McNees Wallace & Nurick LLC

100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Susan E. Bruce
Direct Dial: 717.237.5254
Fax: 717.260.1666
sbruce@mcneeslaw.com

January 14, 2021

VIA EMAIL AND FIRST-CLASS MAIL

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477
RegComments@pa.gov

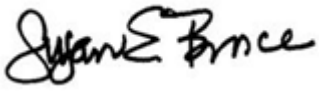
RE: CO2 Budget Trading Program

Dear Madam/Sir:

Enclosed please find comments submitted on behalf of the Pennsylvania Energy Consumer Alliance ("PECA") regarding the above-referenced proposed rulemaking by the Environmental Quality Board published in the *Pennsylvania Bulletin* on November 7, 2020.

Very truly yours,

McNEES WALLACE & NURICK LLC



By
Susan E. Bruce

Enclosure

BEFORE THE
PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD

CO_2 Budget Trading Program	**:**	**25 Pa. Code Chapter 145, Subchapter E**

COMMENTS OF THE
PENNSYLVANIA ENERGY CONSUMER ALLIANCE

I. INTRODUCTION

On November 7, 2020, the Pennsylvania Environmental Quality Board ("EQB" or "Board") published a proposed rulemaking in the *Pennsylvania Bulletin* titled "CO_2 Budget Trading Program" ("Proposed Rulemaking"). 50 Pa. Bull. 6212 (Nov. 7, 2020). Among other things, the Proposed Rulemaking seeks to amend 25 Pa. Code Chapter 145 by adding a new Subchapter E that would establish a carbon dioxide ("CO_2") budget trading program with the objective to reduce anthropogenic emissions of CO_2 and enter the Commonwealth into the Regional Greenhouse Gas Initiative ("RGGI"). Aside from several provisions that are unique to Pennsylvania, the Proposed Rulemaking tracks closely with the 2017 version of the RGGI Model Rule.

The Pennsylvania Energy Consumer Alliance ("PECA") submits these Comments in response to the Proposed Rulemaking. PECA is an unincorporated association of large energy consumers that advocates for statewide energy and environmental policies that advance the interests of large commercial and industrial ("large C&I") customers of energy with the goal of supporting economic growth within the Commonwealth. PECA members include commercial, institutional, and industrial customers of electricity throughout the Commonwealth. Because the cost of electricity (including regulatory costs) is a substantial portion of the operating budgets of

PECA members and many members also operate and rely upon onsite generation, including combined heat and power ("CHP") systems, to support their business operations, the Board's Proposed Rulemaking is of particular concern, especially during the current economic conditions caused by the COVID-19 pandemic. To be clear, many PECA members support the policy direction underlying the Proposed Rulemaking, specifically the reduction of greenhouse gases, and have undertaken tangible and measurable sustainability initiatives within their organizations. It is with this perspective that PECA offers these constructive Comments on the Proposed Rulemaking for the Board's consideration and incorporation into any final action.

II. COMMENTS

PECA appreciates this opportunity to comment on the Proposed Rulemaking. As a threshold matter, PECA notes that, while the Proposed Rulemaking nominally focuses on the Commonwealth's electricity generation sector, the proposed regulations may have unintended, detrimental consequences for large C&I end-users engaged in highly competitive, energy-intensive businesses and trades throughout the Commonwealth. Many members of PECA have specifically chosen to locate and operate within the Commonwealth due in part to its lower energy costs. Accordingly, PECA is concerned that the Proposed Rulemaking fails to consider, or offer practical options to mitigate, the potential adverse economic impact of tying Pennsylvania's environmental controls to those of other states that may not be similarly situated to the Commonwealth in terms of public policy objectives, especially the impact on Pennsylvania's energy-intensive consumers. Moreover, as many PECA members have also heavily invested in cogeneration units and CHP systems, the Proposed Rulemaking may have unduly punitive effects on such businesses and a chilling effect on additional investment in such systems, which provide measurable efficiency and environmental benefits to the Commonwealth.

In response to the Proposed Rulemaking, PECA offers the following recommendations:

- Given the Commonwealth's policies favoring cogeneration and CHP systems, the Board should utilize and incorporate existing regulatory regimes to exclude or exempt such resources from the Proposed Rulemaking.
- To the extent that the Board does not adopt PECA's recommendation above, the Board should:
    - Clarify that the 25 MWe applicability threshold in Section 145.304(a) will be determined on a unit-by-unit basis, rather than through facility-level aggregation, consistent with the implementing regulations of other RGGI member states;
    - Revise the limited exemptions under Section 145.305(a) to provide adequate flexibility and safeguards for large C&I end-users with CHP that experience force majeure events resulting in exceedances of applicable permitting restrictions on energy output;
    - Modify the Proposed Rulemaking such that, in the event an otherwise exempt electric generation unit ("EGU") loses its exemption under Section 145.305, the total number of CO_2 Allowances that the owner or operator must obtain be measured by the percentage of output that exceeds the applicable percentage limitation in the facility's operating permit, rather than the EGU's total annual gross generation;
    - Clarify that, in the event an otherwise exempt EGU loses its exemption under Section 145.305 in a given year, the EGU regains its exemption at the beginning of the next calendar year; and,
    - Clarify the types of data, documentation, and other records that must be retained by an owner or operator to meet the record retention requirements under Section 145.305(c)(3).
- The Board and the Pennsylvania Department of Environmental Protection ("PADEP") should release a proposed plan for the use of auction proceeds as part of the Proposed Rulemaking,

rather than in a separate proceeding, to ensure stakeholders are able to perform a complete evaluation of cost-benefit impacts of Pennsylvania joining RGGI. As part of the proposed plan, PECA recommends that at least one-third of auction proceeds be dedicated to assist large C&I customers.

- The Proposed Rulemaking should be revised to include essential protections for Pennsylvania energy consumers, including procedures to formally withdraw Pennsylvania from RGGI in response to damaging energy price fluctuations, the loss of energy exports, or revisions to the RGGI Model Rule inconsistent with Pennsylvania's public policy objectives.

Due to the number of issues preliminarily identified by PECA in these Comments, PECA strongly encourages the Board and PADEP to continue evaluating potential alternatives to the Proposed Rulemaking, which could allow for a carbon-reduction program to be tailored to reflect Pennsylvania's unique characteristics. While the "one size fits all" approach offered by RGGI may provide a workable framework for other states, Pennsylvania's rich in-state energy resources and the development thereof set the Commonwealth apart from current RGGI member states. In protecting Pennsylvania's valuable public natural resources, the Board and PADEP should proceed cautiously and avoid surrendering their authority to develop programs, policies, and regulations that acknowledge, reflect, and preserve Pennsylvania's distinctive strengths, employment opportunities, energy consumers, and Pennsylvania's status as a leading energy producer and exporter.

A. Pennsylvania's Unique Characteristics Warrant Modifications to the Proposed Rulemaking To Safeguard Environmentally Beneficial Cogeneration Units and CHP Systems.

Unlike the current membership of RGGI, Pennsylvania is a leading energy exporter with vast reserves of natural gas, the development of which have been essential in meeting high energy demands, fostering economic growth, and providing stable, well-paying jobs to residents across

the Commonwealth. At the same time, large C&I energy users in Pennsylvania were early to recognize the efficiency and environmental benefits associated with cogeneration and CHP and have invested significant resources in developing these sustainable technologies. The various benefits derived from cogeneration and CHP have been recognized by the Pennsylvania Public Utility Commission ("PAPUC"). *See* 52 Pa. Code § 3201 ("CHP systems can be an integral part of the defense to natural disasters and manmade attacks on the electric distribution system. CHP can be an important component in addressing environmental concerns and offers significant potential for economic development. In conjunction with natural gas from shale gas resources, CHP also offers potential for lower costs for consumers.").

Due to Pennsylvania's unique position as a leading energy exporter and developer of natural gas technologies, PECA recommends that the Board revise Sections 145.304 and 145.305 of the Proposed Rulemaking to further limit the potential adverse impacts on energy-intensive businesses with cogeneration and CHP resources. To this end, PECA recommends that the Board revise Sections 145.304 and 145.305 by tying the applicability of the Proposed Rulemaking to existing regulatory regimes, such as by exempting qualifying facilities under the federal Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3. *See* 16 U.S.C. § 796(17)-(18) (defining "qualifying small power production facility" and "qualifying cogeneration facility."). Alternatively, PECA recommends that the Board revise Section 145.305 to incorporate additional exemptions based on the definitional exclusions for cogeneration units and CHP systems under the federal Environmental Protection Agency's air quality regulations. *See, e.g.*, 40 C.F.R. §§ 51.123(cc), 60.5509(b), 97.404(b). Specifically, a cogeneration unit or CHP system that is subject to a federally enforceable permit condition limiting the unit's net-electric sales to no more than

one-third of its potential electric output or 219,000 MWh, whichever is greater, should be exempted from the Proposed Rulemaking.

While PECA appreciates the Board's motivations underlying the Proposed Rulemaking, in its current form, the Proposed Rulemaking creates significant regulatory uncertainty and would impose additional, unpredictable costs and burdensome compliance obligations on Pennsylvania businesses that own and operate cogeneration units and CHP systems. Given that the focus of the proposed rulemaking centers on Pennsylvania's electricity generation sector, rather than large C&I businesses manufacturing goods and furnishing services, PECA strongly encourages the Board to revise the Proposed Rulemaking accordingly to minimize any inadvertent, negative impacts to owners and operators of cogeneration units and CHP systems. In the event the Board elects not to adopt more protective measures, such as those proposed above, for Pennsylvania businesses with cogeneration and CHP, PECA requests that the Board and PADEP seriously consider the recommendations detailed in the Comments below.

B. To the Extent the Board Does Not Exempt All Cogeneration Units and CHP Systems, the Board Should Clarify the Applicability of the Threshold Within the Proposed Rulemaking.

Under the Proposed Rulemaking, the Board proposes to limit the applicability of Chapter 145, Subchapter E to owners and operators of EGUs with a nameplate capacity equal to or greater than 25 MWe ("CO_2 Budget Units").[1] *See* 50 Pa. Bull. 6212, Annex A (25 Pa. Code § 145.304(a)).[2] The Board also proposes to conditionally exempt certain CO_2 Budget Units based on restrictions

[1] Under the Proposed Rulemaking, a "unit" is defined as "[a] fossil fuel-fired stationary boiler, combustion turbine or combined cycle system." 25 Pa. Code § 145.302.

[2] For purposes of efficiency, subsequent citations relating to the Proposed Rulemaking will be made to the relevant section under proposed Chapter 145.

in a regulated facility's operating permit issued under 25 Pa. Code Chapter 127 ("AQ Permit"). *See* 25 Pa. Code § 145.305(a).

If the Board elects not to take other steps to protect the development and use of environmentally beneficial cogeneration units and CHP systems as detailed in Section A above, then, as a threshold matter, PECA requests that the Board clarify the applicability provisions under Section 145.304(a) by confirming that, in each instance, the 25 MWe threshold based on an EGU's nameplate capacity is determined on a unit-by-unit basis, rather than by aggregating the total capacity of all EGUs present at a given facility. For example, a facility with two separate EGUs that are each rated at 15 MWe should not have a compliance obligation under the Proposed Rulemaking, while a different facility with a single EGU rated at 30 MWe would be subject to Chapter 145, Subchapter E as a CO_2 Budget Unit unless exempted under Section 145.305(a). Members of PECA operate in various other RGGI states and have confirmed that other RGGI member states apply the threshold applicability provisions using a unit-by-unit approach, rather than through facility-level aggregation. Clarifying the applicability of the Proposed Rulemaking is critical to both ensuring consistency between the various state regulatory programs under RGGI and preventing the inadvertent creation of competitive disadvantages for Pennsylvania-located cogeneration units and CHP systems.

C. To the Extent the Board Does Not Exempt All Cogeneration Units and CHP Systems, the Proposed Exemption Relating to Grid Export Limitations Should be Revised To Provide Additional Flexibility and Regulatory Certainty.

As noted above, the Board proposes to conditionally exempt from the Proposed Rulemaking certain EGUs based on restrictions in a facility's AQ Permit. Specifically, Section 145.305(a) provides limited exemptions for cogeneration units and CHP systems that are subject to a permitting condition restricting either (1) the unit's electrical output to the grid to ≤ 10% of its annual gross generation, or (2) the annual total useful energy supplied by the unit to a non-

interconnected facility to ≤ 15%. Section 145.305(c) further provides that, in order to maintain a conditional exemption under Section 145.305(a), the owner or operator must comply with the supply restriction in the facility's AQ Permit, submit an annual report of the exempt EGU's annual gross generation to PADEP, and, for a period of ten years, retain records demonstrating compliance with the conditions in the facility's AQ Permit. In the event an owner or operator fails to strictly adhere to these requirements, the exemption will be lost and the EGU will become subject to the full requirements of Chapter 145, Subchapter E. *See id.* § 145.305(c)(5)(ii).

PECA understands the Board's intent to limit the exemption only to those owners or operators that provide a relatively small portion of their output to the grid. However, in practice, the proposed design of the limitation appears to be unreasonably inflexible and may result in unduly punitive results for businesses that have invested in efficient cogeneration and CHP systems. As discussed previously, it is common for manufacturers or institutional customers to size their CHP system to serve their thermal requirements. Those thermal requirements would exist regardless and, absent investment in CHP, result in a business purchasing and burning natural gas and then separately purchasing and utilizing electricity. By incorporating CHP into their process requirements, a business is positioned to "wring out" all the efficiencies from the natural gas, and electricity produced by the CHP beyond a customer's requirements becomes a byproduct that can be sold to the grid. When a business sizes its CHP system according to efficiency imperatives, the Board appropriately recognizes that the excess electricity beyond a business's requirements is a relatively small percentage; 10-15% is not an unreasonable benchmark. However, the intricacies of manufacturing/process requirements are such that it could be that a manufacturing line were to trip off, and result in a temporary increase in electricity exports to the electric grid before the business can back down its generation. Under the Proposed Rulemaking,

if a business were to export more than the allowed 10 to 15% allowance due to a force majeure condition, as applicable, it would be relegated to being considered fully within the electricity sector and subject to RGGI for the entirety of its on-site generation. To PECA, this appears to be unduly discriminatory and could result in significant risk exposure to businesses.

Relying upon the flexibility afforded to the Board under the RGGI Model Rule, the Board should revise the Proposed Rulemaking to provide regulatory certainty and sufficient safeguards to owners and operators of cogeneration units and CHP systems that provide crucial efficiency and environmental benefits to the Commonwealth. First, the Proposed Rulemaking fails to consider market and operating conditions beyond a facility's control that may result in exceedances of the applicable limits in the facility's AQ Permit. For example, whether due to extreme weather events, a pandemic, or critical maintenance and upgrades, a facility with co-located onsite generation may be required to temporarily reduce or halt operations, thus resulting in a corresponding decrease in onsite energy consumption. During these force majeure type events; excess supply may be redirected to the electric grid beyond those levels established in the facility's AQ Permit.

As currently drafted, however, the Proposed Rulemaking fails to account for such events. Thus, an affected EGU would lose its exemption under Section 145.305(a) and become subject to the full requirements of Chapter 145, Subchapter E, including being required to apply for a permit modification, establishing a compliance account, participating in annual CO_2 allowance auctions or purchasing CO_2 allowances in the secondary market, and monitoring, reporting, and recordkeeping obligations. Contrary to the public policy goals of the Proposed Rulemaking, such a result unfairly penalizes businesses that own and operate facilities with cogeneration units and CHP systems, and would serve as a disincentive to commercial and industrial facilities that are

considering constructing new, or expanding existing, onsite CHP generation, thus thwarting other Commonwealth policies favoring CHP. *See* 52 Pa. Code §§ 69.3201-3203.

Furthermore, as many of the events that may inadvertently result in an EGU exceeding the applicable supply restriction are unpredictable or unavoidable, the Proposed Rulemaking fails to provide regulatory certainty, thus potentially subjecting owners and operators of affected facilities to additional, unbudgeted regulatory costs and associated compliance obligations. Owners and operators of facilities equipped with cogeneration units and CHP systems are primarily in the business of manufacturing products or providing services. These businesses must consider all inputs and outputs to develop budgets that are used to both (1) price current manufacturing orders and services, and (2) make decisions regarding the sustainability of facilities and the location of new facilities. In the event a large C&I end-user is suddenly subjected to increased regulatory compliance obligations and costs for all or a portion of a facility's cogeneration or CHP output, the business may face temporary or ongoing losses, potentially resulting in job cuts or facility closures. Additionally, due to such uncertainty and a facility's inability to develop a predictable and accurate budget, additional facilities and production may be directed outside of the Commonwealth. As many cogeneration units and CHP systems rely upon natural gas, the uncertainty created by the Proposed Rulemaking and the threat of additional compliance obligations for owners and operators of cogeneration units and CHP systems may depress the beneficial use of Pennsylvania's crucial in-state energy resources. The Board, therefore, should revise the Proposed Rulemaking to include additional flexibility or a safe harbor for facilities with co-located cogeneration and CHP systems that experience force majeure events as outlined above, resulting in anomalous electricity exports above the threshold.

Second, in conjunction with the above recommendations, the PECA requests the Board revise the Proposed Rulemaking by clarifying the compliance obligation of exempted EGUs that, in a given year, exceed the applicable supply restriction in the co-located facility's AQ Permit. Under Section 145.305, if an otherwise exempt EGU exceeds the applicable supply restriction in the associated facility's AQ Permit, the EGU loses its exemption under Section 145.305(a) and is deemed to "commence operation" on the date the exemption is lost. *Id.* § 145.305(c)(6). From the date the EGU loses its exemption (*i.e.*, the date the EGU "commences operation"), the owner or operator must ensure sufficient CO_2 allowances are held in the facility's compliance account for the applicable control and interim control periods. *See id.* § 145.306(c)(2). The Proposed Rulemaking, however, fails to explicitly state how a previously exempted EGU's compliance obligation is to be measured during either a control or interim control period in which the exemption is lost.

Accordingly, PECA requests the Board revise the Proposed Rulemaking to make clear that owners and operators of previously exempted EGUs are only required to obtain and hold CO_2 allowances for the affected EGU as measured by the percentage of output that exceeds the applicable percentage limitation in the facility's AQ Permit, rather than the EGU's total annual gross generation. For example, if a facility's EGU is subject to a 10% supply restriction per Section 145.305(a), but the EGU ultimately supplies 12% of its annual gross generation to the electric grid in a given year, then the number of CO_2 allowances the owner or operator must obtain and hold in the facility's compliance account should be calculated based on the emissions measurements that correspond with the excess output supplied to the electric grid (*i.e.*, 2%), rather than the EGU's total annual gross generation. Again, however, PECA also recommends that any exceedances

attributable to a force majeure event, as described above, should not result in the loss of an exemption or otherwise trigger a compliance obligation under Chapter 145, Subchapter E.

Third, while the Proposed Rulemaking details how an exempt EGU may lose its exemption under Section 145.305(a), additional clarification is necessary to address the interplay between the Proposed Rulemaking and related permit conditions enforceable under 25 Pa. Code Chapter 127. Under Section 145.305(c)(5), an exempt EGU that fails to comply with the applicable supply restriction in the associated AQ Permit will lose its exemption and be deemed to "commence operation" on the same date. The supply restriction applicable to the EGU, however, will remain a separately enforceable permit condition even after the EGU loses its exemption under Section 145.305. Therefore, PECA requests the Board clarify that, while an exemption under Section 145.305(a) may be lost in a given year, the exemption becomes effective again after the end of the year in which the supply restriction was exceeded. This clarification is necessary to ensure that an owner or operator of an EGU that exceeds an applicable supply restriction in one year is not unfairly penalized in subsequent years when the EGU meets all of the conditions for an exemption under Section 145.305(a).

Lastly, PECA requests the Board provide additional clarification regarding the type of information, data, and records that must be maintained to demonstrate compliance with a supply restriction under an AQ Permit. Under Section 145.305(c)(3), owners and operators of exempt EGUs are required to retain "records demonstrating that conditions of the permit under subsection (a) were met," and the owner or operator "bears the burden of proof that the unit met the restriction on the percentage of annual gross generation that may be supplied to the electric grid." In the event PADEP determines that an owner or operator "fails to meet their burden of proving that the unit is complying with the restriction," the exemption under Section 145.305(a) is lost. *See id.* §

145.305(c)(5)(ii). The Proposed Rulemaking, however, fails to expressly state the types of information or records that an owner or operator would need to retain in order to demonstrate compliance. Moreover, as the applicable retention period under Section 145.305(c) is ten years, the Proposed Rulemaking leaves open the question of whether PADEP would seek to retroactively enforce a compliance obligation on owners and operators of exempt EGUs. For example, if PADEP determines that an owner or operator of an exempt EGU failed to carry the burden of proof under Section 145.305(c)(3) for seven years during a ten-year record retention period, would PADEP require the owner or operator to obtain CO_2 allowances for all seven years, and, if so, how would PADEP calculate the number of CO_2 allowances required? Given the potentially high costs associated with losing an exemption, clarification on these points is again crucial for both providing regulatory certainty to the regulated community and for reducing potentially conflicting interpretations in the event the Proposed Rulemaking is finalized.

D. The Board Should Address the Allocation of Auction Proceeds To Ensure Stakeholders Can Fully Evaluate the Impact of the Proposed Rulemaking.

A substantial component of any review of the Proposed Rulemaking must include consideration of the intended use of proceeds derived from the auction of CO_2 allowances. Under Pennsylvania's Regulatory Review Act ("RRA"), 71 P.S. §§ 745.1 *et seq.*, the Board is required to provide an estimate "of the direct and indirect costs to the Commonwealth, its political subdivisions and to the private sector." 71 P.S. § 745.5(a)(4). In the Proposed Rulemaking, however, the Board indicates that any plan outlining reinvestment options for auction proceeds will be addressed separately from the Proposed Rulemaking. Additionally, as noted by other commenters, the Board has also failed to provide any analysis regarding the potential cost impact of the Proposed Rulemaking on large C&I consumers. As the reasonableness and feasibility of the Proposed Rulemaking hinges in large part on the Board's and PADEP's intentions regarding

the investment of auction proceeds, stakeholders are unable to perform a complete, meaningful review of the Proposed Rulemaking. Simply put, any discussion concerning the cost impacts of the Proposed Rulemaking are incomplete or merely speculative until a proposal is released concerning the intended use of auction proceeds.

Similarly, to the extent the Board relied upon certain investment modeling during its review of the Proposed Rulemaking, PECA cautions that such models should not be used to justify the Proposed Rulemaking as such models are, at best, speculative and based on a set of assumptions that have yet to be formalized into an actual investment plan. Consequently, PECA strongly urges the Board to include a proposed investment plan in subsequent phases of the present rulemaking along with a corresponding public comment period before the rulemaking becomes final.

To assist in this effort, PECA offers the following recommendations regarding potential investment options for auction proceeds. In combination, large C&I energy users have a substantial impact on overall energy usage and production in the Commonwealth. Additionally, many large C&I users have taken early action by implementing energy efficiency and sustainability initiatives as well as harnessing the benefits of cogeneration and CHP systems, all of which have resulted in significant efficiency and environmental benefits to the Commonwealth. Under the Proposed Rulemaking, however, large C&I users are concerned that they may experience increased energy costs and bear substantial regulatory compliance obligations if they own on-site generation to support their process requirements. As many facilities equipped with on-site generation will soon be subject to dramatically higher fees under forthcoming amendments to the air quality fee schedules in 25 Pa. Code Chapter 127, any additional costs placed on large C&I energy users may have negative impacts on the Commonwealth's economy. *See* 49 Pa. Bull. 1777 (Apr. 13, 2019).

Based on PADEP's preliminary estimate that the first year of auctions will produce approximately $300 million in proceeds, PECA strongly recommends that at least one-third of these proceeds be used to assist large C&I customers. Due to the efficiency and environmental benefits offered by cogeneration and CHP systems, PECA initially recommends that a portion of auction proceeds be directed to assisting large C&I users, such as through grants to help fund additional greenhouse gas ("GHG") abatement strategies or to implement energy efficiency and sustainability measures that further the policy goal of reducing anthropogenic emissions of CO_2. Alternatively, as large C&I users will be placed in the unique position of having to both pay potentially higher energy costs *and* comply with additional regulatory burdens associated with cogeneration units and CHP systems under the Proposed Rulemaking, PECA suggests that a portion of auction proceeds be utilized to offset both the anticipated energy cost increases, such as through a rebate or bill credit, and the regulatory costs associated with the additional compliance obligations to be borne by owners and operators of cogeneration units and CHP systems.

E. The Board Should Revise the Proposed Rulemaking To Include Essential Protections for All Pennsylvania Energy Consumers.

The Proposed Rulemaking fails to adequately consider or plan for several contingencies that are key to analyzing the feasibility and sustainability of enrolling the Commonwealth in RGGI. While the Proposed Rulemaking includes a cost containment reserve mechanism to help mitigate spikes in the price of CO_2 allowances, the Proposed Rulemaking fails to address or provide safeguards against potentially devastating increases in Pennsylvania energy prices, emissions leakage, or job losses. In fact, only the *preamble* to the Proposed Rulemaking includes even a cursory discussion of emissions leakage. Additionally, as a condition to joining RGGI, Chapter 145, Subchapter E must closely align with the RGGI Model Rule and, in the event the RGGI Model Rule is revised (as is expected in the summer of 2021), Subchapter E would necessarily require

revision in order for the Commonwealth to meet its obligations under the RGGI Memorandum of Understanding. On this point, however, the Proposed Rulemaking is silent, yet by joining RGGI, the Commonwealth would surrender much of its power to directly control the content of the regulations it enforces.

To address these contingencies, PECA recommends that the Board revise the Proposed Rulemaking to include safeguards to protect Pennsylvania's energy consumers, jobs, and status as an energy exporter. First, with regard to energy prices, leakage, and overall economic impacts, PECA strongly encourages the Board to provide a mechanism or procedure that would act as a safety valve, such as by including in the Proposed Rulemaking a set of triggering events (*e.g.*, energy price increases or the loss of energy exports above certain threshold levels) that, upon occurrence, would automatically result in a suspension of enforcement, obligate the Board to initiate the necessary rulemaking process to repeal Chapter 145, Subchapter E, and formally withdraw the Commonwealth from RGGI. Second, due to concerns over the impact future revisions to the RGGI Model Rule may have on the Commonwealth, PECA recommends that the Proposed Rulemaking be revised to expressly indicate that, unless and until adopted and finalized by the Board through the ordinary rulemaking process under Pennsylvania law, no revisions made to the RGGI Model Rule will be enforced or effective in Pennsylvania. Additionally, PECA also suggests the Proposed Rulemaking be revised to include a mandate that would require PADEP, in the event of a future rulemaking due to changes in the RGGI Model Rule, to perform a complete evaluation of the impact of RGGI on the Commonwealth under both the then-current version of Chapter 145, Subchapter E and the revised version of the RGGI Model Rule under consideration. In performing this evaluation, among other things, PADEP would be required to analyze changes in energy prices, job growth and loss, emissions leakage, and energy exports.

F. The Board Should Continue To Consider Potential Alternatives to Joining RGGI.

Due to the significant issues that remain to be addressed in the current rulemaking, as well as those concerns related to Pennsylvania's enrollment in RGGI generally, PECA urges the Board and PADEP to continue to explore alternative measures that can be tailored to reflect the Commonwealth's unique strengths and challenges. Analysis of alternative measures by the Board and PADEP is not only advisable from a public policy standpoint but is also mandated under the RRA. *See* 71 P.S. § 745.5(a)(12). On this point, PADEP's Regulatory Analysis Form ("RAF") submitted to the Independent Regulatory Review Commission ("IRRC") is deficient. In conclusory fashion, PADEP simply states that "[t]here are no less intrusive or less costly alternative regulatory provisions available." RAF at 47. This sweeping statement fails to satisfy the IRRC's requirements. Contrary to the requirements of the RRA, PADEP fails to provide any indication of what alternatives, if any, were considered by PADEP in reaching its conclusion, such as a Pennsylvania-only program. *See* 71 P.S. § 745.5(a)(12) (requiring agencies to provide a "description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected"). Moreover, as the Board's and PADEP's authority to enroll Pennsylvania unilaterally in RGGI under the Air Pollution Control Act, 35 P.S. §§ 4001 *et seq*., is questionable and fraught with legal uncertainty, proceeding with the Proposed Rulemaking increases the likelihood of protracted litigation, thus resulting in additional costs to the Commonwealth, its businesses, and its residents.

While RGGI may be appropriate for the current membership of states, which may be viewed as similarly situated, Pennsylvania's unique status as leader in natural gas production and energy exports, coupled with a robust collection of large C&I users that have already and continue to implement energy efficiency and sustainability initiatives, weighs heavily in favor of a more

tailored approach appropriate to Pennsylvania, its businesses, and its residents. Pennsylvania should continue to pursue a course that reflects Pennsylvania's policy objectives, rather than joining a program designed to advance the policy goals of other states, including the current membership of RGGI. In the event the Board and PADEP elect to develop a Pennsylvania-specific program, PECA would initially recommend that any such program incorporate the protections for cogeneration units and CHP systems detailed in Section A above.

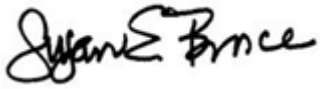
Furthermore, as the current RGGI Model Rule will soon undergo another set of revisions in mid-2021, the timing of the Proposed Rulemaking is inappropriate. First, if Pennsylvania joins RGGI, any revisions made by RGGI's member states in the coming months would necessarily require additional review and analysis by the Board and PADEP, including potentially extensive revisions to the current Proposed Rulemaking or the immediate initiation of a subsequent rulemaking. Pushing ahead under the Proposed Rulemaking, therefore, will result in waste and increased costs during a time when many of Pennsylvania's residents and businesses are struggling due to the economic conditions wrought by the COVID-19 pandemic. Second, to proceed with joining RGGI while the RGGI Model Rule is under review—a process likely to unfold prior to Pennsylvania's enrollment in RGGI and without formal input by Pennsylvania—fails to amount to reasoned decision making, is legally suspect, and threatens Pennsylvania's energy consumers with substantial uncertainty. Again, PECA cautions the Board that the timing of the Proposed Rulemaking is ill-advised.

III. CONCLUSION

For all the foregoing reasons, the Pennsylvania Energy Consumer Alliance respectfully submits that the Proposed Rulemaking should not be adopted unless modified as described herein to ensure adequate protection against significant detrimental impacts to retail energy consumers in Pennsylvania.

Respectfully submitted,

McNEES WALLACE & NURICK LLC



By_____

Susan E. Bruce (Pa. I.D. 80146)
Errin T. McCaulley, Jr. (Pa. I.D. 325966)
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17108-1166
Phone: 717.232.8000
Fax: 717.237.5300
sbruce@mcneeslaw.com
emccaulley@mcneeslaw.com

Counsel to the Pennsylvania Energy Consumer Alliance

Dated: January 14, 2021