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January 14, 2021

Via Email

Environmental Quality Board

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RegComments@pa.gov.

Re: Proposed Rulemaking Entitled CO₂ Budget Trading Program (#7-559)

The PowerPA Jobs Alliance (“PowerPA Jobs”) is a broad coalition of Pennsylvania-based organized labor, business, and community leaders who advocate for the interests of hardworking, blue collar families and communities in the Commonwealth. PowerPA Jobs appreciates the opportunity to provide the Pennsylvania Environmental Quality Board (“EQB”) with these comments on the proposed rulemaking entitled CO₂ Budget Trading Program (#7-559), which was published in the Pennsylvania Bulletin on November 7, 2020 (the “Proposed Rulemaking”).

The Proposed Rulemaking is designed to implement the Regional Greenhouse Gas Initiative (“RGGI”) in Pennsylvania. RGGI is a regional carbon dioxide (“CO₂”) emissions program that is currently being implemented in eleven states – Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia. In these states, consistent with RGGI, the owners of fossil-fuel-fired electric power plants with a capacity of 25 megawatts (MW) or greater are required to obtain allowances to offset the CO₂

emissions from the plants. The vast majority of those allowances are distributed through regional allowance auctions that a private corporation, known as RGGI, Inc., conducts on a quarterly basis. While RGGI's requirements are mandatory for regulated entities that operate in states that participate in the program, a state's participation in the program is entirely voluntary.

In developing the Proposed Rulemaking, the Pennsylvania Department of Environmental Protection ("PaDEP"), as required by statute, consulted with several statutorily-created independent advisory bodies: the Air Quality Technical Advisory Committee, Citizens Advisory Committee, and Small Business Advisory Committee. Each of those bodies formally voted *not* to approve the Proposed Rulemaking, concluding that adopting it would be contrary to the public interest. PowerPA Jobs agrees with them.

The EQB lacks the authority to adopt the Proposed Rulemaking. Moreover, in connection with the Proposed Rulemaking, the EQB has failed to follow certain administrative procedures that it is required to follow under Pennsylvania law. And, from a public policy perspective, adopting the Proposed Rulemaking would not materially benefit the natural environment and yet would have devastating, wide-ranging economic and other impacts on the Commonwealth's citizens.

The EQB should refuse to adopt the Proposed Rulemaking.

THE EQB LACKS THE AUTHORITY TO ADOPT THE PROPOSED RULEMAKING

For two primary reasons, the EQB is not empowered to adopt the Proposed Rulemaking.

First, the cornerstone of RGGI is a revenue-raising auction program that would qualify as a "tax" under Pennsylvania law. Only the General Assembly, not the EQB, has the power to impose such a tax.

Second, even apart from the tax issue, the EQB lacks the statutory authority to implement RGGI in Pennsylvania.

If the EQB implemented RGGI without the express statutory authority to do so, it would set a dangerous precedent and could, for example, lead to attempts to promulgate an economy-wide carbon tax (*e.g.*, on manufacturers), a concept that the PaDEP is currently evaluating.¹

¹ See EQB, Minutes, Environmental Quality Board Meeting April 16, 2019 at 8 (EQB voted to accept for PaDEP's further evaluation a petition for a "Regulation Establishing a Comprehensive Program to Limit Greenhouse Gas Emissions Through an Auction-Cap-and-Trade Program").

The EQB’s Implementation of RGGI Would Impose a Tax in an Unconstitutional Manner

It is “a concept basic and inherent in our form of government...established beyond question in the law of this Commonwealth” that the “power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution[.]”² To this end, Article III, Section 10 of the Pennsylvania Constitution provides that “[a]ll bills for raising revenue shall originate in the House of Representatives.”³ The EQB, as a corollary, is not authorized to unilaterally impose taxes on Pennsylvania businesses or residents.

Under prevailing Pennsylvania case law, something qualifies as a “tax” if it is a “revenue-producing measure.”⁴ Regulatory “fees,” by contrast, are merely “intended to cover the cost of administering a regulatory scheme.”⁵ And therefore, as Pennsylvania’s courts have explained, whether an income-producing mechanism imposes a “tax” or a “fee” turns on the volume of income that the mechanism generates and the proportion of the income that goes to cover the program’s administrative costs.⁶

Under this standard, RGGI’s quarterly auction mechanism – which is the heart of the program – would qualify as a “tax,” not a “fee,” because the proceeds of the auctions are grossly disproportionate to the costs of administering RGGI. Through 2018, in fact, the RGGI states had directed less than 6% of the proceeds toward the program’s administration.⁷ RGGI’s auction mechanism is designed to raise substantial sums of revenue – in fact, it has raised more than \$3 billion to date – and the participating states have used the vast majority of this revenue to either support policy initiatives (such as energy efficiency and renewable energy initiatives) or bolster state coffers through transfers to general funds.⁸ On this point, PaDEP has indicated that, if RGGI were implemented in Pennsylvania, one possibility is that 69 percent of the Commonwealth’s revenue from the quarterly auctions would be channeled into its general fund, which, by its very nature, is supported by tax revenues.⁹ For its part, the EQB acknowledges that, based on PaDEP’s modeling,

² *Mastrangelo v. Buckley*, 250 A.2d 447, 452 (Pa. 1969); *see also Wilson v. School District of Phila.*, 195 A. 90, 94 (Pa. 1937) (“The taxing power, one of the highest prerogatives, if not the highest, of the Legislature, must be exercised through representatives chosen by the people.”).

³ Pa. Const. art. III, § 10.

⁴ *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973).

⁵ *Rizzo v. City of Philadelphia.*, 668 A.2d 236, 237-38 (Pa. Cmwlth. 1995).

⁶ *See, e.g., Greenacres Apts., Inc. v. Bristol Tp.*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984).

⁷ *See RGGI, Inc., The Investment of RGGI Proceeds in 2018* (July 2020) at 12, available at https://www.rggi.org/sites/default/files/Uploads/Proceeds/RGGI_Proceeds_Report_2018.pdf.

⁸ *Id.*

⁹ *See PaDEP, Regional Greenhouse Gas Initiative, RGGI 101: How it Works and How it Benefits Pennsylvanians* (Aug. 6, 2020) at 19, available at

only six percent of the revenue from the quarterly auctions would be used “for any programmatic costs related to administration and oversight of the CO2 Budget Trading Program (5% for the Department and 1% for RGGI, Inc)[,]” which is “in line with the historical amounts reserved by the participating states.”¹⁰ The auction program therefore imposes a tax that, under well-established Pennsylvania law, only the General Assembly can impose.

This conclusion is consistent with the EQB’s limited authority under the Air Pollution Control Act (“APCA”) to establish emission fees. Under Section 6.3(a) of APCA, the EQB may *only* establish “fees sufficient to cover the indirect and direct costs of administering” APCA and the federal Clean Air Act (“CAA”).¹¹ The EQB therefore may *not* adopt regulations that would require regulated entities to pay emission “fees” (by purchasing emission allowances) that would generate revenues that were far in excess of the “indirect and direct costs of administering” APCA and the CAA. And yet the EQB would need to take *precisely* that approach in order to implement RGGI.¹²

Because RGGI’s auction program constitutes a tax measure, only the General Assembly could institute and mandate the program in the Commonwealth. The EQB’s adoption of the Proposed Rulemaking, as a consequence, would amount to an unconstitutional imposition of a tax on energy generators and consumers.

<http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/RGGI/FINAL%20RGGI%20101%20Webinar.pdf>.

¹⁰ 50 Pa. Bull. 6187, 6229 (Nov. 7, 2020).

¹¹ 35 P.S. § 4006.3(a).

¹² To make matters worse, a private corporation, RGGI, Inc., would determine the amount of the tax – which would fluctuate over time – and do so by using auction methodologies and standards that no Pennsylvania statute or regulation required it to use. The EQB, in this regard, characterizes RGGI, Inc.’s auction process as “*consistent* with the process described in this proposed rulemaking[,]” which is a tacit acknowledgment that Pennsylvania law would *not*, in fact, govern the process. 50 Pa. Bull. 6187, 6218 (Nov. 7, 2020) (emphasis added). Because there would be no Pennsylvania statutory or regulatory standard to bind or constrain RGGI, Inc. as it set the amount of the tax that regulated entities were required to pay, the corporation would be engaged in *legislating* (as opposed to fact-finding or implementing legislation), which would amount to a violation of the “non-delegation doctrine” that arises out of Article II, Section 1 of the Pennsylvania Constitution. *See West Philadelphia Achievement Charter Elem. Sch. v. Sch. Dist. of Philadelphia*, 132 A.3d 957, 965 (Pa. 2016) (statute that gave School Reform Commission “what amounts to *carte blanche* powers to suspend” provisions of Public School Code violated non-delegation doctrine because it failed to “impose[] any discernable standards or restraints in relation to the selection of School Code provisions for suspension”). As the Pennsylvania Supreme Court has explained, private entities like RGGI, Inc. “are isolated from the political process, and, as a result, are shielded from political accountability. Because of this, it is perhaps unsurprising that our precedents have long expressed hostility toward delegations of governmental authority to private actors.” *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827, 837 (Pa. 2017).

APCA Does Not Authorize the Adoption of Regulations to Implement RGGI

Even apart from RGGI's tax implications, the EQB does not have the statutory authority to adopt the Proposed Rulemaking to implement RGGI. APCA is the only potential source of that authority – and it does not authorize such an action.

As the Pennsylvania Supreme Court has explained, it is a “well settled principle that the power and authority to be exercised by administrative agencies must be conferred by the legislature.”¹³ As the Supreme Court has also explained, when it comes to a legislative delegation of rulemaking power, the delegation “must be clear and unmistakable as a doubtful power does not exist.”¹⁴

Under these principles, regardless of whether APCA authorizes the regulation of CO₂ emissions generally (which it does not, as explained below), the statute does *not* authorize the adoption of regulations to implement RGGI. While APCA gives PaDEP the authority to impose various requirements regarding air emissions – including recordkeeping, reporting, monitoring, and sampling requirements¹⁵ – and gives the EQB the authority to issue certain categories of regulations regarding air emissions,¹⁶ the statute is devoid of any clear authorization for any agency to adopt regulations that implement the detailed carbon-emission program, including the CO₂ allowances regime, that forms the foundation of RGGI. The result is that, if the EQB were to adopt the Proposed Rulemaking, its action would be *ultra vires* and void. Indeed, unlike Pennsylvania, every state that currently participates in RGGI has express statutory authority to do so or, like New York, has enacted an express statutory mandate to regulate CO₂ emissions.

The EQB contends that Section 5(a)(1) of APCA gives it the authority to adopt the Proposed Rulemaking.¹⁷ Section 5(a)(1) provides that the EQB may adopt regulations that, among other things, “establish maximum allowable emission rates of air contaminants” or “prohibit or regulate any process or source or class of processes or sources[.]”¹⁸ Although, with substantial effort and a sweeping view of the meaning of language, it may be possible to read these phrases so broadly that they would allow for regulations that implement the RGGI program, courts are not supposed to take that approach. Again, the applicable rule of statutory interpretation is that, in every

¹³ *Dep't of Envtl. Res. v. Butler Cnty. Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982).

¹⁴ *Eagle Envtl. II, L.P. v. PaDEP*, 884 A.2d 867, 878 (Pa. 2005) (internal quotations omitted).

¹⁵ See 35 P.S. § 4004(4), (5), & (6).

¹⁶ See generally 35 P.S. § 4005.

¹⁷ 50 Pa. Bull. 6187, 6212 (Nov. 7, 2020) (stating that “[t]his proposed rulemaking is authorized under section 5(a)(1) of the Air Pollution Control Act (APCA) (35 P.S. § 4005(a)(1)), which grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth.”).

¹⁸ 35 P.S. § 4005(a)(1).

case, a delegation of rulemaking power “*must be clear and unmistakable* as a doubtful power does not exist.”¹⁹

Separately, it is reasonable to conclude that APCA does not even authorize the regulation of CO₂ emissions generally. Section 5(a)(1) of APCA, in this regard, provides that when the EQB adopts the types of regulations that are noted above (e.g., regulations that set maximum allowable emission rates) it must do so “for the prevention, control, reduction and abatement of *air pollution*[.]”²⁰ No Pennsylvania court has held that the presence of ambient CO₂ or other greenhouse gases (“GHGs”) in the outdoor atmosphere constitutes “air pollution” within the meaning of the statute.²¹ And, in fact, ambient CO₂ does *not* meet the statute’s definition of “air pollution” because, unlike conventional pollutants (for example, lead, mercury, particulates, nitrogen oxides, and sulfur oxides), the inhalation of carbon dioxide or direct exposure to it at typical atmospheric concentrations is not “inimical to the public health, safety or welfare” or “injurious to human, plant or animal life or to property” and does not “unreasonably interfere[] with the comfortable enjoyment of life or property.”²² By its plain language, in other words, APCA signals that it does not allow for the regulation of substances whose sole environmental consequence is that they contribute to global climate change.²³

RGGI is also distinguishable from cap-and-trade programs like the acid rain SO₂ emissions program, premised on Section 401 of the CAA, and the Cross State Air Pollution Rule, premised on Sections 108 and 109 of the CAA. Unlike RGGI, each of these programs is rooted in the CAA and allows the owners of the regulated units to

¹⁹ *Eagle Envtl. II, L.P.*, 884 A.2d at 878 (emphasis added) (internal quotations omitted).

²⁰ 35 P.S. § 4005(a)(1) (emphasis added).

²¹ In *Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016), the Commonwealth Court suggested in a footnote that, under Section 5(a)(8) of APCA, the EQB had the authority to regulate GHGs in order to implement the CAA. *Id.* at 250, n. 17. This language, however, was non-binding dicta because (a) it was not integral to the court’s holding and (b) the respondents in the case (led by the Governor) had conceded the point. *Id.* at 250-51 (sustaining dismissal of petitioners’ mandamus action because respondents did not have mandatory duty to perform any of the climate change-related actions that petitioners wanted).

²² 35 P.S. § 4003 (defining “air pollution”).

²³ In this way, the APCA definition of “air pollution” is narrower than the CAA definition of “air pollutant.” The CAA defines “air pollutant,” in pertinent part, as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g). This definition, contrary to the APCA definition, does not focus on whether the presence of a pollutant is “inimical to the public health, safety or welfare” or “injurious to human, plant or animal life or to property” or something that “unreasonably interferes with the comfortable enjoyment of life or property.” With that point as a backdrop, the U.S. Supreme Court concluded in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that GHGs “fit well within the Clean Air Act’s capacious definition of ‘air pollutant’” for purposes of motor vehicle regulation under Title II of the CAA. *Id.* at 532. *But see Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (holding that GHGs are *not* an “air pollutant” for purposes of the permitting triggers under the CAA stationary source permit programs, which apply to power plants).

install controls on a specific project, manage multiple units at the fleet level, or trade or “average” emission allowances with other affected units. The allowances are budgeted at the particular emissions levels to be achieved and then allocated to the owners of the affected units, at no cost to them. The overall intent of the programs is to minimize emissions-control costs while still achieving the specified environmental benefit. This approach stands in contrast to RGGI, which requires owners of power plants to choose between paying a unit-specific tax for each ton of CO₂ that the unit emits or shuttering the unit. Under the RGGI framework, these options are the only ones that are available because the allowances are not allocated and instead need to be purchased. Importantly, there are no control options other than fuel switching, reduced utilization, or unit retirement. Fleetwide management is not an option. The notion that RGGI is a “cap and trade” program is therefore misguided.

What is more, even if the presence of CO₂ in the atmosphere amounts to “air pollution,” any attempt by the EQB to employ RGGI’s carbon taxing program to regulate emissions of that gas would not meaningfully “prevent[], control, reduc[e], and abate[]” climate change, as required for the agency to adopt regulations under APCA.²⁴ On a percentage basis, as further explained below, Pennsylvania’s fossil-fuel-fired power plants make only a miniscule contribution to total worldwide GHG emissions. The consequence is that, even if implementing RGGI in Pennsylvania were to completely eliminate carbon emissions from all regulated power plants in the Commonwealth (which, of course, it would not be designed to do), it would not materially impact the concentration of ambient CO₂ in the outdoor atmosphere. And this reality does not even account for the fact that Pennsylvania’s participation in RGGI would result in greenhouse gas emissions “leakage,” as power plants in nearby states like West Virginia, Ohio, Indiana, and Kentucky (all non-PJM states) would generate more electricity (and emissions) to compensate for operational reductions that occurred among power plants in the Commonwealth.

Finally, in addition to invoking Section 5(a)(1) of APCA as a predicate for the Proposed Rulemaking, the EQB says that Section 6.3(a) of the statute “also authorizes the Board by regulation to 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 (CAA).”²⁵ As explained above, however, this approach is misguided. Under Section 6.3(a), the EQB may *only* establish “fees sufficient to cover the indirect and direct costs of administering” APCA and the CAA,²⁶ and therefore may *not* adopt regulations, like the Proposed Rulemaking, that would require entities to pay “fees” (by purchasing emission allowances) that would generate revenues that far exceeded those costs.

²⁴ See 35 P.S. § 4005(a)(1) (EQB may “[a]dopt rules and regulations, for the prevention, control, reduction and abatement” of air pollution).

²⁵ 50 Pa. Bull. 6187, 6212 (Nov. 7, 2020).

²⁶ 35 P.S. § 4006.3(a).

All told, the EQB lacks the statutory authority to adopt the Proposed Rulemaking and should therefore decline to adopt it.

THE EQB HAS FAILED TO FOLLOW REQUISITE PROCEDURES

APCA establishes procedures that the EQB must follow in order to adopt a rulemaking. In this case, the EQB has failed to follow some of those procedures.

As one example, Section 7(a) of APCA states as follows:

Public hearings shall be held by the board or by the department, acting on behalf and at the direction or request of the board, *in any region* of the Commonwealth affected before any rules or regulations with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion. When it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for more than one region of the Commonwealth, the board may hold *one hearing for any two contiguous regions to be affected by such rules and regulations*. Such hearing may be held *in either of the two contiguous regions*. In the case where it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for any area of the Commonwealth which encompasses more than one region or parts of more than one region, public hearings shall be held *in the area concerned*. Full stenographic transcripts shall be taken of all public hearings and shall be made available by the department to any party concerned with the subject matter of the hearing upon the payment of prevailing rates for such transcript.^[27]

In its most natural reading, therefore, this provision contemplates that, in order to adopt a rulemaking regarding air pollution, the EQB must hold hearings and the hearings must be physical, in-person meetings – given that they must take place “*in*” the “regions” or multi-region “areas” of the Commonwealth that the rulemaking would impact. But here, in connection with the Proposed Rulemaking, the EQB has not taken this approach. Instead, it held five WebEx sessions, each punctuated by a break, or, as the EQB describes it, “ten *virtual* public hearings for the purpose of accepting comments on this proposed rulemaking.”²⁸

²⁷ 35 P.S. § 4007(a) (emphasis added).

²⁸ 50 Pa. Bull. 6187, 6231 (Nov. 7, 2020) (emphasis added).

Although it might be argued that, for purposes of Section 7(a), virtual hearings take place “in any region of the Commonwealth affected” or “in the [multi-region] area concerned” because they take place “everywhere” at once (at least theoretically), this reasoning falls flat because it cannot be squared with some of the other language in the same Section.²⁹ The Section provides, for example, that “[w]hen it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for more than one region of the Commonwealth, the board may hold one hearing for any two contiguous regions to be affected by such rules and regulations. Such hearing may be held *in either of the two contiguous regions.*”³⁰ This language makes it clear that when one of these types of hearings takes place, it takes place in *one* of the two contiguous regions (“either”), but *not both* at the same time. Unlike a physical, in-person meeting, a virtual hearing cannot meet this standard because it happens “everywhere” at once. These factors help to confirm that, for purposes of Section 7(a), a hearing must be a physical, in-person meeting.³¹

The EQB has failed to hold physical, in-person hearings in connection with the Proposed Rulemaking. The Proposed Rulemaking is therefore procedurally defective.

FROM A PUBLIC POLICY PERSPECTIVE, THE PROPOSED RULEMAKING IS NOT JUSTIFIABLE

If RGGI were implemented in Pennsylvania, the net result would be ominous: increases in power prices and the loss of affordable and reliable electricity production due to the closure of all coal and some natural gas fired power plants in the Commonwealth. The closure of those facilities, in turn, would lead to the loss of thousands of good-paying jobs and the loss of millions of dollars in tax revenues to the school districts and communities where the plants are located and the state as a whole. Meanwhile, all of Pennsylvania’s electric customers – residential, commercial, and industrial – would be forced to absorb all or a portion of a \$2.6 billion rate increase over the next ten years, which would be especially harmful to low-income households who are forced to pay a larger percentage of their income on electricity.

²⁹ See, e.g., *Commonwealth v. Fant*, 146 A.3d 1254, 1260-61 (Pa. 2016) (“[W]e cannot arrive at the meaning of a word, even the ‘ordinary’ meaning, without considering the surrounding words and provisions....Indeed, a statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated.”) (internal quotation omitted).

³⁰ 35 P.S. § 4007(a) (emphasis added).

³¹ The EQB says that it held the virtual meetings “[i]n accordance with Governor Tom Wolf’s emergency disaster declaration and based on advice from the Department of Health regarding the mitigation of the spread of COVID-19[.]” 50 Pa. Bull. 6187, 6231 (Nov. 7, 2020). But the Governor never suspended Section 7(a) of APCA and there is otherwise no “COVID exception” to that Section’s requirements. See *Commonwealth v. Glenn*, 233 A.3d 842, 846 (Pa. Super. Ct. 2020) (“We are cognizant that it is not for the courts to add, by interpretation, to a statute, a requirement, or an exception, which the legislature did not see fit to include.”) (internal quotation and brackets omitted).

Adopting the Proposed Rulemaking Would Not Materially Benefit the Natural Environment

Pennsylvania's participation in RGGI, as noted above, would do nothing to meaningfully curb global GHG emissions or, therefore, global warming. According to Pennsylvania's most recent Climate Action Plan, sources in the Commonwealth collectively emitted approximately 287 million metric tons of GHGs (CO₂ equivalent) in 2015, and the "energy production" sector (which includes all electricity generation, coal mining, and natural gas and oil production) accounted for approximately 32% of those emissions, or approximately 92 million metric tons.³² By comparison, the Intergovernmental Panel on Climate Change (which the EQB references in the Proposed Rulemaking)³³ has estimated worldwide greenhouse gas emissions to be approximately 49.5 *billion* metric tons (as of 2010).³⁴ Using these figures, Pennsylvania's energy production sector's annual contribution to total worldwide GHG emissions is approximately 0.19%. Taken by themselves, the power plants that would be subject to the Proposed Rulemaking contribute an even smaller percentage. Meanwhile, China is in the process of developing nearly 250 gigawatts of coal-fired power, which is more than the *entire* coal power capacity of the United States.³⁵ By definition, therefore, the Proposed Rulemaking would be materially inconsequential to global GHG emissions and global warming.

To make matters worse, Pennsylvania's participation in RGGI would result in GHG emissions "leakage," as power plants in nearby states would generate more electricity (and emissions) to compensate for operational reductions that occurred among power plants in the Commonwealth. Put differently, if RGGI were implemented in Pennsylvania, CO₂ emissions from power plants in the Commonwealth would, in significant part, transform into emissions from power plants in neighboring, non-RGGI states like West Virginia and Ohio. The result is that Pennsylvania's participation in the program would not even be materially effective in reducing CO₂ emissions in the *region*.

PaDEP's own modeling helps to confirm this point. PaDEP retained a consultant, ICF International, Inc. ("ICF"), to determine the potential impacts that Pennsylvania's participation in RGGI would have on the power sector and the Commonwealth's economy.³⁶ ICF created a modeling report for this purpose. In the report, one of the RGGI stakeholders that ICF discusses is PJM Interconnection

³² PaDEP, *Pennsylvania Climate Action Plan 2018* (April 29, 2019) at 16, 32-33.

³³ See 50 Pa. Bull. 6187, 6213 (Nov. 7, 2020).

³⁴ IPCC, *Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) at 113.

³⁵ See David Stanway, *China Has 250 GW of Coal-Fired Power Under Development – Study*, Reuters (June 25, 2020), available at <https://www.reuters.com/article/china-coal/china-has-250-gw-of-coal-fired-power-under-development-study-idUSL4N2E20HS>.

³⁶ ICF International, Inc., *Pennsylvania RGGI Modeling Report* (Sept. 25, 2020) at 5.

“PJM”), the regional transmission organization that coordinates the movement of wholesale electricity in the mid-Atlantic region. ICF states that, if Pennsylvania participated in RGGI, “[t]otal emissions in PJM decline by less than the fall in PA emissions, as some generation leakage results in higher emissions elsewhere in PJM. Specifically, 54% of the fall in PA emissions (2022-2030) are made up for by higher emissions elsewhere in PJM.”³⁷ More recently, in a set of January 4, 2021 public comments on the Proposed Rulemaking, the Penn State Center for Energy Law and Policy concluded: “Specifically, we estimate that 86% of the CO₂ reductions from Pennsylvania’s joining RGGI would be offset by emissions increases in PJM and/or other RGGI states.”³⁸ Indeed, PJM’s own Carbon Price Senior Task Force has recognized this phenomenon, stating that “[a]s compliance costs within the carbon pricing region drive demand for imported power from cheaper sources located elsewhere, emissions will shift – or ‘leak’ – across borders, *potentially producing higher regional greenhouse emissions even after accounting for the lower emissions in the carbon pricing region*. This is especially important in the context of PJM because many local jurisdictions in and outside of the region do not currently participate in a carbon pricing framework.”³⁹ Concerns about leakage, in fact, are what led former PaDEP Secretary Katie McGinty to conclude that RGGI is *not* a good fit for Pennsylvania.⁴⁰ This point is underscored by the public comments that three prominent labor organizations, the International Brotherhood of Electrical Workers, the International Brotherhood of Boilermakers, and the United Mine Workers of America, recently submitted to the EQB. In those comments, the labor organizations explain that “[w]hen a similar action was proposed several years ago, Governor Rendell listened to our views, considered the experience of other states that had joined RGGI, and ultimately decided not to participate in RGGI. With the strong likelihood of national climate change regulations being issued under the new Administration, we see little reason to depart from that decision.”⁴¹ And yet, in the Proposed Rulemaking, the EQB largely ignores the leakage issue.

³⁷ *Id.* at 27.

³⁸ See Penn State Center for Energy Law and Policy, Comments on Proposed Rulemaking #7-559 (Jan. 4, 2021) at 2, *available at* <https://www.ahs.dep.pa.gov/eComment/DocumentServer.ashx?enc=1xIDOiIZQfBuB5SsbD9T0IiqELoixHf5w9DdfH4HN64%3d>.

³⁹ PJM, *Opportunity Statement: Carbon Pricing in the PJM Energy Market* (2018) at 1 (emphasis added), *available at* <https://www.pjm.com/-/media/committees-groups/task-forces/cpstf/postings/problem-statement.ashx?la=en>

⁴⁰ See Kyle W. Danish, *United States: Climate Change Policy Update Week of February 4-8, 2008* (Feb. 13, 2008), *available at* <https://www.mondaq.com/unitedstates/environmental-law/57176/climate-change-policy-update-week-of-february-4-8-2008>.

⁴¹ See International Brotherhood of Electrical Workers, the International Brotherhood of Boilermakers, and the United Mine Workers of America, Comments on Proposed Rulemaking #7-559 (Jan. 12, 2021) at 1, *available at* <https://www.ahs.dep.pa.gov/eComment/DocumentServer.ashx?enc=%2ffc6kaZCM5DNSWvnK5ludBXeDqwj%2bR4M%2fJoYeSft9jA%3d>.

Adopting the Proposed Rulemaking Would Have Severe Adverse Economic and Other Impacts

Pennsylvania's participation in RGGI would have devastating, wide-ranging economic and other impacts on the Commonwealth's citizens. Pennsylvania is blessed with an abundance of coal and natural gas resources and, as a corollary, has a number of coal and gas-fired electric power plants and one of the most diverse portfolios of electric generation in the United States. Those plants help to power the Commonwealth's robust manufacturing sector and provide consumers with low-cost, reliable electricity. If RGGI were implemented in the Commonwealth, fossil fuel-fired plants that are capable of producing two-thirds of Pennsylvania's electric generation⁴² would be forced to pay the RGGI tax. This would trigger the near immediate closure of all of the coal-fired and many of the older gas-fired plants.⁴³ It would, in other words, eliminate some of the most reliable and affordable sources of electricity for Pennsylvania's businesses and residents. By the same token, it would engender the loss of thousands of jobs, including jobs for blue collar plant workers and contractors.⁴⁴ A recent economic study that focuses on just four of the coal-fired plants in western Pennsylvania indicates that, if RGGI were in place, the host communities and Commonwealth would lose \$2.87 billion worth of annual economic activity, impacting 8,170 jobs that provide employees with \$539 million in compensation.⁴⁵ Pennsylvania, moreover, would lose at least \$34 million in annual tax revenue.⁴⁶ And Pennsylvania's counties, municipalities, and schools would lose \$3.7 million in annual tax revenue.⁴⁷ This figure includes \$2.6 million in property tax revenue,⁴⁸ the bulk of which is used to fund schools.

⁴² See PJM, *PJM Generation Dispatch, Resource Mix, and Emissions*, Presentation to PaDEP Air Quality Technical Advisory Committee (Oct. 15, 2020) at 14, available at <http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/Air%20Quality%20Technical%20Advisory%20Committee/2020/10-15-20/20201015%20PJM%20Presentation%20to%20PA%20DEP%20AQ%20TAC%20on%20Generation%20Dispatch.pdf>.

⁴³ See John P. Shimshock, AQTAC member, *Concerns About PaDEP's Conclusions and Representations from the Supporting IPM RGGI Modeling Results* (May 18, 2020) at 6, available at <https://bipac-momentum-media.s3.amazonaws.com/Media/assets/000/027/042/original/PA-DEP-proposed-RGGI-Rule-Shimshock-comments.pdf>.

⁴⁴ See Pennsylvania State Building and Construction Trades Council, Comments on Proposed Rulemaking #7-559 (Jan. 11, 2021), available at <https://www.ahs.dep.pa.gov/eComment/DocumentServer.ashx?enc=%2ffc6kaZCM5DNSWvnK5ludLESRNJfMm3OSeMSzWmLDyA%3d>; see also Pennsylvania AFL-CIO, Comments on Proposed Rulemaking #7-559 (Jan. 7, 2021), available at <https://www.ahs.dep.pa.gov/eComment/DocumentServer.ashx?enc=%2ffc6kaZCM5DNSWvnK5ludIV%2fKg8b8uSrZNKN%2bjy5B2U%3d>.

⁴⁵ See Econsult Solutions Inc., *Economic Impact of Coal-Fired Plants in Pennsylvania* (Feb. 2020), available at <https://powerpajobs.com/latest-news>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

As PaDEP’s own modeling indicates, moreover, adopting the Proposed Rulemaking would cause consumers in the Commonwealth to experience an increase in the rates that they pay for electricity,⁴⁹ with the increase totaling more than \$2.6 billion by 2030.⁵⁰ A recent analysis indicates that, if Pennsylvania were currently participating in RGGI, it would mean that, based on the price for an allowance at the latest quarterly auction, the amount that each of the Commonwealth’s power plants would be forced to add to their bid per MWh of electricity would range from about \$3.00 to almost \$9.00, depending on the power plant.⁵¹ These types of increases would be passed on to consumers and, according to ICF’s modeling, Pennsylvania energy prices would increase from \$27.8 per MWh to \$32.8 per MWh by 2030 – a 22 percent increase – while the average prices in other RGGI states would remain static.⁵² In Pennsylvania, as it stands today, residential rates for electricity are already 40% higher than the other major rate categories, a difference that the Proposed Rulemaking would only exacerbate. And these price increases would hit low-income households the hardest, given that, relative to other households, they spend a much higher percentage of their income on heating and powering their homes.⁵³ Across Pennsylvania, low-income households would suffer from increased energy poverty – *i.e.*, the inability to access affordable energy. While most RGGI states use proceeds from the quarterly auctions to help alleviate energy poverty, Pennsylvania law is not currently structured in a way that would allow such an approach to be taken here. Indeed, as the EQB states in the Proposed Rulemaking, “[a]s provided under section 9.2(a) of the APCA (35 P.S. § 4009.2(a)), this Commonwealth’s auction proceeds will be held in a subaccount within the Clean Air Fund, which is administered by the Department ‘for the use in the elimination of air pollution.’”⁵⁴ Along these lines, as Bloomberg Law reported, “Hayley Book, a senior adviser on energy and climate at the state’s environmental agency, confirmed that direct assistance to consumers, such as rebates or energy discounts for low-income households, is the only category of investment for which DEP doesn’t have the authority to spend revenues.”⁵⁵

⁴⁹ ICF International, Inc., *Pennsylvania RGGI Modeling Report* (Sept. 25, 2020) at 29 (noting that “[r]esidential bills will increase by an estimated 1.5% in the short-term”).

⁵⁰ See Industrial Energy Consumers of Pennsylvania, *Testimony to the Senate Environmental Resources and Energy Committee* (Aug. 25, 2020) at Exhibit 1, available at <https://www.iecpa-energy.org/carbon-cap-trade-rggi>.

⁵¹ See RGGI Price Adder for All Impacted PA Coal and Natural Gas Plants, available at <https://powerpajobs.com/latest-news>.

⁵² PaDEP, *IPM Modeling Results Discussion Reference Case and RGGI Policy Scenario* (Apr. 23, 2020) at 34, available at <http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/Air%20Quality%20Technical%20Advisory%20Committee/2020/4-23-20/RGGI%20IPM%20Modeling%20Webinar.pdf>.

⁵³ See Pennsylvania Public Utility Commission, *Home Energy Affordability for Low-Income Customers in Pennsylvania* (Jan. 2019) at 6.

⁵⁴ 50 Pa. Bull. 6187, 6220 (Nov. 7, 2020).

⁵⁵ Stephen Lee, *Pennsylvania Governor Pushes to Join Regional Climate Pact*, Bloomberg Law (June 8, 2020), available at <https://news.bloomberglaw.com/environment-and-energy/pennsylvania-governor-pushes-for-joining-regional-climate-pact>.

While the EQB mentions that the proceeds from the quarterly auctions “would be invested into programs that would reduce air pollution and create positive economic impacts in this Commonwealth[,]”⁵⁶ it does not outline how, in particular, the proceeds would be invested. Instead, it asserts that the “Department plans to develop a draft plan for public comment outlining reinvestment options separate from this proposed rulemaking.”⁵⁷ The EQB goes on to discuss how the states that currently participate in RGGI have invested the proceeds that they have received from the auctions. Given that Pennsylvania’s participation in the program would, over time, supposedly generate *billions* of dollars in revenue for the Commonwealth, this approach renders the Proposed Rulemaking materially incomplete. Basic principles of fairness and transparency dictate that, *before* adopting such a significant regulatory proposal, the EQB should apprise stakeholders of how the Commonwealth will spend these large sums of revenue.

PaDEP’s Modeling is Flawed

Finally, a word about PaDEP’s modeling – which, in many respects, serves as the foundation for the Proposed Rulemaking. Although, as noted above, ICF acknowledges in the modeling that implementing RGGI in Pennsylvania would result in GHG emissions “leakage” and higher electricity rates for consumers, it significantly understates these impacts because the modeling is based on certain assumptions that are flawed. The core assumption concerns the estimated price of the RGGI auction “allowance,” which is the tax that owners of Pennsylvania-based power plants would be required to pay, as discussed above, and which would ultimately be passed along to consumers. PaDEP’s modeling, which was released in April of 2020, was based on an assumption that, by 2025, the allowance price would remain less than \$7.00 per CO₂ ton.⁵⁸ But, since March of 2020, the allowance price has already risen from \$5.65 to \$7.41 per CO₂ ton – an increase of \$1.76 or about 31 percent.⁵⁹ And, since October of 2019, when the Governor directed PaDEP to commence work on the Proposed Rulemaking, the RGGI tax rate has increased from \$5.20 to \$7.41 per CO₂ ton – a increase of \$2.21 or 42.5 percent.⁶⁰ By definition, therefore, the modeling falls short in illuminating the adverse effects that RGGI would have on Pennsylvania’s power sector and electricity consumers, including low-income consumers who suffer from energy poverty. PaDEP and the EQB have yet to acknowledge this point or revise the modeling to account for it.

All told, from a public policy perspective, the Proposed Rulemaking is simply not justifiable and the EQB should refuse to adopt it.

⁵⁶ 50 Pa. Bull. 6187, 6228 (Nov. 7, 2020).

⁵⁷ *Id.*

⁵⁸ ICF International, Inc., *Pennsylvania RGGI Modeling Report* (Sept. 25, 2020) at 27.

⁵⁹ See RGGI, Inc., Auction Results, Allowance Prices and Volumes, *available at* <https://www.rggi.org/auctions/auction-results>.

⁶⁰ *Id.*

PowerPA Jobs appreciates your consideration of these comments. If you require any additional information or clarification regarding these comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Jean P. Lane". The signature is written in a cursive style with a large, looped initial "J".

On behalf of:
PowerPA Jobs Alliance