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Pennsylvania Manufacturers' Association

COMMENTS PRESENTED TO THE:
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

REGIONAL GREENHOUSE GAS INITATIVE: A FLAWED PROPOSAL FOR PENNSYLVANIA

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David N. Taylor, President & CEO
Carl A. Marrara, Vice President of Government Affairs

The Frederick W. Anton III Center • 225 State Street • Harrisburg, Pennsylvania 17101
Phone (717) 232-0737 • Fax (717) 232-8623 • www.pamanufacturers.org

The Regional Greenhouse Gas Initiative (RGGI) poses significant policy, legal, and ethical challenges. Therefore, it is the position of the Pennsylvania Manufacturers' Association (PMA) that RGGI is a flawed proposal and is not sound rulemaking for the Commonwealth of Pennsylvania.

Pennsylvania Manufacturers' Association. Founded in 1909 by Bucks County industrialist Joseph R. Grundy, the Pennsylvania Manufacturers' Association is the nonprofit, statewide trade organization representing the manufacturing sector in the state's public policy process. Manufacturing directly employs 570,000 Pennsylvanians on the plant floor, sustaining millions of additional jobs in supporting industries, and generating more than $93 billion in gross state product.[1] Headquartered just steps from the State Capitol in Harrisburg, PMA works to improve Pennsylvania's ability to compete with other states for investment, jobs, and economic growth. PMA's mission is to improve Pennsylvania's economic competitiveness by advancing pro-growth public policies that reduce the baseline costs of creating and keeping jobs in our commonwealth.

Policy

Everyone agrees that Pennsylvania's public policies and regulations should help build and protect a clean, healthy, and sustainable natural environment. The issue at hand is whether or not a government program, which will undoubtedly add substantial costs to Pennsylvania's electricity consumers, is the best mechanism to achieve the cleanest, healthiest, and most sustainable environment possible. RGGI does not accomplish this goal, but the program will negatively impact Pennsylvania's economy in a punishing way. This potential impact could not come at a worse time given the economic downturn caused by the Wolf Administration's decision-making in response to COVID-19.

It is imperative that Pennsylvania policymakers not enact laws or regulations that place our commonwealth at a competitive disadvantage to our competitor states. State laws and regulations should not be more stringent than federal laws and regulations unless there is a compelling reason that is unique to our commonwealth. It is likewise prudent that these regulations achieve real environmental benefits, are within the capabilities of existing technologies, and do not advantage one sector of the economy to the detriment of another. RGGI fails each of these bright-line tests and should be rejected by the Pennsylvania Environmental Quality Board.

[1] National Association of Manufacturers. 2019. https://www.nam.org/state-manufacturing-data/2019-pennsylvania-manufacturing-facts/

Unilaterally enacting a policy such as RGGI will have dire economic consequences, as has been proven in other RGGI states. According to research published by David Stevenson of the CATO Institute,

> RGGI allowance costs added to already high regional electric bills. The combined pricing impact resulted in a 12 percent drop in goods production and a 34 percent drop in the production of energy-intensive goods. Comparison states increased goods production by 20 percent and lost only five (5) percent of energy-intensive manufacturing. Power imports from other states increased from eight (8) percent to 17 percent.[2]

Manufacturers are energy intensive operations. No matter what is being made, manufacturers consume large amounts of energy in the process of turning raw materials or component parts into finished goods. For many manufacturers, energy costs are the largest cost output month-to-month. DEP's own modeling has estimated that, if Pennsylvania joins RGGI, Pennsylvania electric consumers - residential, commercial and industrial - will be forced to pay $2.6 billion more for electricity over 9 years.[3] Adding on additional costs will drive manufacturers out of Pennsylvania and make it exceedingly difficult to bring new firms in; essentially making RGGI a hard-cap on economic growth in the manufacturing sector. For every dollar invested in manufacturing the multiplier effect on the larger economy is $2.74[4]; the largest multiplier effect of any industry, making manufacturing the engine that drives whole economies throughout our commonwealth.

Ironically, Pennsylvania was a part of that increase in goods and in power generation cited by the CATO study. Over the past decade, Pennsylvania has been the largest exporter of energy in the United States[5] and has been the main supplier of energy exports for RGGI states, all while our emissions were decreasing at rates faster than theirs. If Pennsylvania enters RGGI, not a single atom of carbon will be lessened because the power generation will just transfer further west to Ohio or West Virginia and be sold back to us for a higher price. We lose the jobs, we lose the power, and we all pay more for no environmental benefit.

Efficiency is inherent to the success of manufacturing operations. One of the ways manufacturers achieve efficiency is through the utilization of best practices to lower overall energy consumption. Another major achievement in efficiency is the implementation of Combined Heat and Power programs (CHP). It is ultimately market forces that promote efficiency and potential cost savings through CHP programs; ultimately driving down the cost of each unit produced at that specific manufacturing firm while simultaneously promoting environmental stewardship.

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[2] David Stevenson, "A Review of the Regional Greenhouse Gas Initiative," CATO Institute. Winter 2018.

[3] Industrial Energy Consumers of Pennsylvania, Testimony before Senate Environmental Resources & Energy Committee, August 25, 2020.

[4] National Association of Manufacturers, IMPLAN Data, 2018. https://www.nam.org/facts-about-manufacturing/

[5] U.S. Energy Information Administration, "California imports the most electricity from other states; Pennsylvania exports the most," Today in Energy. April 4, 2019.

While we do recognize the fact that CHP and Biomass are exempt, up to a certain size and/or with a specific percentage of power being sold into the electric grid. However, RGGI is not the best mechanism to grow Pennsylvania's economy; or attract and retain manufacturers to realize these efficiencies. Constraints will serve as a disincentive for manufacturers to install these systems as once the regulations are in place, the parameters can be altered in future. Moreover, several of our members expressed concerns that the higher electric utility costs that would result from RGGI would undermine their efforts to implement clean-air and other environmentally beneficial programs.

Instead, these high-energy intensive manufacturers that might eventually install CHP systems could be driven from the state entirely, as proven in the CATO study. Limiting CHP is the opposite of policy the commonwealth should be enacting. A recent report endorsed by the Pennsylvania Department of Community and Economic Development, dozens of state-wide and regional business organizations, and top industries states, "Pennsylvania's low-cost natural gas resource can create significant economic benefits for energy-intensive manufacturers when used as a source of heat and power. In order to tap into those benefits, we need to identify ways to make it *easier* for manufacturers to adopt CHP (Combined Heat and Power) solutions…"[6]

CHP is a major investment, often utilized by some of the nation's largest manufacturing firms. Growth and business competitiveness make it the smart business decision to invest in a particular location. If goods producers are forced from Pennsylvania because of uncompetitive electric rates, CHP will not be an investment these firms will be able to make. Additionally, ever-shifting government-mandated goals and targets do not inspire confidence in manufacturing firms to locate in states with regulatory uncertainty. RGGI is the very definition of regulatory uncertainty as other states and governing bodies within the program will surely impact future policymaking. Additionally, the same regulatory uncertainty and shifts in environmental policy paradigms will affect the investment of biomass. These will be business investment opportunities that will never be realized in our commonwealth.

Governor Wolf's proposed targeted emissions reductions of 26 percent by the year 2025 are well within striking distance now, just four years away. The private sector has led the way, doing what the private sector does best – inventing, innovating, and forging a better future that is cleaner and more efficient. Energy related CO2 emissions have decreased 22 percent from 2005 to 2017[7] and with more natural gas fired power plants coming online since then, that percentage will increase as the data is updated and republished. Governor Wolf's goals are being met without entering Pennsylvania into a regional accord that will thwart private sector innovation,

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[6] Forge the Future, Ideas for Action. 2018. https://paforgethefuture.com/app/uploads/2019/11/FTF_IFA_report_Final_10118_Web.pdf
[7] U.S. Energy Information Administration, State Energy Data System and EIA calculations, United States National-Level Total, *EIA Monthly Energy Review*. September 2018.

forcing layoffs of thousands of Pennsylvania workers, and putting our economy into a tailspin as entire communities will be negatively impacted.

These emission reduction goals are being met, in part, because of competition in the electricity marketplace, which began under Governor Tom Ridge. At that time, PMA was a leading advocate for establishing a competitive market for electricity generation in Pennsylvania through the Electricity Generation Customer Choice and Competition Act. To date, integrating competitive market forces into electric generation has benefited all Pennsylvania consumers - residential, commercial, and industrial. But, by no means has this transition been painless. Abnormally low natural gas prices resulting from booming Marcellus Shale production and a lack of pipeline capacity takeaway, combined with exceedingly expensive state and federal government environmental mandates have taken a serious toll on coal fired generation over the years. We realize that is how competitive markets work. However, RGGI is the antithesis to Pennsylvania's competitive electric marketplace. Imposing a tax that will surely result in the closure of all coal and many natural gas power plants - possibly up to a third of our total generation capacity - thwarts competition and greatly undermines the competitive markets that have proven effective both economically and environmentally.

The premature shuttering of coal and waste coal facilities could have even larger public policy impacts. Consider the fact that Pennsylvania's steel makers require coal to make coke and coke to make steel. Coking coal, more scientifically known as Metallurgical Coal, is a necessary ingredient to produce steel. There is no substitute. Many of the same mining operations that extract coal for power generation also mine Metallurgical Coal. If the power plants shut down, this will surely impact the mining jobs that supply the coal to the power plants. If those mining operations are forced to shutter their businesses, Pennsylvania's steel industry will be impacted as a key feedstock for their product will be more difficult and more expensive to attain. This regional accord threatens entire industries well outside of the realm of which Governor Wolf is aimed, and it puts Pennsylvania at a unique competitive disadvantage. Our economy is not like that of Vermont or Massachusetts, and our public policies should not be reflective of the New England states' directives.

Pennsylvania is fortunate to have abundant natural resources. Individuals have been and continue to be attracted to the Keystone state because of the vast choices for outdoor recreation and quality of life. Likewise, many of those natural resources have been the source of prosperity for the state throughout different points in our history. This is precisely why we should want industrial activity to happen here in Pennsylvania than elsewhere in the world. We benefit from the jobs and the economic activity, but we also benefit from the fact that Pennsylvania has some of the strictest regulations when it comes to emissions standards, oil and gas drilling, and mineral extraction. From an environmental standpoint, we should rather that activity happen here, where companies are responsible stewards of the environment and there is strict oversight, instead of

Russia where environmental regulations are skirted, or China where there are serious human rights violations, worker exploitation, and heavy pollution.

By entering into RGGI, industrial activity will be relocated, and it is unknown where that activity will go. Let's not drive that activity back across our borders into neighboring states, or worse, foreign countries. It is not a stretch to say that by supporting RGGI you are supporting Russian and/or Middle Eastern global energy leadership and Chinese steel-dumping. Instead, we should work with our industries to invent, innovate, and forge a clean, healthy, and sustainable environment – not overregulate our many vital industries out of existence.

The policy decisions made here in Pennsylvania will inevitably cause significant unintended consequences and will push environmental regulatory control and economic growth outside Pennsylvania's state lines.

Legal

Unlike Pennsylvania, all RGGI states have express statutory authorization to implement RGGI or, as with New York, can directly authorize the regulation of CO_2.

RGGI represents the single most impactful energy policy reform since the deregulation of the electricity market under the Electricity Generation Customer Choice and Competition Act of 1996, and only the General Assembly, not DEP, has the power to determine whether or how to implement RGGI.

The Constitution of Pennsylvania does not contain any provision that directs the governor or any other official or entity with the authority to sign onto an interstate compact or agreement such as RGGI. While certain sections of the Pennsylvania Constitution impose duties to "conserve and maintain," Pennsylvania's "public natural resources," it does not expand the powers of the governor or the executive branch agencies to enter into an accord or that places a tax and/or fee on a commodity. This was upheld by the Commonwealth Court in 2016 in Funk v. Wolf where the court opined,

> …Payne II, 361 A.2d at 272–73. Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances,

> the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action…

Because this type of agreement is not a provided power of the executive branch, the authority to enter into an interstate accord, compact, or agreement such as RGGI falls to the General Assembly.

Furthermore, there is no statute that provides the executive department or agencies to adopt regulations to conform with RGGI, even if the executive department or agencies sign the memorandum of understanding to participate in RGGI. While it is highly debatable that the executive department or agencies even have the power to sign the memorandum of understanding, the provisions of the regulations necessary to be able to participate in the program are not expressed powers in the Air Pollution Control Act or the Uniform Interstate Air Pollution Agreements Act.

The quarterly auction mechanism that is established through the proposed regulations can only be viewed as a tax. This is because Pennsylvania case law constitutes a fee as "intended only to cover the costs of a regulatory scheme."[8] The fact that only 6 percent of the funds raised in other RGGI states has been spent on the program's administration makes the quarterly auction a tax, not a fee. The Pennsylvania General Assembly and the Pennsylvania General Assembly alone is the governing body that can author a tax in the commonwealth, as has been held time and time again in case law.[9]

Implementing RGGI, as proposed by DEP, would also violate the non-delegation doctrine under the Pennsylvania Constitution because it would enable a third-party, non-governmental entity - RGGI, Inc. - to determine future tax increases and on a quarterly basis; the sort of delegation of powers our Supreme Court has deemed unconstitutional as recentrly as *Protz v. Workers Compensation Appeals Board*, in 2017.[10]

Therefore, on the foundation of the Constitution of Pennsylvania and established case law, DEP's RGGI proposal should be rejected by the Pennsylvania Environmental Quality Board.

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[8] Rizzo v. City of Philadelphia., 668 A.2d 236, 237-38 (Pa. Cmwlth. 1995)
[9] Mastrangelo v. Buckley, 250 A.2d 447, 452 (Pa. 1969)
[10] 161 A.3d 827 (Pa. 2017).

Ethical

There are major ethical concerns regarding this proposal that must be addressed. The sources of information and modeling that DEP has used throughout the advocacy process are unsound. Additionally, the timeline and process the department has deployed causes profound concerns.

Any air quality benefits that DEP claims through its modeling process that were completed by "ICF International" must be redacted. This particular firm won a major contract to do air-quality modeling for the proposed RGGI regulations. These models are meant to be an independent assessment. However, ICF International regularly engaged in lobbying practices as a signatory on advocacy letters in support of RGGI before the both the Citizens Advisory Council and the Environmental Quality Board. Additionally, ICF International appeared on a letter that was sent to the General Assembly opposing House Bill 2025, a bill that would have further solidified the legislative approval of regulations similar to RGGI. This presents a conflict of interest at the highest level and presents a major ethical issue the Pennsylvania Department of Environmental Protection must address.

Furthermore, the timeline and process the department has deployed to institute this particular regulation is at best incomplete and at worst corrupt. Please also consider the suspect timeline of this consequential rulemaking. The initial concepts were released, lacking much detail, in February of 2020, before the pandemic took hold of Pennsylvania's attention. However, the process then continued all while Pennsylvania has been operating under the Wolf Administration's emergency declaration. The final rule proposal was not made available for public comment until November of 2020, with a constitutionally mandated suspension of the General Assembly from November 30 until swearing-in on January 5, 20201. During this time, legislative committees, which are key in the analysis and comments on proposed regulations, are not permitted to convene, nor are the committees premised to have assigned members. The implementation of this timeline is a major cause of concern as the General Assembly is extremely limited in its ability to react to this rulemaking. We believe this was a deliberate attempt to exclude Pennsylvania's elected representatives from participating in the process.

As for process, it is clearly stated in the Air Pollution Control Act, section 7, "Public Hearings.-- (a) Public hearings shall be held by the board or by the department, acting on behalf and at the direction or request of the board, in any region of the Commonwealth affected before any rules or regulations with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion..."[11]

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[11] Pennsylvania Air Pollution Control Act. Section 7. https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1959&sessInd=0&smthLwInd=0&act=787&chpt=0&sctn=7&subsctn=0

In this instance, the department held virtual hearings in consecutive days that were not based in the areas of the commonwealth that would be most impacted. These virtual meetings were internet-based, and many of the most impacted areas lack access to affordable and/or reliable broadband internet required to participate. Governor Wolf has acknowledged the severe lack of rural broadband access as recently as December of 2020.[12]

COVID-19 pandemic or not, hosting virtual meetings without clear notification and focus in affected areas is a blatant violation of the letter and intent of the law set forth in the Pennsylvania Air Pollution Control Act. Therefore, based on process and ethical concerns alone, DEP's RGGI proposal should be rejected by the Pennsylvania Environmental Quality Board.

In summary, RGGI poses significant policy, legal, and ethical challenges. And to gain what environmental benefit that isn't already being realized? DEP's own modeling shows a negligible impact because the private sector is already reducing CO2 emissions at a steady pace. The remaining CO2 emissions in Pennsylvania that would hypothetically be shuttered due to RGGI will simply shift to coal and natural gas plants in neighboring, non-RGGI states, like West Virginia and Ohio. In attempt to ignore this inevitability, the DEP has used creative forensics to grossly misrepresent any health or monetized benefits to the commonwealth from the RGGI proposal. This is indeed a solution in search of a problem.

Therefore, it is the position of the Pennsylvania Manufacturers' Association (PMA) that RGGI is a flawed proposal and is not sound rulemaking for the Commonwealth of Pennsylvania.

[12] Office of Governor Tom Wolf. Press Release. December 10, 2020. https://www.governor.pa.gov/newsroom/gov-wolf-announces-327000-pennsylvanians-will-gain-access-to-high-speed-internet-through-federal-auction/