to consider is *“whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.”*²⁰ If the objective of this regulation is *“... to abate, control, or limit carbon dioxide emissions from fossil-fuel-fired electric power generators”*²¹ then the tremendous achievements in the reduction of carbon emission from electricity generating sources mentioned above in #5 demonstrates that the regulatory status quo is already working and successfully completing the stated objective. Since the regulatory status quo is a far less costly and less intrusive method than RGGI at achieving tremendous reductions in carbon emissions, we believe the Department’s proposal is not in the public interest.

Secondly, we believe the Department could achieve its objective of implementing a CO₂ budget trading program with a gradually declining CO₂ emissions budget without the exorbitant costs proposed by this submission. That is, the Department could still auction the budgeted proposal of 78,000,000 tons in 2022, but instead of auctioning them at a price that would generate the Department \$330 million, they could calculate a price to auction the tons at that would generate the amount the Department needs just to administer RGGI. But, as the Department admits, they are not trying to implement a traditional cap and trade program, but a “cap and invest” program.²² Not only does this violate the legislative intent of the APCA (see 1, C above), but setting auction prices to just cover administrative costs would be a far less costly method of achieving the goal of the regulation.

7. The next issue we want to raise for the Commission is regarding RGGI’s impact on the economy and jobs. As you know, the RRA requires the Commission to consider the economic or fiscal impacts of a

¹⁶ 71 P.S. § 745.5b (b) (3) (iii).

¹⁷ RAF p.10.

¹⁸ Act 213 of 2004.

¹⁹ <https://joebiden.com/climate-plan/>

²⁰ 71 P.S. § 745.5b (b) (8).

²¹ Executive Order 2019-07, <https://www.governor.pa.gov/newsroom/executive-order-2019-07-commonwealth-leadership-in-addressing-climate-change-through-electric-sector-emissions-reductions/>

²² RAF p. 13.

regulation, specifically the “*adverse effects on prices of goods and services, productivity, or competition.*”²³ We are highly skeptical of the Department’s claims that adding hundreds of millions of dollars in additional costs to the energy production sector will result in lower consumer prices (eventually) and create additional jobs. As members of the General Assembly, we are concerned that the opposite will be true: that energy prices will, in fact, increase as will job losses. Both of which will exacerbate the economic hardships that millions of Pennsylvanians are facing. Our opinion is shared by industry expert.²⁴

If the Department is wrong, and it turns out that RGGI does, in fact, make energy production more expensive and consequently raises the price of energy for consumers, then we are concerned that this more likely scenario will have adverse effects on the Commonwealth’s productivity and ability to compete with other states. Higher costs will be a major consideration for business leaders deciding whether or not to locate, or remain, in Pennsylvania. If neighboring states such as WV and OH who do not participate in RGGI have lower costs, then businesses will view those states as more attractive prospects. The loss of businesses will naturally correspond with a loss of employment. Also, higher energy costs will translate into higher electric bills for families, seniors, nonprofits, businesses, colleges, etc. Neither scenario is good for the Commonwealth.

We believe it is also important to note that the Citizens Advisory Council²⁵ and the Air Quality Technical Advisory Committee²⁶ and the Small Business Compliance Advisory Committee²⁷ have all recommended against the plan to join RGGI. This is significant because these three advisory groups rejected advancing the proposed regulation. Thus, it is not only the General Assembly who does not support joining RGGI.

Because of the potential significant impact on the Commonwealth and its citizens, all these factors show the necessity of the General Assembly being able to deliberate and make decisions on the development and implementation of RGGI.

In conclusion, we appreciate the Department’s concerns about the environment and the potential adverse effects of anthropogenic climate change. We believe this is a serious concern and support efforts to better understand and address the phenomenon, however we believe that no matter how strongly the Department believes RGGI is the right solution to address climate change, their strong beliefs do not grant them special permission to violate the law by circumventing the statutorily prescribed process. For the reasons outlined above, it is clear that this proposed submission does not meet statutory requirements and we, therefore, request that the Commission urge the Department to

²³ 71 P.S. § 745.5b (1) (ii).

²⁴ See Power PA Jobs Initiative: <https://powerpajobs.com/about>. “RGGI will result in the loss of over 8,000 jobs, the loss of \$2.87 billion in total economic impact, the loss of \$539 million in employee compensation and the loss of \$34.2 million in state and local taxes.”

²⁵ CAC Minutes May 19, 2020.

http://files.dep.state.pa.us/PublicParticipation/Citizens%20Advisory%20Council/CACPortalFiles/Meetings/2020_06/Minutes%20of%20CAC%20Meeting%205.19.20.pdf pages 10-11.

²⁶ AQTAC Minutes May 7, 2020.

<http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/Air%20Quality%20Technical%20Advisory%20Committee/2020/8-13-20/MEETING%20MINUTES%20FOR%2005.07.2020.pdf> pages 13-14.

²⁷ SBCAC Minutes July 22, 2020.

[http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/smallbiz/2020/10-28-20/2.July%202020%20SBCAC%20-%20Meeting%20Minutes%20\(Final\).pdf](http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/smallbiz/2020/10-28-20/2.July%202020%20SBCAC%20-%20Meeting%20Minutes%20(Final).pdf) page 4.

withdraw it. We also trust that the Commission will perform its duties under the RRA to provide “oversight and review of regulations ... to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania.”²⁸

We are grateful for the opportunity to present these concerns to the Commission and respectfully request your careful consideration of them as you review the Department’s proposal.

Sincerely,



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Russ Diamond
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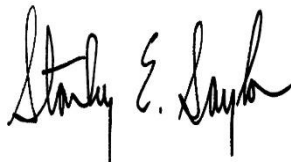
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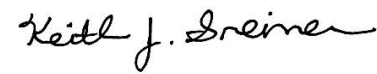
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²⁸ 71 P.S. § 745.2 (a)

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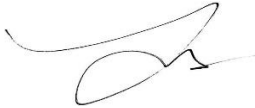
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