Homer City Generating Station

Comments on Proposed CO2 Budget Trading Program Rulemaking

January 13, 2021

1. DEP must obtain approval from the General Assembly to participate in RGGI.

The proposed rule would establish the Commonwealth's participation in the Regional Greenhouse Gas Initiative ("RGGI"), a regional CO2 Budget Trading Program.[1] The purpose of RGGI is for member states to cooperate with other member states to make up a regional CO2 Budget Trading Program. As such, RGGI functions as an interstate agreement or compact. The Pennsylvania Constitution does not provide the Governor or any Executive agency the authority to unilaterally enter into interstate compacts or agreements – only the General Assembly has that power.[2]

The General Assembly can enact legislation authorizing the Executive Department to enter into such agreements, but has not done so in the case of RGGI. The Environmental Quality Board ("EQB" or "Board") claims the Department of Environmental Protection ("DEP" or "Department") has that authority under the Air Pollution Control Act.[3] The powers and duties of the Department are enumerated in Section 4004, and in particular, subsection (24), which specifically addresses the Department's ability to work with other states:

> The Department shall have power and its duty shall be to…
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> (24) Cooperate with the appropriate agencies of the United States or of *other states* or any interstate agencies with respect to the control, prevention, abatement and reduction of air pollution, and *where appropriate formulate* interstate air pollution control compacts or *agreements for the submission thereof to the General Assembly.*
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> 35 P.S. § 4004(24) (italics added).

Since RGGI establishes a regional CO2 Budget Trading Program among its member states, it clearly falls within the scope of Section 4004(24), and Pennsylvania's participation in RGGI clearly requires approval of the General Assembly.

The proposed rule fails the most important requirement for promulgating regulations in Pennsylvania: "First and foremost" the promulgating agency must have "the statutory authority to promulgate the regulation," and the regulation must conform "to the intention of the General

[1] 50 Pa. Bull. 6212. (Nov. 7, 2020); Environmental Quality Board's Regulatory Analysis Form submitted to the Independent Regulatory Review Commission ("RAF") § 7.
[2] *See* 71 P.S. § 745.5b(a) (requiring agencies to have statutory authority to promulgate regulations).
[3] 35 P.S. § 4001 et seq.

Assembly" based on "the statute upon which the regulation is based."[4] Here, the EQB is proposing a rule that contravenes clear statutory language and the intent of the General Assembly. This is further supported not only by comments submitted by individual legislators, including the Chair of the Environmental Resources and Energy Committee of the House of Representatives for the 2019-20 Legislative Session,[5] but also reflected by both chambers of the General Assembly passing House Bill 2025 in the 2019-20 legislative session, which declares that DEP does not have the authority to join RGGI unless authorized by the General Assembly.

Further, the Uniform Interstate Air Pollution Agreements Act ("UIAPAA")[6] does not authorize the Department to enter into a mandatory CO2 Budget Trading Program such as RGGI. The administrative agreements allowed under UIAPAA may provide for, among other things, coordinated administration of air pollution control programs, consultation on technical issues, securing of contract services, and development of recommendations concerning air quality standards.[7] The proposed rule exceeds the scope of administrative agreements authorized under the UIAPAA in that it would impose mandatory CO2 budget limits and require participation in the regional CO2 allowance trading program.

The EQB must be prepared to explain why the proposal does not require the approval of the General Assembly. *See* 71 P.S. § 745.5b(b)(4) (empowering the Independent Regulatory Review Commission to consider whether "the regulation represents a policy decision of such a substantial nature that it requires legislative review.").

2. The APCA does not authorize the Board to establish regulations to implement RGGI.

Contrary to the Board's assertion that it has authority under APCA § 5(a)(1) to promulgate the proposed rule,[8] there is no statutory authority for this rulemaking. Specifically, APCA § 5(a)(1) states:

> (a) The Board shall have the power and its duty shall be to –
> (1) Adopt rules and regulations for the prevention, control, reduction and abatement of air pollution …[s]uch rules and regulations may establish maximum allowable emission rates of air contaminants from such sources, prohibit or regulate the combustion of certain fuels, prohibit or regulate open burning, prohibit or regulate any process or source or class of processes or sources, require the installation of specified control devices or equipment, or designate the control efficiency of air pollution control devices or equipment required in specific processes or sources or classes of processes or sources.
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> 35 P.S. § 4005(a)(1).

Legislative delegation of rulemaking must be clear. While this particular statute authorizes the EQB to promulgate rules setting allowable emission rates, regulating combustion of certain fuels,

[4] 71 P.S. § 745.5b(a).
[5] *See* Rep. Daryl Metcalfe letter to the Independent Regulatory Review Commission, Dec. 1, 2020 at 1, stating "DEP lacks the statutory authority to promulgate this regulation."
[6] 35 P.S. § 4101 et seq.
[7] 35 P.S. § 4103(b).
[8] 50 Pa. Bull. at 6216

and specifying pollution control equipment, it does not provide clear authorization for adopting detailed regulations for a CO2 cap and trade system. Furthermore, while APCA § 5(a)(1) may have been used to authorize rules for other air pollutant cap and trade programs, those programs were established under the federal Clean Air Act and the rules only implemented the federally mandated programs.[9] By contrast, the proposed rule would voluntarily implement the RGGI cap and trade program, which has no federal counterpart, and would impose a host of detailed requirements and substantial costs on regulated sources, well beyond the scope set forth in APCA § 5(a)(1).

3. The cost of CO2 allowances is a tax, not a regulatory fee, which can only be imposed by the General Assembly.

Under Pennsylvania law, a tax is a revenue producing measure, whereas a regulatory fee is a charge intended to cover the cost of a regulatory scheme. Under the Pennsylvania Constitution, the power to impose a tax is vested only in the General Assembly. By this standard, the RGGI allowance program is clearly a tax. As stated in the EQB's Regulatory Analysis Form ("RAF"), CO2 allowance auction proceeds are projected to be over $330 million in the first year and over $2.3 billion through 2030.[10] Of this, only 6% is directed toward programmatic costs related to the CO2 budget trading program. Given the vast sums that will be generated, with only a small portion used for program administration, the costs for purchasing allowances is clearly a tax, which can only be imposed by the General Assembly.

4. To the extent the costs of CO2 allowances are fees, and not a tax, the Department lacks authority under the APCA to assess such fees.

As specified in the proposed rule, proceeds from the auctioning of CO2 allowances are to be paid into the Clean Air Fund.[11] The Clean Air Fund is established under section 9.2(a) of the APCA to receive and hold fines, civil penalties and fees collected under the APCA.[12] Of these categories of funds, the auction proceeds most closely resemble fees.

The Department is authorized to collect fees pursuant to section 6.3 of the APCA.[13] This section imposes certain conditions and restriction on the types and amounts of fees that the Department is authorized to collect, specifically:

- Fees sufficient to cover the indirect and direct costs of administering the air pollution control plan approval process, operating permit program required by Title V of the Clean Air Act, other requirements of the Clean Air Act, and the indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Compliance Advisory Committee and Office of Small Business Ombudsman, and fees to support

[9] Id.
[10] RAF § 16.
[11] 50 Pa. Bull at 6220.
[12] 35 P.S. § 4009.2(a).
[13] 35 P.S. § 4006.3.

the air compliance program authorized by the APCA and not required by Title V of the Clean Air Act.[14]

- Annual emissions fees for regulated pollutants to cover the reasonable direct and indirect costs for administering the programs identified in Section 4006.3(a). In no case shall the amount of the fee be more than that necessary to comply with Section 502(b) of the Clean Air Act [implementing the Title V operating permit program], and the fee shall not apply to emissions of more than 4,000 tons of any regulated pollutant.[15]

As set forth in the proposed rule, the CO2 allowance auction proceeds would not be subject to any of these limitations. Accordingly, the Department would be exceeding its authority in collecting such fees.

5. Setting aside CO2 allowances for waste coal-fired units is an unauthorized expenditure from the Clean Air Fund.

The proposed rule would set aside 9,300,000 allowances for the use by waste coal-fired electric generating units (EGUs). This amount is equal to the sum of the highest year of emissions from each waste coal fired unit in the Commonwealth from the past 5 years.[16] The purported benefit of this is to continue the remediation of the Commonwealth's legacy waste coal piles.[17] However, the diversion of 9.3 million CO2 allowances into a special account for waste coal-fired units equates to a diversion of over $50.4 million from the Clean Air Fund, the stated recipient of allowance auction proceeds, in year 1, and a total of almost $368 million by 2030. If these amounts were deposited into the Clean Air Fund, their use would be limited to projects whose purpose is to improve air quality.

While remediation of waste coal piles undoubtedly has environmental benefits, primarily associated with reduction of acidic drainage, the burning of waste coal for power generation would produce far more air pollutant emissions than would otherwise be emitted from a waste coal pile. To illustrate this point, the Department states that there are approximately 40 waste coal piles that are burning, which significantly impacts local air quality.[18] However, the RAF fails estimate emissions from either source so they could be compared. Likewise, the RAF fails to consider the amount of coal combusted in these fires to the far greater amount of waste coal combusted to generate electricity, and the corresponding CO2 emissions from these waste coal pile fires is far less than the 9,300,000 tons/year of CO2 generated by the waste coal fired EGUs in Pennsylvania. (By comparison, EPA emissions estimates from a representative burning coal refuse pile are orders of magnitude lower than the permitted emissions from a waste coal fired

[14] 35 P.S. § 4006.3(a).
[15] 35 P.S. § 4006.3(c).
[16] 50 Pa. Bull. at 6217.
[17] 50 Pa. Bull. at 6226.
[18] RAF §12.

generating station burning twice the annual mass of waste coal.)[19] The EQB has failed to articulate "any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected." 71 P.S. § 745.5(a)(12).

Furthermore, incentivizing waste-coal units with CO2 allowances at no cost will provide them a competitive pricing advantage with respect to other fossil fuel sources. This will result in greater utilization of these units over coal or natural gas units, which would result in greater emissions of CO2 and air pollutants than would otherwise be the case without RGGI.

From an air quality perspective, subsidizing waste coal fired EGUs is actually subsidizing air pollution.

6. Setting aside CO2 allowances for waste coal fired units may violate FERC and PJM marketing rules.

PJM is a regional transmission organization that coordinates the movement of wholesale electricity across 13 states and the District of Columbia. Not all states in PJM's territory are members of RGGI. The Federal Energy Regulatory Commission ("FERC") has approved a request by PJM to implement a Minimum Offer Price Rule ("MOPR") in its capacity auctions.[20] Under the MOPR, bidders have to adjust their bid prices to account for state subsidies. Otherwise, generators that receive subsidies would be able to submit lower bid prices, thus giving them an unfair advantage. It appears that the waste coal set aside would be a subsidy for the waste-coal fired generators of about $50 million in year 1 and almost $360 million by 2030.

The EQB fails to explain its consideration of FERC's Minimum Offer Price Rule in fashioning the waste coal-fired generation set-aside. At worst, it represents an unlawful attempt to manipulate the wholesale capacity price, which is subject to the exclusive jurisdiction of FERC. At the very least, the EQB must explain how the set aside will function in light of the MOPR. *See* 71 P.S. § 745.5b(b)(1)(ii) (proposed regulations must consider adverse effects on prices of goods and services, productivity or competition); *and* 71 P.S. § 745.5b(b)(3) (proposed regulation should not conflict with existing regulations). The EQB's failure to even address the question is a violation of the Regulatory Review Act. This issue should be resolved before the proposed rule is promulgated.

7. A significant portion of the proceeds from the auction of allowances should be allocated for economic relief to the communities and workers at facilities adversely impacted by the proposed rule.

The EQB fails to sufficiently address the financial, economic and social impact the proposed rule will have on business and labor communities. 71 P.S. § 745.5(a)(10). If the proposed rule is promulgated it will have an immediate and devastating economic impact on coal-fired EGUs in

[19] Compare emissions reported in U.S. EPA *Source Assessment Coal Refuse Piles, Abandoned Mines and Outcrops, State of the Art*. EPA 600 2-78-004v, July 1978 to annual emissions limits for the Seward Generating Station, Title V Operating Permit No. 32-00040.
[20] See FERC October 2020 Order, 173 FERC ¶ 61,061.

Pennsylvania and the families and communities surrounding these plants. In particular, there are four coal-fired EGUs in southwestern Pennsylvania: Cheswick; Conemaugh, Homer City and Keystone. Together these facilities employ over 600 people, plus several times that amount of contractors; spend almost $1.1 billion per year in operations; and have a total economic impact in the Commonwealth of $2.87 billion.[21] Significantly, there are numerous designated environmental justice areas in the vicinity of these plants that will bear the brunt of these impacts. Moreover, since these plants are significant employers in otherwise depressed areas, there are few employment alternatives offering similar wages and benefits for impacted employees, forcing many of them to relocate to find work.

The Department states that the allowance auction proceeds can be used to mitigate impacted communities and families, especially those in the vicinity of coal fired generating stations, through the energy transition.[22] Homer City Generation strongly supports the use of a significant portion of the allowance auction proceeds to offset the economic impact that will fall upon the workers at and communities surrounding the coal-fired generating facilities if the proposed rule is promulgated. We are concerned, however, that directing all of the proceeds into the Clean Air Fund will severely restrict the type of assistance that would otherwise be available with these funds because of the Clean Air Fund requirement that expenditures be made to improve air quality. Homer City Generation respectfully suggests that a substantial portion of the auction proceeds be dedicated for offsetting the economic impacts of the CO2 Budget and Trading Program and that such funds be directed into a special fund dedicated especially for that purpose.

8. The proposed rule fails to address leakage.

The proposed rulemaking indicates that there will be significant leakage of electrical generation from generators in PJM non-RGGI states. Specifically, modeling done in support of the rule shows an approximately 2% reduction in CO2 emissions across PJM through 2030. By contrast, the modeling shows a 21% reduction of CO2 in Pennsylvania over that same period. Obviously other non-RGGI states in PJM will be increasing their generation and CO2 emissions to pick up the slack created by Pennsylvania's reduced generating capacity.

Moreover, the transfer of generating capacity to other states will have an adverse impact on air quality in Pennsylvania. Currently there are ten operating or recently permitted natural gas fired electrical generating facilities along the eastern border of Ohio, whose emissions will readily be transported into Pennsylvania. Similarly, based on the federal Energy Information Administration data, West Virginia has significant excess generating capacity, predominantly from coal-fired generating units, that is available to replace generation in Pennsylvania.[23] It appears that Pennsylvania may suffer the significant economic consequences of joining RGGI while enjoying fewer, if any, improvements in air quality.

9. Participation in RGGI cannot be justified based on co-benefits of reductions of other air pollutants.

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[21] Econsult Solutions Inc. *Economic Impact of Coal-Fired Plants in Pennsylvania*. February 2020.
[22] RAF § 10.
[23] U.S. Energy Information Administration 2019 State Electricity Profiles. https://www.eia.gov/electricity/state.

Part of the justification for the proposed rulemaking is that the Commonwealth's participation in RGGI and the resulting reduction in CO2 emissions will also significantly reduce emissions of other air pollutants including particulate matter, NOx and SO2. The Board cites the projected avoidance of health issues associated with these pollutants as a co-benefit of the proposed rulemaking.[24] It is improper to consider the estimated health benefits as "co-benefits" as Pennsylvania monitors widespread attainment of the National Ambient Air Quality Standards ("NAAQS"), which are established to protect public health, including a sufficiently conservative safety factor. With the Commonwealth already monitoring attainment of these health-based standards, it is questionable whether further reduction of concentrations of these pollutants below these standards would provide any further benefit. Additionally, the Regulatory Review Act requires agencies to consider whether a proposed rulemaking results in a "duplication of statutes or existing regulation." 71 P.S. § 745.5b(b)(3)(i). Here, the APCA already provides statutory authority for DEP to regulate particulate matter, NOx and SO2. An attempt to duplicate existing regulation cannot form the basis for a purported "co-benefit."

Furthermore, by claiming such benefits, it appears that the proposed rulemaking is also directed at regulating these pollutants to levels more stringent than the NAAQS. Such regulation is not permissible under the APCA, which prohibits more stringent regulation of pollutants for which NAAQS' have been established except in certain instances, none of which appear to apply to this rulemaking.[25]

[24] 50 Pa. Bull. at 6226
[25] 35 P.S. 4004.2(b).