



Independent Regulatory Review Commission  
333 Market St., 14th Floor  
Harrisburg, PA 17101

January 22, 2021

**Re: CO2 Budget Trading Program (Regulation #7-559)**

Dear Commissioners:

We, the undersigned environmental organizations, believe the Environmental Quality Board's recently proposed CO2 Budget Trading Program is an important step to respond to the growing climate crises and put Pennsylvania on a path to a cleaner and healthier environment for the benefit of all our citizens. We also submit that the Board has the statutory authority to promulgate the proposed regulation, the proposal conforms to the intent of the General Assembly in its enactment of the Air Pollution Control Act, and the proposal is clearly in the public interest.

We have reviewed the Regulatory Analysis Form submitted with the rulemaking and respectfully submit the attached points in support of the proposal.

Sincerely,

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## **(Block 8) Statutory Authority for the Regulation**

We agree with the analysis in the regulatory analysis form (RAF) regarding the source of authority for the proposed regulation and find that claims made by certain members of the legislature that the Air Pollution Control Act (APCA) does not authorize regulation of carbon dioxide are without merit.

Pennsylvania law specifies that, when interpreting statutes such as APCA, the object of all interpretation and construction is to ascertain and effectuate the intention of the General Assembly. This begins by, first and foremost, giving effect to any unambiguous words in the statute.<sup>1</sup>

The sections of APCA referenced in the RAF make it clear that the Environmental Quality Board (EQB) has the power and the duty to adopt regulations for the control of air pollution, and the carbon dioxide emissions addressed by the proposal unambiguously fall within the statutory definition of air pollution.<sup>2</sup>

Carbon dioxide is specifically included in the definition of the term “regulated pollutant” found in APCA, Section 502 of the Clean Air Act (CAA), and Pennsylvania’s existing air quality regulations.<sup>3</sup> All of those rules and regulations define the term *regulated pollutant* to include those compounds regulated under CAA sections 111 or 112. Because the EPA finalized rulemakings in October of 2015 specifically regulating greenhouse gases—including carbon dioxide—under section 111(d)<sup>4</sup> and 111(b)<sup>5</sup> of the CAA, carbon dioxide is included in the list of regulated pollutants.<sup>6</sup>

If one were to assume that EQB lacked the power to regulate carbon dioxide, APCA would be internally inconsistent since the act also specifies that EQB “shall adopt regulations required by” those same sections of the CAA that designate carbon dioxide as a regulated pollutant.<sup>7</sup> Because Pennsylvania’s Statutory Construction Act specifies that, the General Assembly “does not intend a result that is absurd, impossible of execution or unreasonable,”<sup>8</sup> any argument that the EQB lacks the authority to regulate carbon dioxide must fail.

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<sup>1</sup> 1 Pa.C.S. § 1921 *et seq.*

<sup>2</sup> See *Wolf v. Funk*, 144 A.3d 228, n.17 (Pa. Cmwlth. 2016) (citing: *Mass. v. EPA*, 549 U.S. 497, 528 (2007)).

<sup>3</sup> See: APCAA at § 6.3(m), 42 U.S.C. § 7661a(b)(ii), and 25 PA Code § 127.705(c).

<sup>4</sup> 80 Fed Reg. 64662 (Oct. 23, 2015).

<sup>5</sup> 80 Fed Reg. 64509 (Oct. 23, 2015).

<sup>6</sup> Note: The Affordable Clean Energy Rule, 84 Fed Reg. 32520 (July 8, 2019), attempted to repeal the Clean Power Plan, but it has since been vacated. See: *American Lung Assn. v. EPA* \_\_\_ (D.C. Cir. Jan. 19, 2021).

<sup>7</sup> Section 6.1(b.5) of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*

<sup>8</sup> 1 Pa.C.S. § 1922(1).

We further note that APCA lacks any specific language preempting regulation of carbon dioxide. Because the Pennsylvania Supreme Court has held that “the General Assembly must clearly show its intent to preempt a field in which it has legislated,”<sup>9</sup> any claims to the contrary must fail.

Finally, because agencies are often in the best position to evaluate their own enabling legislation, both federal and state courts give such agencies significant deference in their interpretations<sup>10</sup> and have “refused to substitute their own judgment for that of agencies possessing technical expertise absent a showing the agency arbitrarily and unreasonably exercised the police power.”<sup>11</sup> Absent specific language in legislation to the contrary, it must be concluded that the proposed regulation is permissible under the APCA.

### **(Block 9) Mandates for the regulation**

In addition to the specific statutory requirements cited in the RAF, the Constitution of Pennsylvania provides that our public natural resources, including clean air, are the common property of the people and that the Commonwealth has a trust responsibility to conserve and maintain those resources.<sup>12</sup>

The Pennsylvania Supreme Court has held that the General Assembly both derives its power through the Constitution and is limited by it, specifically in that “everything [within Article I] is excepted out of the general powers of government and shall forever remain inviolate.”<sup>13</sup> While the legislature could enact a separate statutory scheme to regulate carbon dioxide pollution, it lacks the ability to forbid the conservation and maintenance of resources in violation of the trust responsibility in Article I.<sup>14</sup>

Given this Constitutional requirement and the unambiguous language of APCA providing that EQB has a duty to regulate air pollution, it is clear that failure to take action is not an option.

We further note that, with respect to permit programs, the CAA requires that Title V permit programs such as the one operated by Pennsylvania establish emissions fees of not less than \$25 per ton of each regulated pollutant for up to 4,000 tons of each.<sup>15</sup> Pennsylvania’s own regulations currently require each Title V source to pay an emission fee of \$85 per ton on the first 4,000 tons of regulated pollutants emitted from the facility.<sup>16</sup> Even though carbon dioxide meets the definition of a regulated pollutant, no facility has remitted this required fee with respect to CO<sub>2</sub> emissions and no action has been taken to enforce this provision. While these provisions do not require a regulation in the form of that which has been proposed, there is

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<sup>9</sup> *Middletown Twp. v. Benham*, 514 Pa. 176, 180 (1987).

<sup>10</sup> *Buffalo Tp. v. Jones*, 813 A. 2d 659 n.13 (2002) (Citing *Chevron U.S.A. v. NRDC*, 535 U.S. 106, (2002)).

<sup>11</sup> *DER v. Locust*, 483 Pa 350, 360 (1979).

<sup>12</sup> Pa. Const. Art. I § 27.

<sup>13</sup> Pa. Const. Art. I § 25.

<sup>14</sup> See generally: *Robinson Twp. v. Comm*, 83 A.3d 901, 946-47 (2013).

<sup>15</sup> 42 U.S.C. § 7661a(b).

<sup>16</sup> 25 Pa. Code § 127.705(a)

nothing in the statute that would prohibit the proposed regulation from fulfilling this requirement for any covered sources.

### **(Block 11) Is the regulation more stringent than federal standards**

The RAF submitted with this proposal discusses the EPA's Affordable Clean Energy Rule (ACE), which has since been vacated by the U.S. Court of Appeals for the D.C. Circuit and remanded to the agency.<sup>17</sup> Relevant provisions of the ACE rule attempted to repeal the prior Clean Power Plan (CPP) and limit consideration of the required "best system of emissions reduction" to unit-specific factors that would exclude emissions trading programs such as the one established by the proposed rule.

The D.C. Circuit noted that "[o]ver the last half century, no prior Administrator read the Act to foreclose from consideration in the 'best system' all but at -the-source means of emission control."<sup>18</sup> This includes specific examples of EPA reliance on such trading programs to meet the required standard in the Clean Air Mercury Rule and the Municipal Waste Combustors Rule. Because of this, the court expressly rejected the ACE rule's attempt to require state compliance measures be source-specific.<sup>19</sup>

In finalizing the CPP, the EPA noted that states participating in the Regional Greenhouse Gas Initiative (RGGI) intended to maintain their existing state programs and that a "multi-state rate-based or mass-based emission trading program" is a compliance option for the federal rules.<sup>20</sup> Whether the CPP continues unaltered or the incoming administration revises its regulatory approach, it is likely that this program will remain a cost-effective compliance option for Pennsylvania.

### **(Block 14) Describing the public participation**

Several complaints have been raised noting the required public hearings were not held in person in "regions impacted by the regulation"<sup>21</sup> and were, instead, conducted virtually because of the dangers of the global COVID-19 pandemic.

Those comments misstate APCA's public hearing requirement. Since the regulation is effective statewide and "encompasses more than one region or parts of more than one region" of the commonwealth, APCA does not require public hearings be held in person in any specific region but rather "be held in the area concerned."<sup>22</sup> Each of the ten virtual public hearings was

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<sup>17</sup> *American Lung Assn. v. EPA* \_\_\_ (D.C. Cir. Jan. 19, 2021). (available at: [https://www.cadc.uscourts.gov/internet/opinions.nsf/6356486C5963F49185258662005677F6/\\$file/19-1140-1880546.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/6356486C5963F49185258662005677F6/$file/19-1140-1880546.pdf))

<sup>18</sup> *Id* at 65.

<sup>19</sup> *Id* at 72.

<sup>20</sup> 80 Fed. Reg 64662, 64839, n.807.

<sup>21</sup> Letter from the PA House Environmental Resources and Energy Committee (Jan. 12, 2021).

<sup>22</sup> Section 7 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended

accessible and available for any resident of Pennsylvania to register, attend, and deliver testimony while limiting risks from the pandemic.

The Governor also has authority to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.”<sup>23</sup> Pursuant to that authority, the Governor ordered on November 27, 2020 that “Unless impossible, all businesses must conduct their operations remotely, through individual teleworking of their employees in the jurisdiction or jurisdictions in which they do businesses.”<sup>24</sup> This order remained in effect during the time period for which the public hearings were scheduled. As ten separate virtual public hearings were held at which nearly 500 individuals were able to safely and conveniently provide testimony over the course of more than 30 hours, it is clear that using teleworking was both possible and a highly effective way to ensure public participation without recklessly endangering the lives of Pennsylvania citizens.

The Pennsylvania Supreme Court also spoke to the effectiveness of teleconferencing when it ruled that members participating in public meetings via telephone could be counted towards quorum requirements and that such meetings fulfilled the requirements for taking action under the Sunshine Act.<sup>25</sup>

### **(Block 15) Types of businesses affected**

We note that the Beaver Valley Nuclear Generating Station—which has a total capacity of over 1.87 GW, enough to power more than one million homes—was scheduled to retire this year, but following the announcement of this proposed regulation with an anticipated effective date of January 2022, the company revised those plans and now intends to keep the facility in operation, thereby saving 1,000 jobs.<sup>26</sup>

### **(Block 17) Financial and social impact of the regulation**

In analyzing the consumer impacts of this program, the Department’s modeling indicated a modest short-term increase in bills estimated at 1.5%, or less than \$2.05 per month assuming no new investments in residential energy efficiency. The Department further predicts energy prices to fall below business-as-usual levels within the next ten years.

In addition to consumer cost savings from investments in efficiency and cleaner generation, and in addition to the protections provided by the proposed Cost Containment Reserve, we note that Pennsylvania customers can also take advantage of our state’s consumer electric choice

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<sup>23</sup> 35 Pa.C.S. § 7301(f)(1).

<sup>24</sup> Order of the Governor for Mitigation, Enforcement, and Immunity Protections, § 1(A.) (November 27, 2020).

<sup>25</sup> See *Babac v. Milk Mktg. Bd.*, 531 Pa. 391 (1992).

<sup>26</sup> Litvak, Anya, Beaver Valley nuclear plant will remain open past 2021, owner says, *Post-Gazette*. Pittsburgh. (March 13, 2020).

program<sup>27</sup> to select their electricity supplier. By choosing suppliers that provide less carbon-intensive generation, consumers will have the ability to insulate themselves from increases in fossil-fuel costs.

### **(Block 20) Estimate costs/savings to local governments**

We agree that local governments are not expected to incur any costs as a result of the proposed rulemaking, but we note that they may see substantial savings if investments of auction proceeds in energy efficiency or clean renewable energy are targeted to reduce their utility expenditures. This may appear as direct cost reductions, or provide indirect benefits as a hedge against variable prices of fossil-fuel-derived energy.

Street lighting, for example, can represent 40% of a municipality's energy spending. An investment as simple as transitioning street lighting from mercury vapor or halogen products to LEDs can reduce direct energy costs over 50 percent, reduce maintenance costs, improve lighting quality, and lower carbon pollution.<sup>28</sup>

### **(Block 25) Provisions that meet the needs of minorities, the elderly, small businesses, or farmers.**

We strongly support the investment of proceeds to benefit low-income ratepayers, environmental justice communities, and communities and workers impacted by the retirement of fossil fuel generation. Investments in energy efficiency are particularly appropriate and the work of the independent Act 129 Statewide Evaluator has consistently shown that significant energy efficiency investments are available that can be achieved at no net cost to consumers.<sup>29</sup>

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<sup>27</sup> See generally: 66 PA.C.S § 2801 *et seq.*

<sup>28</sup> US DOE, *Regulatory Issues and Approaches to Municipal LED Street Lighting Conversions*, (Feb. 2017)

<sup>29</sup> PA PUC, *Pennsylvania Act 129 - Phase IV Energy Efficiency and Peak Demand Reduction Market Potential Study Report* (Feb. 28, 2020).