

Conemaugh Generating Station  
1442 Power Plant Road  
New Florence, PA 15944



January 14, 2021

Environmental Quality Board  
P.O. Box 8477  
Harrisburg, PA 17105-8477  
[via <http://www.ahs.dep.pa.gov/eComment/>]

Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101  
[via email to [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)]

Re: Keystone-Conemaugh Projects, LLC Comments on EQB's Proposed CO<sub>2</sub> Budget Trading Program, 50 Pa.B. 6212 (Nov. 7, 2020); EQB Regulation #7-559 (IRRC-3274).

To Whom It May Concern:

Keystone-Conemaugh Projects, LLC (KEY-CON) submits the following comments in response to the Environmental Quality's Board's (EQB) proposed amendment to Title 25 of the Pennsylvania Code of Regulations Chapter 145 to implement a carbon cap and trade program in the Commonwealth, also known as the CO<sub>2</sub> Budget Trading Program. This proposed rulemaking was adopted by the EQB at its September 15, 2020 meeting and was published in the Pennsylvania Bulletin on November 7, 2020. CO<sub>2</sub> Budget Trading Program, 50 Pa.B. 6212 (Nov. 7, 2020). KEY-CON appreciates the opportunity to submit these comments.

KEY-CON is the licensee for the Keystone Generating Station located in Armstrong County, PA and the Conemaugh Generating Station located in Indiana County, PA. Each station is staffed by about 160 full-time employees, excluding contractors (averaging about 85 per weekday) and suppliers. The full-time employees are engaged in highly technical jobs, and are well-trained in engineering, physics, and technical service disciplines, and include military veterans with specialized experience. Each station operates two pulverized bituminous coal-fired boilers (Units 1 and 2), each with a steam turbine-driven electric generator. Each electric generating unit (EGU) is equipped with a suite of emissions control devices that include the following:

- Selective catalytic reduction (SCR) system for nitrogen oxide (NO<sub>x</sub>) emissions control,
- Electrostatic precipitator (ESP) for particulate matter emissions control,
- Hydrated lime sorbent injection system for sulfuric acid mist (H<sub>2</sub>SO<sub>4</sub>) emissions control, and

- Wet limestone slurry-forced oxidation scrubber for sulfur dioxide (SO<sub>2</sub>) emissions control.

These emissions control devices also provide for co-beneficial control for hazardous air pollutants including mercury and other non-mercury metal emissions, acid gases (hydrochloric and hydrofluoric) and volatile organic compounds. Each unit is demonstrating compliance with the following applicable requirements:

- PADEP's NO<sub>x</sub> and VOC RACT 2 Rule – compliance with this rule began 01-01-2017 and the rule requirements are applicable year-round,
- U.S. EPA's Transport Rule (CSAPR, 40 C.F.R. Part 97, Subparts 5A-5C) – compliance with this rule began in calendar year (CY) 2015 (Phase 1) and CY 2017 (Phase 2), and there are separate requirements for the ozone season and calendar year NO<sub>x</sub> compliance periods; and
- U.S. EPA's Mercury and Air Toxics Rule (MATS, 40 C.F.R. Part 63 Subpart 5U) – compliance with this rule began in CY 2015 and the rule requirements are applicable year-round. Keystone Generating Station Units 1 and 2 successfully demonstrated low-emitting EGU (LEE) status for non-mercury metals and acid gas (HCl) emissions under the MATS Rule. Conemaugh Generating Station Units 1 and 2 also successfully demonstrated LEE status for non-mercury metals and satisfy presumptive acid gas emissions control via the alternate SO<sub>2</sub> emissions limit standard under the MATS Rule.

Units 1 and 2 at both Keystone and Conemaugh Generating Stations are affected units under the EQB's Proposed CO<sub>2</sub> Budget Trading Program.

### **Summary of Comments**

KEY-CON has reviewed the proposed regulations, Preamble, Regulatory Analysis Form and other materials provided by PADEP and, based on the various statutory considerations and information available, KEY-CON does not support the finalization of the proposed regulation. Based on KEY-CON's review of the Regulatory Review Act and available information, KEY-CON does not agree that EQB has the authority to promulgate the regulation, nor does it agree that this regulation is in the public interest. The proposed regulation is inconsistent with the Air Pollution Control Act because (1) it exceeds the grant of authority to collect fees and spend from the Clean Air Fund, (2) the General Assembly did not grant PADEP the authority to join interstate agreements under the statute, and (3) PADEP has not fulfilled the requirement to hold public meetings as required by the statute. The regulation is also not in the public interest. KEY-CON has concerns with the economic impact of the regulations, the modeling and data used to support the proposed regulation, the inadequate explanation of the need for the regulation to protect public health and the Commonwealth's natural resources, and the reasonableness of some provisions in the regulation.

## Background

The Pennsylvania Department of Environmental Protection (PADEP) initiated the rulemaking for the CO<sub>2</sub> Budget Trading Program in response to Governor Wolf's October 3, 2019 executive order. That order directs PADEP to propose regulations to limit carbon dioxide (CO<sub>2</sub>) emissions from fossil fuel-fired EGUs. Exec. Order No. 2019-07, 49 Pa.B. 6376 (Oct. 26, 2019), as amended Exec. Order No. 2019-07 As Amended, 50 Pa.B. 3406 (June 22, 2020). The executive order provided that the regulation should be consistent with the Regional Greenhouse Gas Initiative (RGGI) Model Rule and that it should be presented to the Environmental Quality Board by July 31, 2020, which was later extended to September 15, 2020. *Id.*

PADEP presented the CO<sub>2</sub> Budget trading program to the EQB on September 15, 2020, and EQB voted to adopt the proposed regulation. In addition to releasing the text of the proposed regulation, EQB also made public the Preamble and CO<sub>2</sub> Budget Trading Program Regulatory Analysis Form (hereafter, "RAF"). As proposed, the regulation would amend 25 Pa. Code Chapter 145 (relating to interstate pollution transport reduction) and add Subchapter E to establish a program limiting CO<sub>2</sub> emissions from a fossil-fuel-fired EGUs with a nameplate capacity of 25 MW or greater that sends more than 10 percent of its annual gross generation to the electric grid. The rule would officially link Pennsylvania to the RGGI program.

RGGI is a regional, market-based cap-and-trade program<sup>1</sup> that seeks to reduce carbon dioxide emission from EGUs. The program was created by the drafting of a Memorandum of Understanding ("MOU") signed by the governors of the original participating states. The MOU committed the signatory states to propose a CO<sub>2</sub> budget trading program for legislative or regulatory approval and to adopt regulations based on the RGGI Model Rule. RGGI establishes an emissions cap for each participating state that declines annually to reduce power sector CO<sub>2</sub> emissions from the region. The proposed initial emissions cap for Pennsylvania is 78 million tons of CO<sub>2</sub> in 2022, which gradually declines to 58 million in 2030. The emissions cap translates into "allowances," each representing one ton of CO<sub>2</sub>, which are auctioned quarterly at a regional auction facilitated by RGGI, Inc., a regional non-profit organization that facilitates the ongoing administration of RGGI. Facilities subject to the regulation would be required to purchase and submit to the state an allowance for each ton of CO<sub>2</sub> they emit. The price for an allowance at the December 2020 regional auction was \$7.41.

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<sup>1</sup> There is minimal incentive to trade allowances in RGGI because of the absence of (i) technically-feasible and available emissions control technology for CO<sub>2</sub> emissions reduction and (ii) an allocation of allowances to the affected units. Potential emissions reductions can be realized by switching to a less carbon intense fuel (e.g., coal to natural gas), but the consequential electrical generation efficiency loss usually makes the unit uneconomic for dispatch. See also Tools of the Trade – A Guide to Designing and Operating a Cap and Trade Program for Pollution Control, EPA430-B-03-002, June 2003.

## Comments

### **I. The proposed CO<sub>2</sub> Budget Trading program does not meet the requirements set forth in the Regulatory Review Act.**

Under the Regulatory Review Act (RRA), the Independent Regulatory Review Commission (IRRC) must review a proposed regulation to determine whether the proposed regulation is consistent with the authorizing statute and whether the regulation is in the public interest. 71 Pa. Stat. § 745.5b. The RRA lists factors that must be considered in determining whether the proposed regulation is in the public interest. KEY-CON has concerns that the proposed CO<sub>2</sub> Budget Trading Program is inconsistent with the authorizing statute and, considering these statutory factors, is not in the public interest.

#### **A. Statutory Authority**

A key inquiry under the RRA is “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.” 71 Pa. Stat. § 745.5b(a).

##### **1. The proposed CO<sub>2</sub> Budget Trading Program exceeds the grant of authority in the Air Pollution Control Act to collect fees and make expenditures from the Clean Air Fund.**

In the Preamble and RAF, PADEP claims its statutory authority for this regulation is section 5(a)(1) of the Air Pollution Control Act (APCA), which grants the EQB general authority to adopt rules and regulations for the “prevention, reduction, and abatement of air pollution in the Commonwealth.” Preamble at 1; RAF at 1; 35 Pa. Stat. §4005(a)(1). PADEP further claims that because CO<sub>2</sub> falls under the definition of “air pollution” in section 3 of the APCA, it has the authority to regulate CO<sub>2</sub> pollution under the APCA. RAF at 2.

Under the APCA, PADEP may establish “fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act.” 35 Pa. Stat. § 4006.3(a). The anticipated proceeds from RGGI amount to much more than a fee.

As part of its modeling scenarios, PADEP estimated that 5% of annual auction proceeds would cover the agency’s programmatic costs related to the oversight of the CO<sub>2</sub> Budget Trading Program. RAF at 22. PADEP’s modeling also anticipates that in the first year of participation in RGGI, the Commonwealth will generate approximately \$300 million in auction proceeds. If only 5% of the anticipated \$300 million in proceeds, or \$15 million, covers the indirect and direct cost of administering the program, the remaining 95% of revenue, or \$285 million, is not a fee.

If PADEP were to propose to sell allowances to only cover operating expenses, it would have to set an allowance price far below the RGGI allowance price. For example, the proposed 2022 allowance budget is 78 million allowances. RAF at 1; Preamble at 9. That budget must be reduced by the allowances set aside for waste coal, which PADEP proposes will be 9.3 million allowances. RAF at 24; Preamble at 11. The remaining 68.7 million allowances would have to

be sold to cover the estimated \$15 million cost of the program, making the cost of each allowances around \$0.22. This price is far below any auction allowance price since RGGI's inception.

It is also unclear whether PADEP has the authority to spend auction proceeds in the manner it proposes. Under the APCA, fees collected are paid into the Treasury of the Commonwealth in a special fund known as the Clean Air Fund. 35 Pa. Stat. § 4009.2(a). The PADEP plans to deposit auction proceeds into a subaccount within the Clean Air Fund. Preamble at 16. PADEP, under the APCA can use disbursements from Clean Air Fund “for use in the elimination of air pollution.” 35 Pa. Stat. § 4009.2(a). PADEP's modeling anticipates investing the proceeds from allowances auctions to fund energy efficiency initiatives (such as upgrading appliances and HVACs) and renewable energy projects. RAF at 21. Expenditures of these funds will not directly eliminate air pollution, and therefore are not statutorily authorized expenditures out of the Clean Air Fund.

Nothing in the APCA gives PADEP the authority to collect fees far in excess of the programmatic cost. Additionally, the APCA does not give PADEP the authority to make expenditures out of the Clean Air Fund for energy efficiency initiatives and renewable energy projects, the latter of which (i.e., state subsidies for renewable generation) is under review by the Federal Energy Regulatory Commission's Minimum Offer Price Rule order for generators that compete in energy markets managed by a Regional Transmission Organization (PJM in Pennsylvania). Therefore, because the proposed CO<sub>2</sub> Budget Trading Program both exceeds the General Assembly's grant of authority to PADEP to collect fees under the APCA and make expenditures from the Clean Air Fund, PADEP's proposed regulation is inconsistent with the statutory authority under the APCA.

2. The Governor of the Commonwealth of Pennsylvania and the Pennsylvania Department of Environmental Protection do not have the authority to join the Regional Greenhouse Gas Initiative without authorization from the General Assembly.
  - a. RGGI is an interstate agreement.

Under the Pennsylvania Constitution “[n]o law shall be passed except by bill [.]” Pa. Const. art. III, § 1. “Authority may be given to a government official or an administrative agency to make rules and regulations to cover mere matters of detail for the implementation of a statute,” but the legislature cannot delegate its power to make a law. *Ruch v. Wilhelm*, 43 A.2d 894, 897 (Pa. 1945). A grant of authority will be constitutional so long as the Legislature makes the “basic policy choices” and establishes “adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Sullivan v. Dep't of Transp., Bureau of Driver Licensing*, 708 A.2d 481, 484 (Pa. 1998) (citations omitted). The Pennsylvania Supreme Court has recognized that entering into interstate compacts is such a basic policy choice and that the grant of authority to an executive branch official to enter into such compacts must be limited. See generally *id.*; *Whitlatch v. Pa. Dep't of Transp*, 715 A.2d 387, 389 (Pa. 1998).

Pennsylvania has a history of joining interstate compacts for the purpose of protecting the Commonwealth's natural resources, such as the Delaware River Basin Compact and the Susquehanna River Basin Compact. To join with other states and the federal government to participate in these interstate organization, the General Assembly specifically adopted those interstate agreements by statute and authorized the Governor to take the necessary actions to effectuate the compact. For example, in 1961, the General Assembly adopted the Delaware River Basin Compact, which created the Delaware River Basin Commission, and authorized the Governor the authority to "take such action as may be necessary and proper in his discretion to effectuate the compact and the initial organization and operation of the commission thereunder." 32 Pa. Stat. § 815.101. Similarly, in 1968, the General Assembly adopted the Susquehanna River Basin Compact, which created the Susquehanna River Basin Commission by statute. 32 Pa. Stat. § 820.1. The legislation also authorized the Governor to effectuate the compact and support the initial organization and operation of the commission. 32 Pa. Stat. § 820.3.

Unlike the aforementioned legislation adopting interstate compacts, the Pennsylvania General Assembly has not adopted any legislation authorizing the Governor or PADEP to enter into and implement a regional CO<sub>2</sub> emissions budget and allowance trading program.

RGGI is an initiative among states to implement a regional CO<sub>2</sub> emissions budget and allowance trading program. This regional program is a compact in that it ties the programs together through the implementation of a model rule and provides that allowances from any participating state may be used for compliance purposes in any other participating state. The RGGI Memorandum of Understanding (MOU) ties the participating states together by creating a regional organization to facilitate the ongoing administration of the program; this is RGGI Inc. RGGI MOU, §§ 4, 5.A. Under the terms of the MOU, each of the signatory states agree to create and fund the fund the regional organization. See *id.* Furthermore, participating states contract with RGGI, Inc. to perform program administrative functions, such as facilitating quarterly auctions of state allowances that can be used in any state for compliance purposes. Because states participating in RGGI create and support RGGI, Inc. and sell collectively sell allowances through auctions run by RGGI, Inc., participation in RGGI is an interstate agreement.

The requirement that the legislature authorize a state's participation in an interstate compact is entirely consistent with the actions by most of the states already participating in RGGI. Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Virginia enacted statutes authorizing their participation in RGGI.

Of most relevance here, APCA § 4(24) authorizes PADEP to do the following:

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.*

35 Pa. S. §4004(24) (emphasis added). Under the plain language of this provision, PADEP has the authority to “formulate” interstate air pollution agreements “for the submission thereof to the General Assembly.” Therefore, while APCA envisions that PADEP will negotiate interstate air pollution control agreements, it does *not* authorize the agency to actually execute such agreements, without first submitting them to the General Assembly for approval. The statute signals that neither the Governor nor PADEP can unilaterally bind the Commonwealth to implement an agreement like RGGI without the General Assembly’s consent.

b. The Air Pollution Control Act does not provide authority for the regulations.

In the RAF, PADEP claims its statutory authority for this regulation is section 5(a)(1) of the APCA, which grants the EQB general authority to adopt rules and regulations for the “prevention, control, reduction, and abatement of air pollution applicable throughout the Commonwealth.” 35 Pa. Stat. §4005(a)(1).

The authority to promulgate air pollution regulations under the APCA, however, is not a grant of authority by the General Assembly to participate in interstate programs for the prevention and reduction of air pollution. The Pennsylvania Supreme Court has made clear that grants of authority must demonstrate the legislature’s basic policy choice and standards to restrain the exercise of the delegated authority. Neither the Governor nor PADEP has been granted the power by the General Assembly to promulgate the proposed Chapter 145 regulations or participate in a regional CO<sub>2</sub> emissions budget and allowance trading program. Some legislative action by the General Assembly will be necessary to effectuate the proposed CO<sub>2</sub> Budget Trading Program.

3. PADEP has not complied with the requirement in the APCA to hold public meetings.

Under the APCA, EQB must hold public meetings 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.” 35 Pa. Stat. § 4007(a). EQB only held virtual public meetings for this regulation. PADEP has acknowledged that the public has varying levels of access to online resources and telephones to participate in virtual public hearings. Virtual Public Hearings in Response to COVID-19 Pandemic, available at <https://www.dep.pa.gov/Pages/Virtual-Public-Hearings-in-Response-to-COVID-19-Pandemic.aspx>. Additionally, as a result of the virtual meetings, a significant number of people from non-impacted communities in favor of RGGI were able to verbally testify, skewing the perception that there is support from state residents. The opinions of the sample population able to speak does not reflect the opinions of the affected communities. Only when a public outreach limited to affected community members is held, will this requirement have been met. Without holding in-person meetings in the regions impacted by this rule to allow for public participation, the regulation will not be properly promulgated. Lastly, the issue related to holding in-person public hearings, especially in locales that would be significantly impacted by the rule, was the subject of considerable debate among the EQB during their meeting on September 15, 2020. Two separate motions were made regarding this issue, but these motions failed with votes of 13-

6. Minutes, Environmental Quality Board Meeting, September 15, 2020, available at [http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2020/November%2017/9.15.20%20EQB%20Minutes\\_FINAL.pdf](http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2020/November%2017/9.15.20%20EQB%20Minutes_FINAL.pdf).

## **B. Public Interest**

A secondary inquiry under the RRA is whether the regulation is in the public interest. The IRRC is required to consider a number of factors under the statute when making this determination. 71 Pa. Stat. § 745.5b(b). KEY-CON does not believe that, on the balance, the proposed regulation is in the public interest. When considering the following factors, the IRRC should take the following information into account.

### **1. Economic Impact of the Proposed Regulation**

The IRRC must consider the “economic or fiscal impacts of the regulation.” 71 Pa. Stat. § 745.5b(b)(1). The cost of acquiring CO<sub>2</sub> allowances by the coal and older-natural gas fired generators as required by the rule will result in these units becoming uneconomical for dispatch by PJM, the regional electric grid operator; PADEP’s RGGI modeling confirmed this outcome. Consequently, these stations will be pushed off an economic cliff once the rule becomes effective (January 2022 as proposed), resulting in an expedited early retirement for these stations and great economic disruption to the Commonwealth, especially in the western bituminous coal region. A summary of these disruptions to only four select coal-fired electric generating stations (including KEY-CON), as included in testimony to the Pennsylvania Legislature in 2020 and attached hereto as Exhibit A, is outlined below:

- The loss of 8,000 plus jobs
- The loss of \$2.87 billion in total economic impact
- The loss of \$539 million in employee compensation
- The loss of \$34.2 million to state and local taxes base

These sorts of impacts conflict with the goal of the PADEP’s Pennsylvania Climate Action Plan:

**Goals:** To ensure the effectiveness of this Plan, overarching adaptation goals and emissions reduction targets are used to frame the strategies. This Plan identifies two adaptation-focused goals, which can be achieved by actions from citizen, businesses, and leaders in the commonwealth:

- Minimize disruptions to Pennsylvania’s citizens, economy, and environment from climate related hazards.
- Increase Pennsylvania’s ability to anticipate, prepare for, and adapt to changing conditions and withstand, respond to, and recover rapidly from climate-related disruptions.

See PADEP, Pennsylvania Climate Action Plan at 15 (2018). The above-listed impacts also do not account for the recent and significant economic disruptions attributable to the COVID-19 pandemic - electrical generation for KEY-CON in calendar year 2020 was about 33 percent less than recent annual historic generation. Because collected RGGI proceeds will be deposited into the Clean Air Fund, those funds will not be available to directly redistribute to those impacted by the premature retirement of the stations.

## 2. Protection of Public Health, Safety and Welfare and the Effect on Natural Resources

The IRRC must consider the “protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.” 71 Pa. Stat. § 745.5b(b)(2). While KEY-CON applauds and acknowledges the efforts undertaken by the PADEP and their consultants to quantify the emissions changes and impacts associated with implementing RGGI in the Commonwealth, we are disappointed and perplexed that PADEP has to date been reluctant to share the supporting files and analyses as is typically done by the U.S. Environmental Protection Agency (U.S. EPA) and other agencies when performing these types of efforts. PADEP has shared select summaries only, available at <https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx>, and based on our review of the available information, KEY-CON believes that the PADEP is presenting select findings only from their analyses. Consequently, KEY-CON believes that PADEP has not adequately explained why this regulation is necessary to protect public health or the Commonwealth's natural resources.

Climate experts note that the residence time for CO<sub>2</sub> in the atmosphere is generally 5 to 50 years. Recognizing that global wind circulation time scales are on the order of hours to a few weeks, CO<sub>2</sub> emitted in the Commonwealth or any other specific locale will be well-mixed in the global atmosphere and will remain in the atmosphere for years. Consequently, KEY-CON is perplexed as to why the PADEP focuses on in-state / parochial changes in CO<sub>2</sub> emissions, especially if the emissions are simply displaced outside of state borders, which are completely arbitrary from a climate change perspective. This point is supported by the knowledge that long-term CO<sub>2</sub> monitoring sites are located at a few select sites only as administered by the National Atmospheric and Oceanic Administration. These sites are located in Barrow, Alaska; Mauna Loa, Hawaii; American Samoa; and South Pole, Antarctica. Additional monitoring sites are located in throughout the country in support of various carbon cycling investigative studies. Further information about the In-Situ Measurement Program is available at <https://www.esrl.noaa.gov/gmd/ccgg/insitu/>.

The findings from the above-referenced PADEP modeling show that the aggregate CO<sub>2</sub> emissions reduction for the eastern U.S. (the model domain) that results from the Commonwealth implementing RGGI is equal to 43 million short tons of CO<sub>2</sub> over the period 2020 – 2030. On an annualized basis (say 10 years), the emissions reductions (%) are less than the YOY change in total U.S. CO<sub>2</sub> emissions ( $4.3 / 5,940 = 0.07\%$ ) and total global CO<sub>2</sub> emissions ( $4.3 / 32,696 = 0.01\%$ ). The CO<sub>2</sub> emissions reductions are negligible when viewed on a more appropriate national and global basis; the following table is provided as support for this finding. See Exhibit B.

Furthermore, PADEP has admitted that this regulation will result in emissions elsewhere.

“Historically, the RGGI program has experienced some emissions leakage. Emissions leakage is the shifting of emissions from states with carbon pricing to states without carbon pricing. The Department’s modeling indicates that there may be some future emissions leakage in terms of additional fossil fuel emissions outside of this Commonwealth’s borders.”

RAF at 33. While air emissions will be reduced in the Commonwealth as a result of enacting the CO<sub>2</sub> Budget Trading Program, 77 percent of these emissions will simply be displaced to other neighboring states (mostly those who are not among the RGGI-participating states) to meet the regional electricity demand.

PADEP also explains that this regulation is needed to “establish this Commonwealth’s participation in a regional approach that significantly reduces CO<sub>2</sub> emissions and this Commonwealth’s contribution to regional climate change.” RAF at 3. But as PADEP acknowledges, climate change and the greenhouse effect are global issues, not just regional or local ones. The impact that Pennsylvania’s participation in RGGI will have on global and even regional climate change is speculative, inestimable, and unquantifiable.

PADEP’s Regulatory Analysis Form for this proposed rulemaking explains the health impacts of air pollution from sulfur dioxide, oxides of nitrogen, and particulate matter, and the health benefits in the Commonwealth due to the expected ancillary emission reductions of these pollutants with the adoption of this regulation. See e.g., RAF at 16-20. These particular pollutants are “criteria pollutants” regulated under Title I of the Clean Air Act, which requires the U. S. EPA to set and periodically review the National Ambient Air Quality Standards (NAAQS). These standards are already in place to protect the nation’s public health and environment. Nearly all areas in the Commonwealth are in attainment with the NAAQS. See 40 C.F.R. §81.339. Furthermore, the PADEP should note that as part of its recent review of the MATS Rule, U.S. EPA noted that accounting for environmental benefits solely attributable from reductions in criteria pollutants not targeted by a subject rule is “particularly inappropriate[:.]”

The EPA believes that relying almost exclusively on benefits accredited to reductions in pollutants not targeted by CAA section 112 is particularly inappropriate given that those other pollutants are already comprehensively regulated under other CAA provisions, such as those applying to the NAAQS. As the EPA outlined in the 2019 Proposal, the determination that it is not appropriate to give equal weight to non-HAP co-benefits in making the appropriate and necessary determination is further supported by the fact that Congress established a rigorous system for setting standards of acceptable levels of criteria air pollutants and provided a comprehensive framework directing the implementation of those standards in order to address the health and environmental impacts associated with those pollutants. *See, e.g.*, 42 U.S.C. 7409; 7410; 7501; 7502; 7505a; 7506; 7506a; 7507; 7509; 7509a; 7511; 7511a; 7511b; 7511c; 7511d; 7511e; 7511f; 7512; 7512a; 7513; 7513a; 7513b; 7514; and 7515.

National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31286, 31299-300 (May 22, 2020). PADEP has not explained why further regulation of these pollutants is necessary to protect public health.

Because the potential beneficial impact on regional climate change from Pennsylvania’s participation in RGGI is inestimable and unquantifiable, and the adverse impacts of participation in RGGI are easily quantified as explained above, PADEP has not adequately shown that this regulation is necessary to protect public health and the Commonwealth’s natural resources.

### 3. Clarity, Feasibility, and Reasonableness of the Regulation

The IRRC must consider the “clarity, feasibility and reasonableness of the regulation to be determined by considering the following:

- (i) Possible conflict with or duplication of statutes or existing regulations.
- (ii) Clarity and lack of ambiguity.
- (iii) Need for the regulation.
- (iv) Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.
- (v) Whether acceptable data is the basis of the regulation.”

71 Pa. Stat. § 745.5b(b)(3). KEY-CON believes that some of the requirements of the CO<sub>2</sub> Budget Trading Program conflict with other law and are unreasonable.

#### *a. The Proposed Regulation is an Improper Tax*

As noted above, the funds that PADEP anticipates collecting under CO<sub>2</sub> Budget Trading Program exceed what it is authorized to collect under the APCA. By collecting funds in excess of the funds needed to administer the program, the funds are no longer a fee, they constitute a tax on regulated entities. “The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.” *City of Philadelphia v. Se. Pennsylvania Transp. Auth.*, 303 A.2d 247, 251 (Pa. Commw. Ct. 1973). Taxes are revenue producing measures while fees cover the cost of administering a regulatory program. Because the RGGI auction process is designed to raise significant revenue far beyond what is necessary to administer the program, it clearly represents a tax as defined in Pennsylvania caselaw. While PADEP may establish fees sufficient to cover the costs of administering its air pollution control programs, it does not have the power to tax. The power to tax lies solely with the General Assembly in the Commonwealth of Pennsylvania. *Mastrangelo v. Buckley*, 250 A.2d 447, 452 (Pa. 1969). As explained above, PADEP anticipates collecting \$285 million in excess of the cost of the program in the first year of RGGI

participation. Raising an additional \$285 in revenue is an improper tax levied on owners and operators of fossil fuel-fired EGUs. As PADEP only has the power to impose fees and has no authority to levy taxes, this aspect of the program is in conflict with the powers specifically granted to the General Assembly.

*b. Potential Unreasonable Penalties*

The penalties proposed for noncompliance under the CO<sub>2</sub> Budget Trading Program are unreasonable because they are impermissibly excessive and not comparable to the harm caused by potential noncompliance. The Pennsylvania Constitution provides that excessive fines may not be imposed. Pa. Const. art. I, § 13. The penalties that PADEP imposes must reasonably fit the violation. *See, e.g., Pines at W. Penn, LLC v. Pennsylvania Dep't of Env't Prot.*, 24 A.3d 1065, 1070 (Pa. Commw. Ct. 2011). A penalty would not reasonably fit a violation where it “would strike at one's conscience as being unreasonable....” *U.S. Steel Corp. v. Dep't of Env't'l Res.*, 300 A.2d 508, 514 (Pa. Commw. Ct. 1973).

The penalties that have been proposed in the CO<sub>2</sub> Budget Trading Program do not reasonably fit potential violations; they are excessive fines. Under the proposed regulation, a CO<sub>2</sub> Budget Source is found to be in violation of the program by having excess emissions. A CO<sub>2</sub> Budget Source has excess emissions by failing to have adequate allowances in its RGGI CO<sub>2</sub> Allowance Tracking System (COATS) account equal to the number of tons of CO<sub>2</sub> it emitted during a compliance period, or half of the number of allowances needed to meet its obligation during an interim compliance period. This violation is not the exceedance of an emissions allowance by statute or by permit; it is a purely administrative violation and should be treated as such.

It is KEY-CON's understanding of the penalty scheme in proposed §145.355(d) that, if a CO<sub>2</sub> Budget Source's emissions exceed the equivalent number of allowances in the account when deductions are made for compliance purposes, PADEP will deduct allowances equal to three times the number of the CO<sub>2</sub> Budget Source's excess emissions. If the compliance account does not contain enough allowances to cover these additional deductions, the CO<sub>2</sub> Budget Source must transfer adequate allowances to that account immediately.

Additionally, and for the same violation, a CO<sub>2</sub> Budget Source will be subject to a permit violation. If a CO<sub>2</sub> Budget Source has excess emissions in a control period or an interim control period, each day of that control period constitutes a day of violation unless the owner or operator demonstrates that a lesser number of days should be considered. Furthermore, each ton of excess emissions will be considered a separate violation. It is unclear from the proposed regulation how PADEP proposes to calculate this penalty. If PADEP intends to rely on existing law, namely the APCA penalty provision, the penalty could be as high as \$25,000.00 per day per ton, which is excessive for an administrative violation. 35 Pa. Stat. § 4009.1.

This penalty scheme anticipates three separate penalties arising out of a single administrative violation: (1) a treble penalty in the form of allowance deductions, (2) a per day

violation, and (3) a per ton violation. Such a penalty for an administrative violation “strikes at one's conscience as being unreasonable.”

#### 4. Policy Decision of a Substantial Nature

The IRRC must consider whether “the regulation represents a policy decision of such a substantial nature that it requires legislative review.” 71 Pa. Stat. § 745.5b(b)(4). The decision to join a regional carbon dioxide cap and trade program, RGGI, is a policy decision of a substantial nature. As noted above, the PADEP cannot join RGGI without the authorization of the General Assembly.

#### 5. Comments, Objections, or Recommendations of a Committee

The IRRC must review the “[c]omments, objections or recommendations of a committee” as part of its analysis. 71 Pa. Stat. § 745.5b(b)(5). The Air Quality Technical Advisory Committee, the Citizens Advisory Committee, and the Small Business Advisory Committee all voted not to recommend the regulation be presented to the EQB. Members of these committees have voiced their concerns with the proposed CO<sub>2</sub> Budget Trading Program. While KEY-CON has not reproduced a summary of these concerns in these comments, it strongly urges the EQB, PADEP, and the IRCC to reconsider the concerns of these committees and the testimony presented before them.<sup>2</sup> Additionally, KEY-CON also urges EQB, PADEP, and the IRRC to consider the comments filed by the House Environmental Resources & Energy Committee. See Exhibit C.<sup>3</sup>

#### 6. Support by Acceptable Data

The IRRC must consider whether “the regulation is supported by acceptable data.” 71 Pa. Stat. § 745.5b(b)(7). Issues related to the findings from PADEP’s modeling effort were presented above. KEY-CON also has the following concerns with the PADEP’s modeling efforts as summarized below:

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<sup>2</sup> The minutes for these meetings can be found at the following links: Air Quality Technical Advisory Committee (April 23, 2020 meeting), available at <https://www.dep.pa.gov/Business/Air/BAQ/AdvisoryGroups/Air-Quality-Technical-Advisory-Committee/Pages/Archive.aspx>; Small Business Compliance Advisory Committee Archive (July 22, 2020 meeting), available at <https://www.dep.pa.gov/Business/Air/BAQ/AdvisoryGroups/SmallBusiness/Archive/Pages/default.aspx>; Citizens Advisory Council (August 18, 2020 meeting), available at <https://www.dep.pa.gov/PublicParticipation/CitizensAdvisoryCouncil/Meetings/Pages/Schedule-2020.aspx>; Environmental Quality Board (Sept. 15, 2020 meeting), available at <https://www.dep.pa.gov/PublicParticipation/EnvironmentalQuality/Pages/2020-Meetings.aspx>.

<sup>3</sup> Please note a similar letter is anticipated from the Pennsylvania Senate Environment & Energy Committee.

- (a) The PADEP-summarized results from the two model runs conducted (with and without RGGI in-effect, the “Reference Case” and “Policy Case,” respectively). For the Reference Case, KEY-CON is perplexed that the forecasted amount of electrical generation in the Commonwealth for the years 2022 through 2028 is significantly greater than any annual historic generation realized in the past 20 years, whereas the forecasted amount of electrical generation in the Commonwealth for the same years for the Policy Case is consistent with recent historic generation. Consequently, KEY-CON believes that the excessively high electrical generation and resultant CO<sub>2</sub> emissions in those years have biased the impact of implementing RGGI in the Commonwealth. On two separate occasions (most recently as part of a Right-to-Know request submitted in December 2020, but later withdrawn with the understanding that the PADEP would respond soon thereafter, attached hereto as Exhibit D, KEY-CON requested the PADEP to explain this issue. KEY-CON is disappointed that the PADEP has to date failed to adequately respond to these requests for additional information.
- (b) KEY-CON believes that the model runs performed to support RGGI have significantly underestimated the amount of electrical generation displacement (leakage) to neighboring states, especially Ohio, that are not among the RGGI-participating states. The maps provided in Exhibit E depict newly-permitted and constructed generating stations located in Ohio and their proximity to PJM’s high voltage transmissions lines. The information made available by the PADEP is silent on the potential impact of newly-permitted but not yet constructed generating stations located in Ohio and on the amount of leakage that is expected to occur if the Commonwealth implements RGGI.
- (c) PADEP claims that RGGI-related CO<sub>2</sub> reductions by 2030 are imperative to advance the Commonwealth’s climate goals, and without RGGI, the Commonwealth would not even meet the interim goal of 26% reduction from 2005 emissions by 2025. RAF at 34. KEY-CON is uncertain if the interim goal will be attained, but it’s important to understand that:
- (i) CO<sub>2</sub> emissions from the electric generators, other industrial stationary sources and mobile sources comprise about 85% of the current total state-wide CO<sub>2</sub> emissions, and the percentage contributions are similar to one another for these 3 source categories.
  - (ii) It is inappropriate and unreasonable for PADEP to assign the entire burden of emissions reductions desired by 2030 on the electric generators. This industry has no direct control over CO<sub>2</sub> emissions from other industrial sources and mobile sources.
  - (iii) Emissions inventory data submitted annually to U.S. EPA clearly shows that CO<sub>2</sub> emission reductions from the Pennsylvania electric generators alone and combined with CO<sub>2</sub> emissions from other industrial stationary sources have already exceeded the 26% reduction goal specified in Executive Order 2019-

01. 49 Pa.B. 438 (Feb. 2, 2019); see table below. CO<sub>2</sub> emission reductions from the electric generators are expected to decrease throughout this decade without a RGGI Rule in effect because the coal-fired units that are expected to retire by 2030 will be replaced by new natural gas-fired units (which results in a 2:1 reduction in CO<sub>2</sub> emissions and some co-reduction of criteria pollutants such as NO<sub>x</sub>, SO<sub>2</sub> and PM<sub>2.5</sub>).

CO <sub>2</sub> Source Category - PA	CO <sub>2</sub> Equivalents * (million metric tons) per U.S. EPA's Greenhouse Gas Reporting Program			% change 2005 to 2018	% change 2011 to 2018
	2005 Total direct emissions (estimated)	2011 Total reported direct emissions	2018 Total reported direct emissions		
Electric Generators	121	114.1	74.7	-38%	-35%
Other Industrial Stationary Sources	46	38.7	37.8	-18%	-2%
Sum	167	152.8	112.5	-33%	-26%

\*: CO<sub>2</sub> equivalents account for CO<sub>2</sub>, methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O) emissions – CH<sub>4</sub> and N<sub>2</sub>O emissions are typically ~ 1% of CO<sub>2</sub> emissions from these sources

## 7. Consideration of Impact on Small Businesses

The IRRC must consider whether “a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.” 71 Pa. Stat. § 745.5b(b)(8). The Preamble does address the power producers potentially subject to the regulation that are small businesses and assess the impact of the proposed regulation on those EGUs. Preamble at 19. The RAF also concludes that “[s]mall businesses would not be unduly burdened by this proposed rulemaking.” RAF at 47. This analysis, however, does not directly consider the potential impact that increased electricity prices could have on small businesses. While the RAF addresses the potential impact of the proposed CO<sub>2</sub> Budget Trading Program on consumer electric bills, which are projected to increase between 2022 and 2030, it does not consider the impact that increased power costs will have on commercial customers, many of which are small businesses. RAF at 36. Many small businesses in Pennsylvania, especially those that use significant power in their operation, could be adversely affected by the increase in power prices. The RAF does not provide this analysis. Additionally, the RAF does not consider the impact of the regulations on small businesses that provide materials and support to the coal-fired powerplants that would shut down as a result of this regulation, such as engineering and environmental consulting firms, equipment maintenance and support companies, waste haulers and plant maintenance contractors, and analytical laboratory services, to name only a few. These small businesses would lose a significant portion of their

revenue as a result. PADEP should be required to investigate further the impact of this proposed regulation on the Commonwealth’s small businesses.

**II. The Commonwealth realizes the same outcome in 2030 with or without RGGI.**

Even using PADEP’s RGGI modeling results (with significant concerns, especially about the Reference Case generation amounts, all greater than historic except in calendar year 2030), the Commonwealth realizes the same outcome in 2030 with or without RGGI.

Area of Interest	Projected CO <sub>2</sub> Emissions in Calendar Year 2030 (million short tons)		
	Reference Case (no RGGI)	Policy Case (RGGI In-Effect)	Difference
PJM Region	298	295	3 (1% of average)
Eastern Interconnect (entire model domain)	1,140	1,138	2 (0.2% of average)

The PADEP acknowledged this outcome in the Preamble to the proposed rule –

In 2010, coal generation represented 47% of this Commonwealth’s generation portfolio and is expected to decline to roughly 1% of this Commonwealth’s generation portfolio in 2030. This shift away from coal-fired generation occurs irrespective of this Commonwealth’s participation in RGGI.

Preamble at 35. Consequently, KEY-CON requests that the proposed rule be modified to offer a glide path to retirement for affected coal-fired generating units. Such units would be exempt from the rule until January 1, 2030.

**III. Deactivation of coal-fired stations is likely.**

Implementing the RGGI Rule in January 2022 would result in the likely deactivation or retirement of at least three affected coal-fired stations, the KEY-CON and Homer City Stations. PADEP asserts that it needs about \$20 million annually from Title V fees to maintain the Title V program. The KEY-CON stations each remit \$900,000 - \$1,000,000 annually, and the Homer City Station remits a similar amount. Together, these stations pay a disproportionate share of the total funding. These three facilities pay about 15% of the total funding, while the hundreds of other Title V facilities in the Commonwealth pay the remainder. If the three facilities were to dramatically curtail operations or deactivate simultaneously in a single calendar year (as is predicted by PADEP’s RGGI modeling with the rule in effect), PADEP would lose a significant portion of its Title V funding. A revised RGGI Rule that includes a glide path to retirement for these facilities would provide sufficient time for the PADEP to develop alternate funding sources for their Title V budget.

KEY-CON appreciates the opportunity to submit these comments. Should you have any questions about KEY-CON's submission, please contact me at (724) 235-4596 or [jshimshock@keyconops.com](mailto:jshimshock@keyconops.com).

Respectfully submitted,

A handwritten signature in black ink that reads "John P. Shimshock". The signature is written in a cursive style with a clear, legible font.

John P. Shimshock  
Environmental Specialist  
Conemaugh Generating Station

# **Exhibit A**

# MEMORANDUM

**FROM:** Econsult Solutions, Inc. (ESI)  
**DATE:** February 2020  
**RE:** Economic Impact of Coal-Fired Plants in Pennsylvania

The figures below reflect the economic impact of the annual operating activity of four coal-fired plants in Pennsylvania: Cheswick, Conemaugh, Homer City, and Keystone.

These plants were included as part of a broader economic study that also included two coal-refuse plants (Seward and Ebensburg) dated November 2019. The results below are derived from the same method defined in that report, but include only the four coal-fired plants as shown below.

Table 1: Annual Plant Operating Activity

Plant	Annual Energy Generation (Millions of MWHrs)	Annual Operating Expenditures (\$M)	Total Employees	Employee Compensation (\$M)
Cheswick	1.2	\$56	60	\$9
Conemaugh	12.1	\$363	166	\$24
Homer City	8.1	\$294	230	\$35
Keystone	11.8	\$359	166	\$24
<b>Total</b>	<b>33.2 million</b>	<b>\$1.07 billion</b>	<b>622 jobs</b>	<b>\$91 million</b>

Source: Plant operational data

Note: Columns may not sum due to rounding

In total, operations of these four plants produce \$2.87 billion in annual economic impact within Pennsylvania, supporting 8,170 total jobs with \$539 million in employee compensation (see Table 2).

Table 2: Economic Impact of Plant Operations by Geography

	Indiana County	Armstrong County	Cambria County	Allegheny County	Rest of PA	Commonwealth of Pennsylvania
Direct Impact (\$M)	\$657	\$359	\$0	\$56	\$0	\$1.07 billion
Indirect & Induced Impact (\$M)	\$216	\$186	\$122	\$55	\$1,223	\$1.80 billion
<b>Total Economic Impact (\$M)</b>	<b>\$873</b>	<b>\$544</b>	<b>\$122</b>	<b>\$111</b>	<b>\$1,223</b>	<b>\$2.87 billion</b>
<b>Total Jobs Supported (FTE)</b>	<b>1,490</b>	<b>1,100</b>	<b>590</b>	<b>320</b>	<b>4,670</b>	<b>8,170 jobs</b>
<b>Total Employee Compensation (\$M)</b>	<b>\$112</b>	<b>\$65</b>	<b>\$26</b>	<b>\$28</b>	<b>\$307</b>	<b>\$539 million</b>

Source: IMPLAN (2015), Econsult Solutions (2019)

Note: Rows and Columns may not sum due to rounding

This direct and indirect economic impact generates \$34 million in state revenue from taxes and fees annually (see Table 3).

Table 3: Pennsylvania Tax and Fee Revenue Impact of Plant Operations

	<b>Annual Total</b>
Income Taxes (\$M)	\$10.8
Sales Tax (\$M)	\$15.6
Business Tax (\$M)	\$5.0
Environmental Taxes and Fees (\$M)	\$2.8
<b>State Total</b>	<b>\$34.2 million</b>

*Source: IMPLAN (2015), Econsult Solutions (2019)*

*Note: Columns may not sum due to rounding*

Plants are major contributors to the local tax base in their host communities. Collectively, the four plants represent more than \$88 million in assessed property value, and pay an estimated \$2.5 million annually in property taxes to municipalities and school districts and \$1.2 million annually in municipal utility and service fees, a total of \$3.7 million annually (see Table 4).

Table 4: Local Payments for Property Taxes and Utility/Service Fees

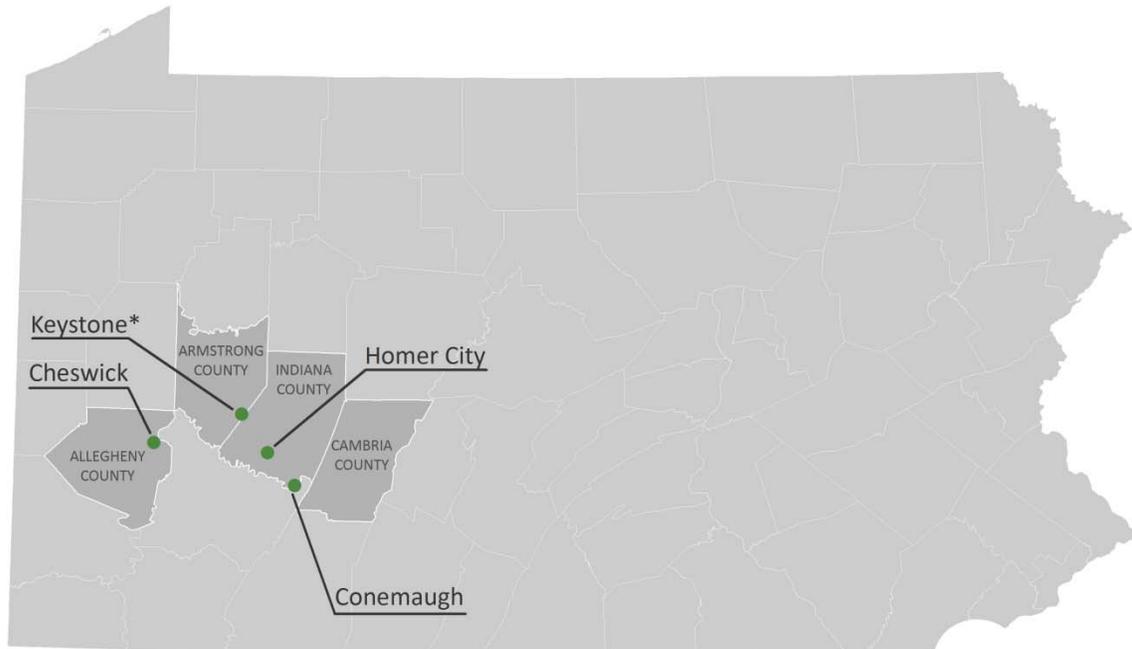
	<b>Annual Total</b>
Assessed Property Value (\$M)	\$88.3
Property Tax Revenue (\$M)	\$2.5
Municipal Utility and Service Fees (\$M)	\$1.2
<b>Local Total</b>	<b>\$3.7 million</b>

*Source: Plant operational data*

*Note: Columns may not sum due to rounding*

Figure 1: Map of Modeled Plants

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\*Keystone Power Plant is located in both Armstrong and Indiana Counties

## **Exhibit B**



## **Exhibit C**



**DARYL METCALFE, MEMBER**  
HOUSE OF REPRESENTATIVES  
ROOM 144 MAIN CAPITOL  
PO BOX 202012  
HARRISBURG, PENNSYLVANIA, 17120-2012  
PHONE: (717) 783-1707  
FAX: (717) 787-4771

Website: RepMetcalfe.com

CRANBERRY TOWNSHIP MUNICIPAL CENTER  
2525 ROCHESTER ROAD, SUITE 201  
CRANBERRY TOWNSHIP, PA 16066  
PHONE: (724) 772-3110  
FAX: (724) 772-2922

ENVIRONMENTAL RESOURCES AND  
ENERGY COMMITTEE  
CHAIRMAN

**House of Representatives**  
Commonwealth of Pennsylvania  
Harrisburg

January 12, 2021

Independent Regulatory Review Commission  
333 Market Street  
Harrisburg, PA 17101

Dear Commissioners:

As members of the House Environmental Resources and Energy Committee, we write to you to express our disapproval of proposed Environmental Quality Board (EQB) Regulation #7-559 (IRRC # 3274).

The Committee voted today, January 12<sup>th</sup>, in favor of sending you this letter disapproving of the regulation regarding the Regional Greenhouse Gas Initiative (RGGI). As the standing House Committee with legislative oversight over the Department of Environmental Protection (DEP), it is our role to ensure that regulations proposed by DEP through the EQB are consistent with the intent of the Acts on which they are based and proposed in a manner consistent with the law, a standard which this regulation utterly fails. As you can see from the number of comments already submitted, while this committee has commented on regulations before, none has been as controversial as this one. This is because by proposing this regulation, DEP has entirely surpassed their authority as a regulatory agency and is attempting to usurp the General Assembly's proper role as policymakers.

We could easily discuss for many pages the tremendous amount of harm that this regulation will have on our businesses, constituents, and communities by directly eliminating thousands of jobs across the Commonwealth, completely destroying an industry, devastating communities, making Pennsylvania less competitive, and by raising electricity prices in the Commonwealth. As this ground has been extensively covered by other commenters, we as the standing committee, have chosen to focus on comments primarily on DEP's lack of legal authority to promulgate this regulation.

While the Department cites the Air Pollution Control Act (APCA) as its authority for the regulation, the APCA fails to grant such authority without the involvement of the legislature. The APCA provides that DEP may "formulate" interstate air pollution control agreements, it gives the Department no ability to execute them. In fact, the statute explicitly requires that such an agreement be submitted to the General Assembly for its consideration.

Furthermore, while DEP claims that RGGI's auction mechanism would impose a "fee", which it has the authority to do under the APCA, the regulation would actually impose a "tax" as this term has been defined under Pennsylvania case law. Pennsylvania courts have consistently held that under the Constitution of Pennsylvania, the authority to tax rests solely with the General Assembly. Under

Pennsylvania case law, an action of government is defined as a “tax” if it is a revenue-producing measure. On the other hand, regulatory “fees” are intended merely to cover the cost of administering a regulatory scheme. Whether a government action is defined as a “tax” or a “fee” turns on the amount of income that is generated and the percentage of that income allocated to covering the program’s administrative costs.

RGGI’s auction mechanism clearly represents a “tax” under these definitions. The auction is designed to raise significant revenue, in fact, it has raised over 3 billion dollars to date. RGGI states have allocated less than 6% of the auction revenue toward administering the program. Instead, these states have used the vast majority of the revenue to support policy initiatives or to prop up the state’s budget through transfers to their general funds. Thus, the revenue generated by the auction must be defined as a “tax” which can only be imposed by the General Assembly.

Administrative agencies can only exercise power and authority which has been conferred to them by the General Assembly. Pennsylvania courts have consistently held that this legislative delegation must be clear and unmistakable, or else the power does not exist. In order to accept the Department’s authority to promulgate this rulemaking, you would have to stretch the APCA well past its breaking point in several different places. You will not find in the act text stating that the Department may promulgate regulations to join RGGI. You will not find in the act text stating that the Department may promulgate regulations to adopt a cap and trade system. You will not even find in the act text stating that the Department may promulgate regulations to govern carbon emissions generally.

Every other state in RGGI received specific authorization to join the initiative from their legislature except for New York. Unlike Pennsylvania, however, New York’s legislature has specifically and explicitly authorized the regulation of carbon dioxide. Carbon dioxide is unlike other conventional pollutants, in that the inhalation of it or direct exposure to it in typical atmospheric concentrations is not dangerous. A strong argument can be made that carbon dioxide does not fit under the definition of “air pollution” within the APCA. Pennsylvania would be alone among the RGGI states if it proceeds without specific legislative authority for this rulemaking.

Even if carbon dioxide was to be considered within the definition of “air pollution” under the APCA, the act only allows DEP to promulgate regulations for the “prevention, control, reduction and abatement” of air pollution. The adoption of RGGI would have an entirely negligible impact on the concentration of ambient carbon dioxide in the atmosphere. The contribution of Pennsylvania’s power plants to worldwide greenhouse gas emissions is negligible. Additionally, as demonstrated by modeling conducted by the Department itself, in addition to others, Pennsylvania joining RGGI will result in “leakage” as power plants in neighboring states will generate more electricity and thus more carbon dioxide emissions after our entry. This means that the overall reduction in emissions seen if Pennsylvania joins RGGI will be miniscule, failing the APCA’s standard of any meaningful “prevention, control, reduction and abatement” of air pollution.

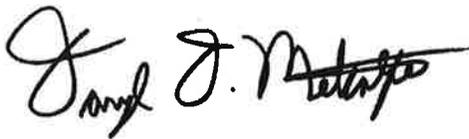
One final point about the APCA is that it clearly requires that DEP hold in-person public hearings in regions impacted by a regulation before it can be adopted. DEP has refused to comply with this portion

of the law, instead holding 10 virtual hearings. A motion was made during the EQB meeting to require that DEP comply with the law, but this motion was rejected. DEP has shown a contempt for the law and proper process throughout the development of this rulemaking and has rejected required engagement with communities and industry who will be devastated by this regulation at every turn.

In addition to our comments regarding DEP's lack of legal authority for this rulemaking, we lend our support to many of the other comments that have been offered. We urge you to consider the comments of small business owners throughout the state, both those whose livelihoods will be directly impacted when power plants close, and those who will be harmed by an increase in energy prices. We urge you to consider the comments of unions throughout the state who are fighting hard to protect their jobs and to keep Pennsylvania competitive as a state. We urge you to consider the comments of individuals in communities that will be devastated by the regulation. We urge you to consider the impact that this regulation will have on low-income Pennsylvanians who will struggle to pay the increased energy bills that they will be faced with. We urge you to consider the comments of those who have noted that there could not be a worse time to propose this regulation when the economy has been harmed so drastically by the COVID-19 outbreak.

This proposed regulation is unacceptable and DEP has failed to comply with the law and the Constitution of Pennsylvania when developing it. DEP's description of its statutory authority in the regulatory analysis form is woefully inadequate and does not begin to address any of the legal deficiencies with the regulation. The bottom line is that this regulation is such a significant policy decision that it must be made by the General Assembly and not by the executive branch of government. Moving forward with this regulation will only condemn the state to a protracted and expensive legal battle in attempting to defend it. We therefore ask IRRC to disapprove this regulation in its proposed form since the provisions of the regulation are plainly unreasonable. We urge the EQB and DEP to withdraw this proposed regulation. We, the undersigned members of the House Environmental Resources and Energy Committee, write this letter to draw your attention to our concerns and disapproval of this proposed regulation and respectfully ask for your consideration.

Sincerely,



Daryl D. Metcalfe, Chairman  
Environmental Resources & Energy Committee



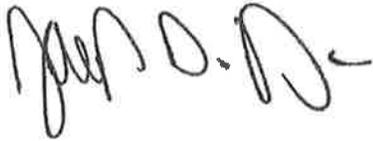
Rep. Mike Armanini  
75<sup>th</sup> Legislative District



Rep. Stephanie Borowicz  
76<sup>th</sup> Legislative District



Rep. Bud Cook  
49<sup>th</sup> Legislative District



Rep. Joseph Hamm  
84<sup>th</sup> Legislative District



Rep. Joshua Kail  
15<sup>th</sup> Legislative District



Rep. Tim O'Neal  
48<sup>th</sup> Legislative District



Rep. Kathy Rapp  
65<sup>th</sup> Legislative District



Rep. Paul Schemel  
90<sup>th</sup> Legislative District



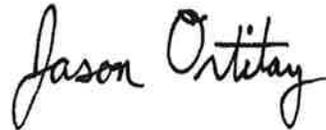
Rep. Ryan Warner  
52<sup>nd</sup> Legislative District



Rep. R. Lee James  
64<sup>th</sup> Legislative District



Rep. Ryan Mackenzie  
134<sup>th</sup> Legislative District



Rep. Jason Ortitay  
46<sup>th</sup> Legislative District



Rep. Tommy Sankey  
73<sup>rd</sup> Legislative District



Rep. Perry Stambaugh  
86<sup>th</sup> Legislative District



Rep. Pam Snyder  
50<sup>th</sup> Legislative District

Cc: Environmental Quality Board  
Department of Environmental Protection

## **Exhibit D**



## DEP Right-to-Know Law Record Request Form

**Business Hours:** 8:00 am - 4:30 pm (RTK requests received after 4:30 pm are considered received the next business day)  
**Mail to:** DEP Open Records Officer ("AORO"), DEP/BOS, PO Box 8473, Harrisburg, PA 17105-8473.  
**Or Fax to:** 717-705-8023  
**Or Email to:** [EP-DEP-RTK@pa.gov](mailto:EP-DEP-RTK@pa.gov) \*Request sent to any other email will not be deemed a RTKL request.  
**Contact:** 717-787-2043

**Name of Requester (or Anonymous):** John P. Shimshock  
**Name of Company (or N/A):** Conemaugh Generating Station  
**Requester's Street Address:** 1442 Power Plant Road  
**Requester's City/State/Zip Code:** New Florence, PA 15944  
**Requester's Telephone Number:** (724) 235-4596  
**Requester's Email Address:** jshimshock@keyconops.com

Records being requested (please sufficiently describe the record(s) requested so that they are identifiable to Department staff.):

All files and documents generated in support of the PA DEP's proposed RGGI Rule as prepared by ICF (contracted by PA DEP)

Department Records Requested: Name of Company or Individual of records you are seeking (including former names)

Facility Name of Requested Department Records: Records for (if different from Company Name)

Street Address (including zip code)

N/A

County

Municipality

Additional information to assist with search and retrieval of responsive records (e.g. permit no.(s); dates or timeframe of records requested; programs of interest)

ICF's activities were conducted in late 2019 and early 2020.

### Programs for File Review

Air Quality

PA DEP Policy Office

**FORM OF RECORD PRODUCTION – check appropriate response:**

**REQUESTING FILE REVIEW ACCESS:**

Seeking access, review and self copying of records is at a reduced cost of \$.15 per page.

- YES
- NO

**REQUESTING DUPLICATION AND MAILING RECORDS:**

Agency copying of records is at a cost of \$.25 per page

- YES
- NO

**REQUESTING CERTIFICATION OF RECORDS:**

I WANT DEP TO CERTIFY RECORDS (AT A COST OF \$1.00 PER PAGE):

- YES

December 14, 2020

**VIA EMAIL: [jshimshock@keyconops.com](mailto:jshimshock@keyconops.com)**

John P. Shimshock  
Conemaugh Generating Station  
1442 Power Plant Road  
New Florence, PA 15944

RE: Right-to-Know Request Tracking Number: 2020-0774 (CO)

Dear Requester:

The Department of Environmental Protection's (DEP) Open Records Officer received your request and assigned the above-listed tracking number to it. This letter is the DEP's interim response to your request under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL).

A copy of your request is enclosed and incorporated into this response.

The DEP's offices have been closed since March 16, 2020 due to the COVID-19 pandemic. On May 29, 2020, the County where the DEP's Agency Open Records Officer is stationed moved to the yellow phase of the Governor's reopening plan. While the DEP's offices remain closed at this time, the DEP will make its best efforts to respond to your RTKL request in a manner consistent with the Governor's pandemic mitigation plan.

The DEP's Central Office is issuing this interim response on behalf of all DEP offices that have been or may be assigned to this request. If the DEP determines that multiple DEP offices may potentially have responsive records, it assigns the request to each of those DEP offices. The DEP's final response(s) will list each of the assigned DEP offices covered by that final response. It is possible that you may receive more than one final response to your request. It is also possible that a final response may cover more than one office.

Under the RTKL, a written response to your RTKL request is due by December 14, 2020.

This interim response notifies you that DEP requires up to an additional 30 days, until January 13, 2021, to issue a final response to your request. The extension is permitted under Section 902 of the RTKL, 65 P.S. § 67.902, because:

- A response by the mailing date of this letter could not be accomplished due to bona fide staffing limitations.
- The extent or nature of the request precludes a response within the required time-period.

**NOTICE REGARDING FEES, FORMATS, AND ACCESS TO RECORDS**

Under Section 1307 of the RTKL, 65 P.S. § 67.1307, DEP may impose fees for postage, duplication, certification, and conversion to paper. Under Section 901 of the RTKL, 65 P.S. § 67.901, *all applicable fees must be paid to receive access to the record requested.*

The RTKL requires that DEP produce records in a requested medium only if DEP maintains them in that medium for regular business purposes. DEP need not create or reformat records to respond to a RTKL request. 65 P.S. § 67.705.

*If the fees for your records are expected to exceed \$100.00, DEP may—under Section 1307 of the RTKL, 65 P.S. 67.1307—require that you prepay an estimate of the fees required to fulfill the request. (Although prepayment is required in all situations in which DEP does not waive fees, DEP requires prepayment based on the estimated fees only when the fees are estimated to exceed \$100.00) If the estimate exceeds the actual fees, DEP will reimburse you for the difference. If the actual fees exceed the estimate, you will be responsible for paying the difference.*

*If you are concerned about duplication costs, consider performing a file review. In a file review, you may duplicate documents at a reduced rate of \$0.15 per page for standard-size pages, and you can be selective about which records you copy. Please note that an informal file review (a file review outside the RTKL) may enable you to access records more quickly than a formal file review (a file review pursuant to the RTKL) or a request under the RTKL that records be sent to you. If you prefer an informal file review, you may withdraw your RTKL request and conduct an informal file review. Performing an informal file review does not preclude you from filing a RTKL request later. You can find more information about informal file reviews on DEP's public website.*

*If you request a file review, you must view the records at the DEP office that maintains the records. Records are not transferred between DEP offices for file reviews.*

*If you need records certified, certification of records costs \$1.00 per page.*

*If you expressly limited your RTKL request to electronic records and no electronic records exist, DEP will issue a “no records” final response.*

Please contact me if you have questions.

Sincerely,



Sandra Keister  
Agency Open Records Officer

Enclosure

cc: RTK CO Legal via email

## Shimshock, John

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**From:** Shimshock, John  
**Sent:** Wednesday, December 9, 2020 10:43 AM  
**To:** 'Krueger, John'  
**Subject:** RE: RTK request

Hi John,

Thanks for the quick response – I was unaware of the modeling report, which is helpful. Following a quick review of the report, I noticed that the Excel summary tables of case results (Reference, RGGI, RGGI + Investments) that were shared during various presentations are not included in the report. As such, I'm concluding that there are other materials that were generated by ICF which include these tables. Those tables of case results also likely include the modeling results for other non-RGGI states in PJM (e.g., Ohio, West Virginia, Indiana, etc.), which were not shared in previous presentations. I'd be grateful for your help in obtaining those complete tables / files and well as a list of the generating units and their annual generation amounts included in the model runs. I continue to be perplexed that total annual PA generation amounts in the Reference Case are greater than any historic annual PA totals (looking back to CY 2000) for all modeled years except CY 2030. A review of the detailed annual unit-level generation data for each of the modeled cases may help me to better understand this issue. Thanks again for your help with the RTK request, happy to discuss – John.



**John P. Shimshock**  
Environmental Specialist  
Conemaugh Generating Station  
1442 Power Plant Road  
New Florence, PA 15944  
Office Phone: (724) 235-4596  
Cellular Phone: (724) 787-1410  
[jshimshock@keyconops.com](mailto:jshimshock@keyconops.com)

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**From:** Krueger, John <jkrueger@pa.gov>  
**Sent:** Wednesday, December 9, 2020 10:01 AM  
**To:** Shimshock, John <jshimshock@keyconops.com>  
**Subject:** RTK request

To follow-up on our conversation does any of the information below from our [website](#) meet your needs, in particular the September 25, 2020 Modeling Report?

## RGGI Modeling Results

The Department has hired an expert modeling consultant to identify how Pennsylvania would be affected by RGGI participation. Explore the data and presentations below to see how Pennsylvania will benefit by participating in RGGI.

Read about the Department's modeling process in this [Modeling Report](#). You can further explore the data and presentations below to see how Pennsylvania will benefit by participating in RGGI.

[Collapse All](#)

## **Power Sector Modeling**

- [Modeling Overview Webinar](#)
- [Modeling Overview Presentation slides](#)
- [Reference Case Results](#)
- [RGGI Case Results](#)

## **RGGI + Investment Modeling Results**

- [Overview of RGGI + Investment Results Webinar](#)
- [Overview of RGGI + Investment Results Presentation Slides](#)
- [RGGI + Investments Case Results](#)

## **Economic Modeling**

- [Economic Modeling Overview Webinar](#)
- [Economic Modeling Overview Presentation Slides \(PDF\)](#)
- [Economic Modeling Results \(Excel\)](#)

## Shimshock, John

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**From:** Shimshock, John  
**Sent:** Monday, December 28, 2020 8:59 AM  
**To:** Krueger, John  
**Cc:** EP, Right-to-Know  
**Subject:** RE: Right to Know Request

Hi John,

Yes, as discussed, I agree to withdraw the Right to Know request, we'll proceed as outlined below. Thanks again for your support with this effort. Wishing you and yours a Happy New Year – John.



**John P. Shimshock**  
Environmental Specialist  
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1442 Power Plant Road  
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Office Phone: (724) 235-4596  
Cellular Phone: (724) 787-1410  
[jshimshock@keyconops.com](mailto:jshimshock@keyconops.com)  
**Please note my new email address**

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**From:** Krueger, John <jkrueger@pa.gov>  
**Sent:** Monday, December 28, 2020 8:53 AM  
**To:** Shimshock, John <jshimshock@keyconops.com>  
**Cc:** EP, Right-to-Know <EP-DEP-RTK@pa.gov>  
**Subject:** Right to Know Request

Hello John, it was good to talk to you this morning. I am writing to confirm our conversation that I will be setting up a conference call during the first week of January to discuss how we can best fulfill your request for the files and documents generated in support of the PA DEP's proposed RGGI Rule as prepared by ICF. Please acknowledge that you have graciously agreed to withdraw your Right to Know request so that we can handle this informally. Sincerely,

John F. Krueger | Assistant Bureau Director  
Department of Environmental Protection | Air Quality | 12<sup>th</sup> Fl  
Rachel Carson State Office Building  
400 Market Street | Hbg PA 17101  
Phone: 717.783.9264 | Mobile: 717.903.4394  
[www.dep.pa.gov](http://www.dep.pa.gov)

*In order to prevent the further spread of COVID-19, all DEP offices will remain closed until restrictions are lifted. In the meantime, I will be working remotely to continue the mission of the Pennsylvania Department of Environmental Protection and frequently retrieving emails. Thank you for your patience.*

## Shimshock, John

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**From:** Shimshock, John  
**Sent:** Wednesday, January 13, 2021 4:12 PM  
**To:** Krueger, John  
**Cc:** Book, Hayley; Ramamurthy, Krishnan; Hammond, Mark; Landis, Allen; Demjanick, Jennie  
**Subject:** RE: RGGI Modeling Questions  
**Attachments:** IPM Modeling Results\_PA DEP Reference Case (1).xlsx; IPM Modeling Results\_PA DEP Policy Case (1).xlsx; pa.xlsx

Hi John / PA DEP friends,

Thanks for your response, I'm grateful for the Department considering my request. Upon review, I'm unfortunately disappointed to write that the responses below do not address my inquiry. Perhaps I did not explain my request clearly, and if so, then I'd be grateful for your consideration to a restated version of the same as presented below.

1. In the modeling summary files for the Reference Case and Policy case (attached), the amounts of net electrical generation in PA for the year 2022 are 245,578 GWh and 217,476 GWh, respectively. Presumably these totals were derived by summing the amounts of generation from each of the generating units included in the model runs. The summary tables present the generation amounts by type (e.g., coal, combined-cycle natural gas, etc.) but do not list the amounts of generation (MWh) by each of the applicable units – this is the info I'm seeking. The worksheets "Assumptions PA Firm" and "Assumptions PA Units" simply list the capacity (MW) of each of the generating units included in the model runs, not the projected annual generation (MWh). BTW – for KEY-CON and Cheswick Stations, the listed capacities are nameplate for the generator, i.e., gross [not net] generation, I'm uncertain if all others are nameplate too.
2. For the Reference Case, the listed amount of net electrical generation in PA in 2020 is 216,581 GWh, which is consistent with recent annual historic generation totals in PA – please see the 3<sup>rd</sup> attached file (EIA data). For reasons that are currently beyond my understanding, the listed amounts of annual generation in the Reference Case jump to 245,578 GWh, 241,076 GWh and 232,370 GWh in years 2022, 2025 and 2028, respectively. These amounts are all significantly greater than recent historic generation amounts ( all < 230,000 GWh). The difference between 245,578 GWh and recent historic annual generation (say 230,000 GWh) = 15,000 GWh, which is equivalent to 2 separate 1000 MW generating stations operating at 85% capacity factor. A review of the units-specific generation amounts for each of the modeled years should help to explain the significant increase in the projected 2022 annual generation. BTW – the "Assumptions PA Firm" includes the 1,026 MW Renovo Energy Center as a station that is expected to be on-line in 2022. It's my understanding is that this facility has yet to commence construction, so it is extremely unlikely that this facility will in fact be on-line next year.
3. I'm seeking the same detailed generation info for units located in states in PJM but not among the current RGGI-participating states (e.g., Ohio, West Virginia and Indiana especially). I'm also interested in seeking the total CO2 emissions for each of those states in a manner similar to that presented for PA and current RGGI-participating states. I can certainly calculate the total CO2 emissions for the non-RGGI participating states by difference, but that will not provide the state-specific info.

Thanks again for your efforts in responding to my inquiry, happy to discuss – John.



**John P. Shimshock**  
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Cellular Phone: (724) 787-1410  
[jshimshock@keyconops.com](mailto:jshimshock@keyconops.com)

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**From:** Krueger, John <jkrueger@pa.gov>  
**Sent:** Wednesday, January 13, 2021 3:05 PM

**To:** Shimshock, John <jshimshock@keyconops.com>

**Cc:** Book, Hayley <hbook@pa.gov>; Ramamurthy, Krishnan <kramamurth@pa.gov>; Hammond, Mark <mahammond@pa.gov>; Landis, Allen <alllandis@pa.gov>; Demjanick, Jennie <jdemjanick@pa.gov>

**Subject:** RGGI Modeling Questions

Good afternoon John - Below are responses to the questions you had based on our conversation last week. First the [Reference Case Results](#) spreadsheet includes the assumptions that were made regarding generation in Pennsylvania for the purposes of the modeling. There are two tabs on that spreadsheet that will be relevant to your question (a) "Assumptions PA Units Tab" - lists all of those units that were operational in Pennsylvania at the end of 2018- and this is the list upon which we based our generation numbers. You will see on this spreadsheet that there is a column that indicates "RGGI Affected"- if Y than that facility is expected to require compliance under the proposed regulation based on their 2018 reported data, if that column reads N than it is not expected to have a compliance obligation. Changes that were made to these generation assumptions are outlined in the "Assumptions PA Units Tab". In this tab the projects (generation) expected to come online and go offline are outlined. The generation closures are based on deactivation notices to PJM and the generation additions are based on the following criteria. A project and its associated generation were included in the modeling if it was determined to be a firm capacity addition which was defined by a project meeting two of the three following criteria as established by PJM. Project is (a) fully funded (b) fully permitted or (c) has a contract in place for the majority of the electricity generation. If a project met two of these three criteria, it was added to the model as firm capacity. The rest of the capacity additions and retirements were market driven per the model.

The second item you had inquired about was whether the power sector modeling included information regarding the PJM (non-RGGI) states. The answer as we discussed is 'yes'. This PJM (non-RGGI) state data is shared in the collective and can be found in each of the three modeling runs conducted by the Department as linked here [Reference Case Results](#), [RGGI Case Results](#) and [RGGI + Investments Case Results](#) which are all available publicly on the DEP website. I've included an example below from the "Reference Case Results- Transmission Tab" whereby the imports and exports from Pennsylvania to PJM Non-RGGI states are outlined. Additionally on the Generation Tab the generation from PJM Non-RGGI states can be calculated if desired using the information posted.

## Pennsylvania

	2020	2022	2025	2028	2030
Imports from PJM RGGI	2	5	8	10	11
Imports from PJM Non-RGGI	12	7	8	6	5
Imports from NYISO	0	-	1	1	1
Imports from Non-PJM	0	-	-	0	0
Exports to PJM RGGI	73	97	93	82	72
Exports to PJM Non-RGGI	1	8	14	19	16
Exports to NYISO	5	2	3	3	4
Exports to Non-PJM	1	0	1	1	1
Net	(66)	(96)	(94)	(87)	(76)

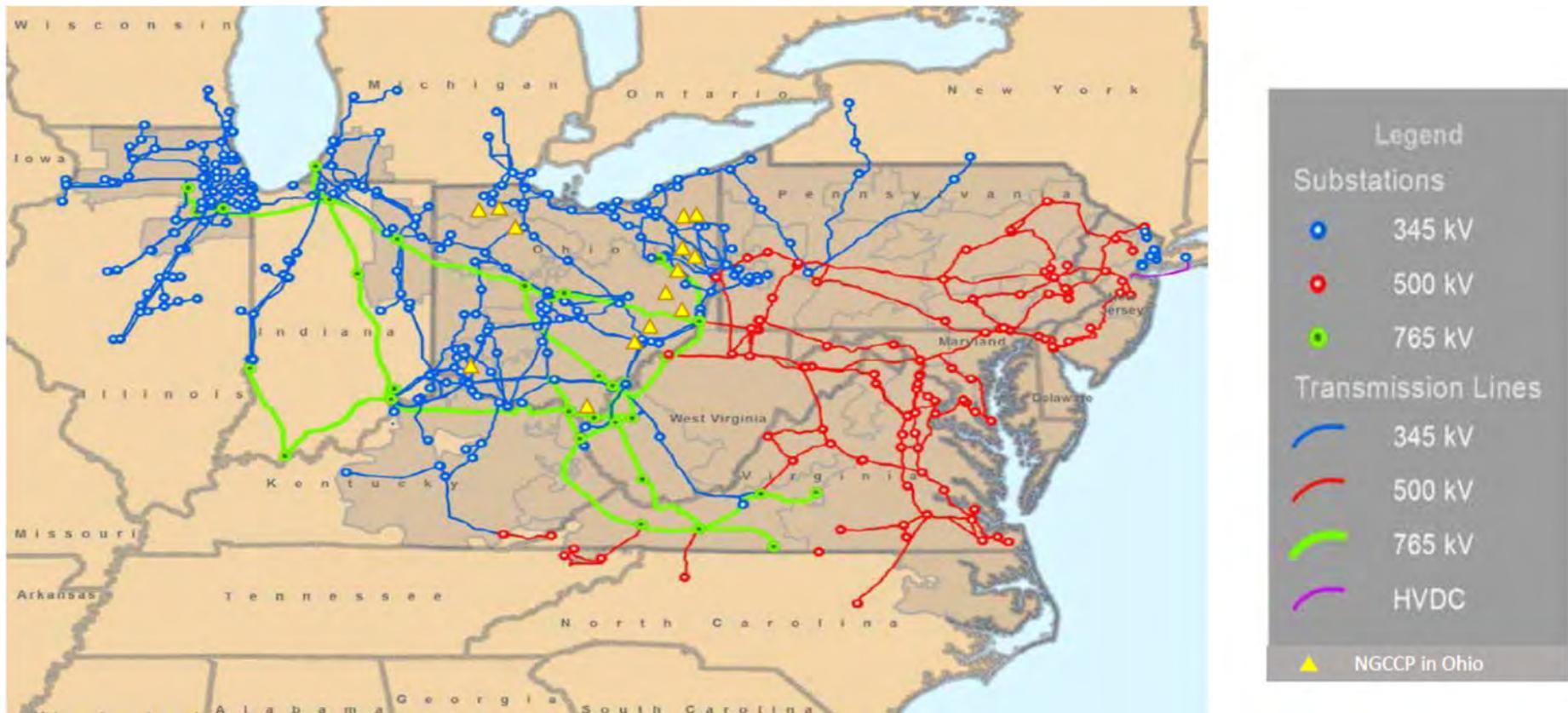
John F. Krueger | Assistant Bureau Director  
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# **Exhibit E**

# PJM Service Territory – All or portions of PA, NJ, DE, MD, VA, NC, WV, KY, OH, IL, IN, MI, TN and DC

Please note number of newly permitted and constructed natural gas electric generating stations located in Ohio (▲) and their proximity to PJM's high voltage transmission lines.



The PA DEP's IPM RGGI modeling did not account for the

- 2 facilities currently under construction (K and L); or
- 2 facilities that were issued construction permits within the last 3 years but have not yet commenced construction (M and N); or
- 2 facilities that were issued construction permits in Q1 2020 but not yet commenced construction (I and J)

A go / no-go decision on construction, and consequential impact on electrical generation shifting from PA westward, will likely be influenced by the outcome of PA DEP's draft proposed RGGI Rule.

### Natural Gas Combined Cycle Plants In Ohio (11/3/17)

#### Operating Facilities ▲

- A) Washington Energy Facility (Beverly, OH), 715 MW
- B) Waterford Plant (Waterford, OH), 921 MW
- C) Hanging Rock Energy Facility (Ironton, OH), 1430 MW
- D) Fremont Energy Center (Fremont, OH), 740 MW
- E) Oregon Clean Energy Center (Oregon, OH), 1060 MW
- F) Clean Energy Future Lordstown (Lordstown, OH), 962 MW
- G) Carroll County Energy, LLC (Washington Twp., OH), 832 MW
- H) NTE Ohio, LLC - Middletown Energy Center (Middletown, OH), 544 MW

Total – 7204 MW

#### Recently Permitted Facilities ▲

- I) Oregon Energy Center (Oregon, OH), PTI issued March 2020, 955 MW net
- J) Trumbull Energy Center (Lordstown, OH), PTI issued Feb 2020, 940 MW
- K) South Field Energy (Wellsville, OH), PTI issued Sept 2016, 1150 MW – Broke Ground May 2019
- L) Hannibal Port Power Station (Hannibal, OH), PTI issued Nov 2017  
(Long Ridge Energy Generation LLC – Hannibal Power), 485 MW – Broke Ground May 2019
- M) Guernsey Power Station (Byesville, OH), PTI issued Oct 2017, 1650 MW
- N) Ohio River Partners LLC: Harrison Power (Cadiz, OH), PTI issued April 2018, 1000 MW

Total – 6180 MW

