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ENVIRONMENTAL RESOURCES AND
 ENERGY COMMITTEE
 CHAIRMAN

December 1, 2020

Independent Regulatory Review Commission
 333 Market St
 Harrisburg, PA 17101

Dear Commissioners,

I write you today to state my serious concerns with the Department of Environmental Protection's (DEP) regulation, promulgated through the Environmental Quality Board (EQB), regarding the Regional Greenhouse Gas Initiative (Reg #7-559, IRR #3274). As I will lay out in this letter, DEP's process in developing and promulgating this regulation has lacked transparency and the Department has and continues to violate the law by exceeding their statutory authority. The regulation in question will exacerbate existing economic difficulties in the Commonwealth and cost Pennsylvania thousands of jobs. I urge you when considering and commenting on this proposed regulation to hold DEP accountable by urging them to withdraw this regulation or, at the very least, to rework it to ensure that it is lawful and does not devastate our economy.

Three DEP advisory committees have rejected the draft regulation in unprecedented fashion. The RGGI process officially began when Governor Wolf issued Executive Order No. 2019-7 directing DEP to develop a draft regulation to bring to the EQB for a vote no later than July 7th, 2020. After the Department developed a draft, it brought the regulation before three entities, which were created to advise DEP on policies and regulations such as this, to seek their endorsement. First, on May 7th, the Air Quality Technical Advisory Committee voted to not approve the regulation. Next, on May 19th, the Citizens Advisory Council voted overwhelmingly to reject the regulation. Finally, on July 22nd, the Small Business Compliance Advisory Committee voted to not approve the regulation. Despite these failures, DEP has decided to arrogantly proceed with promulgating the proposed regulation without taking into account the serious issues and concerns that the experts who sit on these esteemed committees have raised.

Next, and perhaps most importantly, DEP lacks the statutory authority to promulgate this regulation. The two main acts which DEP cites, the Air Pollution Control Act (APCA) and the Uniform Interstate Air Pollution Agreements Act do not provide this authority. In fact, the APCA explicitly provides that DEP may formulate such an agreement but must submit it to the General Assembly for its consideration. Additionally, DEP lacks the authority to impose the tax that the RGGI program would impose, as the power to tax clearly is vested in the General Assembly. RGGI's auction mechanism would represent a "tax" and not a "fee" under Pennsylvania law, as the RGGI program's goal is to produce revenue for reinvestment, which meets the definition of a tax. It does not meet the definition of a "fee", which are intended merely to cover the cost of administering a regulatory scheme.

This regulation, if finally promulgated, will immediately be challenged in court due to its legal deficiencies, which will end up costing the Commonwealth significant resources attempting to defend it in legal fees. Additionally, as a simple matter of the separation of powers within our state government, it is evident that this illegitimate regulation represents a significant policy decision which ought to be made by the General Assembly, and not by executive fiat. It would play a significant role in reshaping our energy economy and markets, and thus must go through the General Assembly. 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.

It is very alarming to me that DEP has and continues to promise robust public engagement, but refuses to sit down and discuss the regulation with those who would be the most impacted and lose their jobs if the regulation takes effect. As far as I am aware, the Administration has not met with the owners of the plants who will be forced to close if the regulation becomes law since they have drafted the regulation. To my knowledge, the local unions whose members will be directly impacted by this regulation have asked repeatedly for a meeting with the Administration but have not received one. This is part of why almost every major labor organization in the state impacted by the regulation has vocally opposed RGGI.

DEP set a public comment period of 69 days and scheduled 10 virtual hearings for the proposed regulation. This paltry outreach is both inadequate and it violates the law. DEP happened to schedule this comment period both for the major holiday season in our country and coinciding with the end of the 2019-20 Legislative Session. This is significant because the 19-20 General Assembly and standing committees, which have an important role in the regulatory process, ceased to exist as of November 30th and will realistically not likely be reconstituted and able to meet before the end of the comment period. At the EQB meeting, Senator Gene Yaw and I made several motions for reasonable extensions to the comment period but were voted down by the Governor's appointees to the Board, who represent a majority of the Board.

Additionally, the Air Pollution Control Act requires that DEP hold in-person public hearings in regions affected by a regulation before a regulation is adopted, which DEP has refused to do. Instead, they will be holding 10 virtual hearings and no in-person hearings in direct contradiction to the APCA, which they cite as their authority for the regulation. Again, a motion was made during the EQB meeting to require in-person hearings, but this was voted down by the Governor's appointees. DEP's all virtual hearings will deny a meaningful opportunity for plant workers, families and communities, many located in rural areas which lack reliable internet access. Also, it is simply not possible to have the same level of engagement between DEP staff and the public when a meeting is held virtually as opposed to in person, within an affected community, which is why the law contains this provision. The public's attention is diverted by COVID and the holidays, the General Assembly's session is concluded, and yet DEP remains committed to sneaking through this regulation as quickly as possible, to the point of violating the law, despite reasonable requests for them to modify their schedule.

Despite these unacceptable failures, during this public comment period, you are receiving, and will likely continue to receive, an overwhelming amount of comments from so many individuals and businesses, small and large, whose livelihoods are directly threatened by this regulation. If enacted, the regulation will devastate entire communities and even counties within our state. The loss of tax revenues in these communities caused by the forced shuttering of the coal industry will mean that municipal and county governments will struggle to provide the most basic of required social services. School districts in these communities will see their budgets' slashed and will struggle to provide an adequate education.

Though there is never a good time to move forward with this illegal, blatantly partisan regulation, COVID-19 means that now is the worst time to be doing so. RGGI would not only fail to assist the crucial effort of helping Pennsylvania recover from the dire economic circumstances which we are currently facing, but it would actively harm our economic recovery by driving more business from the state and instantly destroying family-sustaining jobs from hard working citizens. The industries which RGGI will hurt, like most at the moment, have been hit deeply by the economic devastation created by the COVID-19 outbreak. By pursuing RGGI, DEP is harming our citizens and businesses when they can least afford it. Our focus as government should be on aiding our economic recovery, not actively making it more difficult, as this regulation would do.

One final point as far as process is worth mentioning here. DEP is pursuing this regulation based on modeling created by a company, ICF, which has lobbied on several occasions in favor of RGGI and how RGGI proceeds should be spent. This is

the height of corruption when the supposedly neutral company whose analysis is meant to be relied upon on is publicly lobbying in favor of what they should be analyzing in an unbiased fashion, and further lobbying regarding how these funds should be spent, revealing an additional conflict of interest. DEP's economic and health models developed by ICF are not neutral and cannot be trusted.

While the Governor and DEP's process in developing this regulation has been blatantly partisan, opposition to this regulation is bi-partisan. The House and Senate both passed House Bill 2025 in the 2019-20 legislative session with overwhelming bi-partisan support in both chambers. This bill would have crystallized the law by spelling out the process by which the Governor would have to seek approval from the General Assembly before entering RGGI, even though General Assembly approval is already required under current law. The Governor predictably vetoed this legislation to protect his illegitimate regulatory scheme without listening to the voices in his own party who spoke up to protect Pennsylvania jobs and communities by supporting House Bill 2025.

I ask that you carefully review the comments that come in during the public comment period and hold DEP accountable for their violations of the law, lack of transparency, and lack of concern for the livelihoods of our citizens.

Sincerely,

A handwritten signature in black ink, appearing to read "Daryl D. Metcalfe". The signature is stylized and written in cursive.

Daryl D. Metcalfe

Environmental Resources & Energy Committee Chairman of Session 2019-2020

DDM:pn

CC: Department of Environmental Protection
Environmental Quality Board