



January 14, 2021

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Dear Commissioners:

We have serious concerns with the Department of Environmental Protection's (DEP) proposed rulemaking establishing a CO₂ budget trading program (#7-559) and joining Pennsylvania to the Regional Greenhouse Gas Initiative (RGGI). We believe this proposed regulation exceeds the statutory authority granted to the DEP under the Act of Jan. 8, (1960) 1959, P.L. 2119, No. 787 known as the Air Pollution Control Act (ACPA) and violates specific provisions of the Pennsylvania Constitution. In addition to the lack of authority to promulgate, the proposed regulation will cause serious economic harm to communities throughout Pennsylvania, the loss of thousands of family-sustaining jobs, and increase the price of electricity for all consumers. Likewise, the legal precedent it would set for future attempts to regulate and/or tax carbon dioxide emissions from other sources (i.e., manufacturers, automobiles, etc.) would be particularly troubling. We urge you to disapprove this proposed regulation as it fails to meet several of the specific statutory requirements under Section 5.2 the Act of Jun. 25, 1982, P.L. 633, No. 81, known as the Regulatory Review Act (RRA).

On October 3, 2019, Governor Wolf directed the DEP through Executive Order 2019-17 to develop a regulation that would facilitate Pennsylvania's entry into RGGI. In coordination with RGGI Inc., the private, non-profit administrator of RGGI, and member states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont), DEP submitted a draft carbon dioxide trading program regulation to, and received approval from, the Environmental Quality Board (EQB) on September 15, 2020, which is now open to public comment and review by IRRC.

The EQB published the proposed RGGI regulation (#7-559) in the Pennsylvania Bulletin and limited public comment from November 7, 2020 to January 14, 2021, only 69 days, which coincided with three national holidays and the end of the 2019-20 Session of the General Assembly, limiting both public and legislative engagement opportunities already compromised by the COVID-19 pandemic.

As an example of the lack of public participation opportunities, the APCA requires in person public hearings "where it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for any area of the Commonwealth which encompasses more than one region or parts of more than one region, public hearings shall be held in the area concerned." However, the EQB expressly rejected a motion at the September 15th meeting to hold such a public hearing on the proposed regulation within any of the counties that hosts coal-fired electric generation plants, and instead held five, all-day virtual public hearings in mid-December. The virtual hearings denied tens of thousands of impacted families who lack reliable broadband internet access the opportunity to raise concerns over the impacts RGGI will cause their family and community.

Additionally, the statutory authority to promulgate the proposed regulation is based on an erroneous interpretation by DEP. RGGI is a multistate program in which each state regulates carbon

dioxide emissions from electric generation plants by imposing a cap and then a tax on those emissions, intended to reduce in-state carbon dioxide emissions and generate revenues to fund various non-fossil fuel related projects. No state, Federal court, or Federal agency mandates exist that would require Pennsylvania to cap and tax carbon dioxide emissions from electric generation units. In fact, under the Pennsylvania APCA, there is no reference to carbon dioxide under the definition of “air pollution,” let alone express statutory authorization to regulate, cap and tax carbon dioxide emissions. Furthermore, in contrast to the federal Clean Air Act definition of “air pollutant,” the APCA definition also requires an air pollutant to be “inimical to public health...injurious to humans...or which unreasonably interferes with the enjoyment of life or property,” unlike carbon dioxide which is necessary to sustain life.

Finally, the proposed regulation is wholly inconsistent with the Pennsylvania Constitution and Pennsylvania Supreme Court precedent. Under Pennsylvania Supreme Court precedent, “the power of taxation, in all forms and of whatever nature lies solely in the General Assembly” and a regulatory fee is “intended to cover the cost of administering a regulatory scheme.” The RGGI revenue generating mechanism— which according to DEP will generate more than \$2.4 billion in revenue over ten years—is therefore a tax because only a small portion will be used to pay the expenses of administering the RGGI program. Moreover, the Pennsylvania Constitution precludes the General Assembly from delegating taxing power to an unelected board or commission, such as the EQB or RGGI, Inc., by declaring “[t]he General Assembly shall not delegate to any special commission, private corporation or association, any power...to levy taxes or perform any municipal function whatever.” It is clearly evident RGGI constitutes a tax on electric generating units that was never authorized by the General Assembly.

The proposed regulation joining Pennsylvania to RGGI represents the single, most significant energy policy reform since the deregulation of electric generation in the 1990’s. Joining RGGI will force the early retirement of coal and natural gas plants across Pennsylvania leading to the loss of thousands of direct and indirect jobs and devastating the economy of host communities. Such a transformational policy that lacks clear statutory and Constitutional authorization should only proceed once such authorization is directly granted by the General Assembly. In fact, every state within RGGI has enacted legislation that specifically governs entry into the initiative or otherwise expressly authorizes the regulation of carbon dioxide. Given these significant legal concerns and the associated negative economic consequences associated with Pennsylvania joining RGGI, we urge IRRC to disapprove the proposed regulation and recommend the DEP seek legislative approval prior to promulgating any regulation to join Pennsylvania to the RGGI.

Sincerely,



Senator Jake Corman, President Pro Tempore



Senator Kim Ward, Majority Leader



Senator John Gordner, Majority Whip



Senator Bob Mensch, Caucus Chair



Senator Ryan Aument, Caucus Secretary



Senator Pat Browne, Appropriations Chair



Senator Camera Bartolotta, Caucus Admin.



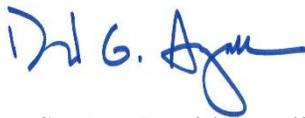
Senator Mario Scavello, Policy Chair



Senator Mike Regan



Senator Gene Yaw, Environmental Chair



Senator David Argall



Senator John Yudichak



Senator Cris Dush



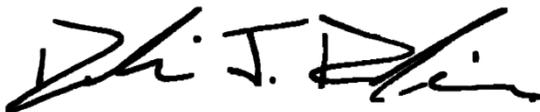
Senator Dave Arnold



Senator John DiSanto



Senator Lisa Baker



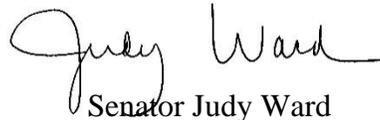
Senator Devlin Robinson



Senator Michele Brooks



Senator Kristin Phillips-Hill



Senator Judy Ward



Senator Joe Pittman



Senator Scott Hutchinson



Senator Wayne Langerholc



Senator Dan Laughlin



Senator Scott Martin



Senator Doug Mastriano



Senator Pat Stefano



Senator Robert Tomlinson



Senator Elder Vogel

Cc: The Honorable Tom Wolf, Governor
The Honorable Patrick McDonnell, Secretary, Department of Environmental Protection
Independent Regulatory Review Commission (IRRC)