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**COMMENTS OF EXELON CORPORATION**  
**PROPOSED RULEMAKING, CO<sub>2</sub> BUDGET TRADING PROGRAM**  
January 14, 2021

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## **1. Introduction**

Exelon Corporation (Exelon) appreciates the opportunity to submit comments on the Environmental Quality Board's (EQB's) proposed "CO<sub>2</sub> Budget Trading Program" (Proposed Rule). While we offer some clarifications below, Exelon supports the Proposed Rule as written. EQB should finalize the Proposed Rule in time for Pennsylvania to enter the Regional Greenhouse Gas Initiative (RGGI) on January 1, 2022. In order to support this timeline, the Pennsylvania Department of Environmental Protection (DEP) and EQB should move swiftly. The proposed starting point for the emissions budget reflects recent emissions, a modest but important first step. Exelon supports this approach, which will allow Pennsylvania to join RGGI in 2022 while establishing a framework to allow meaningful emissions reductions over time.

A Fortune 100 company, Exelon is the country's and the Commonwealth's largest producer of emission-free electricity, with a clean portfolio that includes nuclear, hydroelectric, wind, and solar generation. Exelon has a long history of meeting Pennsylvania's energy needs while working to improve air quality in the Commonwealth. PECO Energy Company, an Exelon Utility, delivers electricity and natural gas to several million Pennsylvanians, while Exelon Generation Company powers the Commonwealth with one of the nation's cleanest and lowest-cost power generation fleets. Through Constellation NewEnergy, Inc., Exelon provides energy products and services to Pennsylvanians. All told, the company has an estimated annual economic impact of \$4.5 billion in Pennsylvania, supporting more than 9,600 jobs and producing \$760 million in labor income.

## **2. Pennsylvania Should Participate in the Regional Greenhouse Gas Initiative (RGGI)**

### **a. Pennsylvania Should Enter RGGI January 1, 2022**

Exelon urges finalization of this rule in time to enter RGGI on January 1, 2022, and underscores the importance of avoiding undue delay that would impede this timeline. We further support the proposed emissions budget of 78 million tons in 2022, decreasing to just over 58 million tons in 2030.

### **b. Timely Participation in RGGI Would Support Pennsylvania's Essential Nuclear Resources**

Participating in RGGI beginning January 1, 2022 at the proposed budget level would help support the continued and long-term operation of the Commonwealth's remaining nuclear plants. Energy Harbor Corporation's announcement to rescind the shutdown decision for the Beaver Valley nuclear facility in Shippingport, which previously had been scheduled to retire prematurely in 2021, highlighted the role RGGI can play in helping to preserve Pennsylvania's nuclear capacity. But for this action, Pennsylvania would have lost another nearly 2,000 MW of emissions-free generation, along with over a thousand high-paying, highly skilled local jobs. The announcement explained that Pennsylvania's decision to begin this regulatory process in time for a 2022 program start date was a large driver for rescinding the retirement plans, and those plans would need to be revisited if Pennsylvania does not begin participation in RGGI next year as proposed. The harm retirement of Beaver Valley would have caused the greater Shippingport community, to say nothing of all Pennsylvanians' air and climate, is highlighted by the 2019 closure of the remaining unit at Three

Mile Island, which cost the Harrisburg area 650 family-sustaining jobs in addition to more than 7 million MW-hours of zero emission electricity output annually.

Joining RGGI provides Pennsylvania with a proven, efficient tool to begin addressing climate change and supporting the preservation and deployment of clean sources of electricity, including nuclear. It is a prudent insurance policy to help maintain our existing clean electricity resources and encourage continued expansion of emission-free electricity.

### **c. The COVID-19 Pandemic Must Not Be Used as an Excuse to Delay**

In the numerous public comment opportunities DEP has conducted prior to offering this Proposed Rule, a handful of commenters raised the suggestion that this important regulatory action be delayed due to the ongoing COVID-19 pandemic. We urge DEP not to delay for two main reasons. First, the current regulatory timeline would enable Pennsylvania to join RGGI a full year from now, in 2022. Second, the value of clean air has never been clearer, and these important protections should not be delayed, particularly given emerging evidence that long-term exposure to air pollution increases risk of death from COVID-19.<sup>1</sup>

While of course the science will continue to develop, several studies have already demonstrated that air pollution may increase and worsen COVID-19 cases. For instance, researchers with Harvard University's T.H. Chan School of Public Health found that in counties across the United States, very small increases in exposure to fine particulate matter (PM<sub>2.5</sub>) air pollution were associated with an 11 percent increase in COVID-19 mortality rates, even after controlling for county-specific levels of household income, education, age distribution, race and population density.<sup>2</sup> The study adds to a growing body of research that finds even slightly higher levels of air pollution worsen COVID-19 health outcomes. Georgia State University researchers studied United States 2020 data and found that lower PM<sub>2.5</sub> air pollution levels were associated with fewer confirmed COVID-19 cases and lower mortality rates from COVID-19.<sup>3</sup> In England, researchers showed that PM<sub>2.5</sub> was a major contributor to COVID-19 cases.<sup>4</sup> Worldwide, about 15 percent of the people who have died from COVID-19 were people exposed to higher levels of PM<sub>2.5</sub> pollution long term.<sup>5</sup> Pennsylvania is not yet in full compliance with the most recent federal PM<sub>2.5</sub> standards.<sup>6</sup> These studies demonstrate that,

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<sup>1</sup> American Lung Assoc., "The Important Link Between Air Pollution and Increased COVID," Each Breath Blog (Aug. 7, 2020), <https://www.lung.org/blog/air-pollution-and-covid-19-link> (last visited Jan. 13, 2021).

<sup>2</sup> Wu, Nethery, Sabath, Braun, and Dominic, "Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis," *Science Advances* Vol. No. 45 (Nov. 4, 2020); available at: <https://advances.sciencemag.org/content/6/45/eabd4049> (last visited Jan. 13, 2021).

<sup>3</sup> Austin, Carattini, Gomez-Mahecha, and Pesko, "COVID-19 Mortality and Contemporaneous Air Pollution," Georgia State University International Center for Public Policy, Working Paper 20-16 (Oct. 1, 2020); available at: <https://icepp.gsu.edu/files/2020/10/paper2016.pdf> (last visited Jan. 13, 2021).

<sup>4</sup> Travaglio, Yu, Popovic, Selley, Leal, and Martins, "Links between air pollution and COVID-19 in England," *Environmental Pollution* Vol. 268 Pt. A (Jan. 1, 2021); available at: <https://pubmed.ncbi.nlm.nih.gov/33120349/> (last visited Jan. 13, 2021).

<sup>5</sup> Pozzer, Dominici, Haines, Witt, Münzel, and Lelieveld, "Regional and global contributions of air pollution to risk of death from COVID-19," *Cardiovascular Research* Vol. 116 Issue 14 (Dec. 1, 2020); available at: <https://academic.oup.com/cvres/article/116/14/2247/5940460> (last visited Jan. 13, 2021).

<sup>6</sup> U.S. Environmental Protection Agency, "PM-2.5 (2012) Designated Area State/Area/County Report" (Dec. 31 2020); available at: <https://www3.epa.gov/airquality/greenbook/kbcs.html#PA> (last visited Jan. 13, 2021).

rather than providing a reason for further delay, the ongoing COVID-19 pandemic further supports the urgent need for the emission-reduction benefits to be gained through participating in RGGI.

### **3. The Proposed Rule is Reasonable**

The Commonwealth is currently bearing the costs of carbon dioxide (carbon or CO<sub>2</sub>) pollution from emitting generators, effectively providing those generators with an unfair subsidy. RGGI partially addresses this problem by requiring these generators to pay a portion of the cost of these emissions, which encourages cleaner generation to run at any given moment while encouraging the gradual shift to a cleaner fleet. Importantly, the revenue raised through RGGI will support measures that will further reduce emissions while minimizing the program's overall cost.

#### **a. The Proposed Emissions Budget is Reasonable and Must Not be Increased**

RGGI works in part by sending a positive price signal to clean generation sources through the energy markets, ramping up cleaner generation and ramping down relatively dirtier generation through the instantaneous dispatch of the electricity markets.<sup>7</sup> This reordering can occur between types of generation, such as from coal to natural gas, or within fuel type, such as from a less-efficient to a more-efficient natural gas turbine. The efficacy of RGGI's price signal is a direct consequence of whether the emissions budget is set appropriately – too high a budget, and demand for allowances will be weak, resulting in an inconsequential price signal.

By requiring emitting generators to internalize some portion of the cost of their CO<sub>2</sub> pollution, the price signal also encourages the preservation of low- and non-emitting resources and the development of new clean generation capacity. Current and forward electricity market prices that reflect some portion of the cost of CO<sub>2</sub> are visible to all market participants, including potential investors in clean energy projects and purchasers of generation and other products from existing and new clean resources. This transparency, combined with the certainty of a long-term emissions-reduction trajectory, are necessary for the transition to a cleaner generation fleet.

The Proposed Rule's emissions budget trajectory, which starts at recent historical annual emissions and decreases each year at a rate in line with other RGGI states, establishes a framework for meaningful emissions reductions while minimizing consumer costs. This budget level also retains and in fact likely encourages maintenance of Pennsylvania's status as an electricity exporter, particularly to other RGGI states that have stated a preference for cleaner electricity.

In the numerous public comment opportunities DEP has provided prior to offering this Proposed Rule, some argued that the 2030 budget level is too close to the reference or business-as-usual case, such that joining RGGI would be wasted effort. While Exelon would support a more stringent budget, we disagree that the Proposed Rule would not result in significant emissions reductions – the nine million tons avoided per year by 2030 is itself significant. Further, there is no guarantee that the reference case reflects what would occur or that emissions would not be even higher without

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<sup>7</sup> It also works by raising revenue from polluters for investment in projects to reduce customer cost, reduce additional emissions, or often both. Hibbard, Tierney, Darling, and Cullinan, "The Economic Impacts of the Regional Greenhouse Gas Initiative on nine Northeast and Mid-Atlantic States," Analysis Group (April 17, 2018); available at: [https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis\\_group\\_rggi\\_report\\_april\\_2018.pdf](https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_april_2018.pdf) (last visited Jan. 13, 2021).

participation in RGGI, particularly if Pennsylvania were to lose another nuclear plant like Beaver Valley.

Importantly, with a pollutant like CO<sub>2</sub> that accumulates over time, each reduction matters. Unlike nitrogen oxides (NO<sub>x</sub>) or other pollutants that have limited effect across years or even months, CO<sub>2</sub> accumulates in the atmosphere for hundreds of years. Thus, cumulative emissions matter more than any particular annual variation. The 163 million tons DEP projects RGGI will decrease within Pennsylvania over only eight years are very significant. For context, the projected annual reductions alone are greater than the budgets of six RGGI states. DEP has proposed eminently achievable, yet significant, emissions reductions.<sup>8</sup>

### **b. Leakage Concerns Should Not Prevent Participation in RGGI**

Emissions leakage is a common phenomenon that results from differing emissions prices across interconnected jurisdictions – as has been the case in PJM since 2009, with some states are in RGGI and others are not. Emissions leakage is not unique to RGGI; any requirement that raises the apparent cost of production in one jurisdiction will cause the relocation of some portion of production to the jurisdiction where the requirement does not exist. Despite the inevitability of some quantity of emissions leakage from Pennsylvania to neighboring states that do not participate in RGGI, recent studies from The Pennsylvania State University and for DEP have shown that overall emissions, which is what matters for a pollutant like CO<sub>2</sub>, would be lower if Pennsylvania participates in RGGI than if not.<sup>9</sup>

PJM, the regional electric grid operator for Pennsylvania, 12 other states, and the District of Columbia, has also conducted modeling of the impacts of imposing a carbon fee on combinations of states across the market footprint as part of its Carbon Pricing Senior Task Force (CPSTF) stakeholder process. In publicly available materials, PJM notes that the analysis is “not intended to be a representation of actual system conditions,” nor does PJM model RGGI as the program is actually structured.<sup>10</sup> In other words, PJM has analyzed neither the current system nor RGGI, much less what would occur if Pennsylvania joined RGGI. Instead of simulating the RGGI cap-and-invest program with all of the associated features (including but not limited to an emissions allowance price that adjusts to reflect market conditions, the cost containment reserve and emissions containment reserve mechanisms, or the impact of revenue investment), PJM models a simple carbon fee set at various pre-determined levels. PJM stakeholders, including Exelon, have questioned PJM’s modeling inputs. Exelon has suggested specific additional modeling improvements before the initial conclusions from the PJM analysis can credibly inform any policy decisions.<sup>11</sup> In December 2020,

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<sup>8</sup> The Regional Greenhouse Gas Initiative, “Allowance Distribution,” <https://www.rggi.org/allowance-tracking/allowance-distribution> (last visited Jan. 13, 2021).

<sup>9</sup> Penn State Center for Energy Law and Policy, “Prospects for Pennsylvania in the Regional Greenhouse Gas Initiative,” (Dec. 2020); available at: [https://celp.psu.edu/files/2021/01/CELP\\_RGGI.pdf](https://celp.psu.edu/files/2021/01/CELP_RGGI.pdf) (last visited Jan. 13, 2021); Pennsylvania Dept. of Environmental Protection, “Pennsylvania RGGI Modeling Report” and modeling presentations and results (Sept. 25, 2020); available at: <https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx> (last visited Jan. 13, 2021).

<sup>10</sup> PJM, “Economic Dispatch and Border Adjustment Options,” (Aug. 26, 2019); available at: <https://www.pjm.com/-/media/committees-groups/task-forces/cpstf/20190826/20190826-item-03-economic-dispatch-and-border-adjustments-updated.ashx> (last visited Jan. 14, 2021).

<sup>11</sup> Exelon, “Base Case Review,” (Oct. 27, 2020); available at: <https://www.pjm.com/-/media/committees-groups/task-forces/cpstf/2020/20201027/20201027-item-04-exelon-base-case-review.ashx> (last visited Jan. 14, 2021).

PJM provided supplementary material from its CPSTF modeling to members of the Pennsylvania Legislature.<sup>12</sup> As with the broader CPSTF analysis, the modeling described in PJM’s report to the Legislature does not accurately reflect RGGI program mechanics and is based on input assumptions that are still under review by the Task Force members and PJM staff. Further, as PJM correctly notes, “[l]onger term impacts to investment decisions or potential changes to the resource mix as a result of the RGGI carbon price were not included in the scope of the study,” and the “study focused solely on impacts at the wholesale market level and did not include any impacts or benefits of RGGI outside of the wholesale market, including how allowances are allocated or how allowance revenue is invested.”<sup>13</sup>

### **c. Pennsylvania Should Auction the Remaining Allowances**

A key element of the RGGI program is the investment of auction proceeds. Thus, we support DEP’s proposal to auction the vast majority of allowances, with the proceeds to be invested in ways that further reduce emissions (see Section 4 below). As numerous analyses have demonstrated, auctioning allowances and investing the proceeds further reduces emissions and provides additional economic benefits to RGGI states. As Analysis Group found, RGGI states raised approximately \$1 billion from the sale of CO<sub>2</sub> allowances over the 2015-2017 compliance period.<sup>14</sup> At the most recent auction price, \$7.41/ton,<sup>15</sup> RGGI participation and auctioning the vast majority of allowances would raise over \$500 million for the citizens of Pennsylvania.

## **4. RGGI Revenue Is a Significant Decarbonization, Environmental Justice Opportunity**

As discussed above, a prime benefit of Pennsylvania participating in RGGI is that allowance purchases by polluting electric generators would provide revenue that can be used for a number of socially beneficial purposes, including investing in traditionally over-burdened and under-invested communities. Given the cap-and-invest structure of RGGI, it also would benefit those communities harmed both by fossil fuel production and combustion, and then again by the transition away from emitting generation. At \$500 million annually, RGGI investments would allow for a wide variety of projects that significantly reduce air pollution while improving all Pennsylvanians’ quality of life. For example, RGGI auction proceeds can fund weatherization and building repair programs that reduce the long-term need for energy assistance while supporting local jobs and economies. These programs will offer Pennsylvanians an opportunity to reduce their energy burdens and breathe cleaner air.

In addition to the many beneficial programs that can be funded through existing statutory authority (see Section 6.c below), new opportunities could be pursued and prioritized if authorized by the

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<sup>12</sup> PJM, “Carbon Pricing Study – Potential Impacts of a Carbon Price on Pennsylvania,” (Dec. 2020) (on file with author; provided by e-mail from Stephen Bennett, Manager, Regulatory and Legislative Affairs, PJM; Jan. 13, 2021).

<sup>13</sup> PJM, “Carbon Pricing Study – Potential Impacts of a Carbon Price on Pennsylvania: Executive Summary” at p. 2 (Dec. 2020) (on file with author; provided by e-mail from Stephen Bennett, Manager, Regulatory and Legislative Affairs, PJM; Jan. 13, 2021).

<sup>14</sup> Hibbard, Tierney, Darling, and Cullinan, “The Economic Impacts of the Regional Greenhouse Gas Initiative on nine Northeast and Mid-Atlantic States,” Analysis Group (April 17, 2018); available at: [https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis\\_group\\_rggi\\_report\\_april\\_2018.pdf](https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_april_2018.pdf) (last visited Jan. 13, 2021).

<sup>15</sup> Regional Greenhouse Gas Initiative, Auction 50 (held 12/2/20), “Auction Statistics,” <https://www.rggi.org/Auction/50> (last visited Jan. 13, 2021).

Pennsylvania Legislature. We urge the DEP to continue to work with the Legislature to authorize the use of RGGI proceeds to address low-income customers' energy burdens, particularly as the Commonwealth continues its transition to a clean energy economy. In recent years, the PA PUC has taken a number of steps to alleviate low-income customers' energy burdens, with the cost of these initiatives being shared by utility customers throughout the state. By taking full advantage of the RGGI funding opportunity, the energy burden of these low-income families can be further reduced without concurrently increasing overall costs. As described below, RGGI funding can provide both immediate benefits in terms of direct assistance and long-term benefits through weatherization and usage reduction investments.

Specific recommendations for use of RGGI revenues include:

- Supplementing low-income Customer Assistance Programs (CAP) and providing additional assistance to customers who meet federal poverty guidelines for CAP but are not determined to have sufficient energy burdens for bill assistance. Providing increased direct bill assistance for low-income customers reduces costs for all utility customers by reducing the cost of CAP assistance that must be borne by non-low-income customers, as well as reducing costs associated with delinquency and bad debt.
- State or utility programs that offer weatherization and building repair assistance that will reduce the long-term need for direct energy assistance. Pennsylvania's Act 129 energy efficiency law only applies to large electric distribution utilities, but many households use other fuel sources for heating, cooking, and hot water, and these needs have largely gone unmet, particularly for low-income customers. The need for housing improvements across the state is great, as Pennsylvania has the country's fourth-oldest housing stock with an average age of 51 years and 61 percent of renter-occupied units are older than 50 years. In other words, those least able to invest in their housing have the oldest and presumably least-efficient housing. This is a significant challenge for older Pennsylvanians, 67 percent of whom live in homes that have the greatest need for weatherization services and repair. Additionally, many family-owned small businesses operate in buildings that have significant energy efficiency and weatherization needs and could benefit from funding allocated to small business assistance programs beyond electric programs available through Act 129.
- Training Pennsylvanians to address the massive need for weatherization and building improvements throughout the state. Pennsylvania needs to increase workforce development programs to provide a skilled workforce to execute these programs. Scaling up these programs would provide skills training and jobs in disadvantaged communities that cannot be exported.

Strategic use of RGGI funds would allow communities throughout Pennsylvania to thrive over the long term. Importantly, even without the Proposed Rule, the transition away from more heavily-emitting and, importantly, more expensive fossil fuels will nonetheless continue. The Proposed Rule provides Pennsylvania an opportunity to proactively invest in communities that need the support, while simultaneously reducing CO<sub>2</sub> emissions in a manner that is protective of public health and welfare as well as the Commonwealth's natural resources.

## 5. Allowances Could Also be Used to Promote New Renewable Electricity

As EQB works toward finalizing the Proposed Rule, Exelon supports a clarification, either through a minor revision of the regulatory text or in the preamble published in connection with the Final Rule, to ensure that support for voluntary renewable electricity within the Commonwealth is not inadvertently affected by its participation in RGGI. This need not and must not delay finalization in time for a 2022 start. Specifically, Exelon supports confirmation that, under the Final Rules, CO<sub>2</sub> emission allowances could be retired on behalf of voluntary renewable electricity sales made and sourced within the Commonwealth. This approach, a version of which has been adopted by Connecticut, Maine, Massachusetts, New Hampshire, New York and Rhode Island,<sup>16</sup> allows customers to retain, and claim, the emission avoidance value associated with their voluntary renewable electricity purchases. This would further the purpose of the Proposed Rule “to reduce anthropogenic emissions of CO<sub>2</sub>, a greenhouse gas (GHG) and major contributor to climate change impacts, in a manner that is protective of public health, welfare and the environment.”<sup>17</sup>

Over the years, the voluntary renewable electricity market has grown as customers seek to meet sustainability goals and support renewable electricity use and may, depending on the type of renewable electricity, use such purchases to claim reduced Scope 2 GHG emissions.<sup>18</sup> If the customer participates in a GHG reporting program, its reported Scope 2 GHG emissions may be reduced based on such purchases.

Voluntary renewable electricity and REC products may be certified by independent third parties, such as the Center for Resource Solution, which administers the Green-e® Energy certification program, among others. Certified products are subjected to audits to ensure they comply with the standards of the certifying entity including standards preventing the double-counting of attributes, upholding the integrity of the renewable energy market.

Emission reduction claims associated with voluntary renewable electricity and REC purchases are typically supported because the renewable electricity resource supplying the REC to the customer has displaced another – likely fossil-fueled - facility that would have otherwise been delivering electricity to the grid. In the case of facilities located in a state participating in a cap-and-trade program, however, emissions are already subject to a cap, which effectively means generation by a resource that produces no GHG emissions permits another resource to emit more. Absent additional action, the REC holder’s intended GHG emissions reductions may not be realized. In such circumstances, this may adversely affect the ability of a renewable product from such a facility to be certified or for the purchaser of such a product to make Scope 2 emission reduction claims associated with that renewable product. Thus, further investments in RECs and associated emission reductions could be disincentivized.

This issue can be easily addressed by providing for the retirement of allowances associated with voluntary renewable electricity sales within the state. As noted above, this is the approach that has

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<sup>16</sup> Conn. State Agencies Regs. § 22a-174-31(e)(7)(A) (2020); Code of Maine Regs. § 06-096-156 (2)(G)(4) (2020); 310 C.M.R. 7.70(5)(b), (c) (2020); N.H. Admin. Rules, Env-A 4606.09 (2020); NYCRR § 242-5.3(c); 250 R.I.C.R. 120-05-46.8(K) (2020).

<sup>17</sup> Proposed Rule, “Background and Purpose,” 50 Pa. Bull. 6212 (Nov. 7, 2020).

<sup>18</sup> Scope 2 emissions are GHG emissions associated with electricity use and, absent specific renewable energy purchases, are typically based on the “system mix” emissions of the applicable service territory.

been taken by Connecticut, Maine, Massachusetts, New Hampshire, New York and Rhode Island. Each of these states has included a mechanism within their RGGI regulations that allows for such retirement, which in turn allows customers making voluntary renewable electricity purchases from facilities located within RGGI states to claim the full emission reduction value of those purchases and allows those renewable electricity products to be eligible for certification through programs such as Green-e® Energy.

Absent such a mechanism, implementation could have the unintended consequence of de-valuing voluntary renewable electricity products originating from Pennsylvania and other RGGI states and incentivizing customers to look outside of the region for renewable electricity supply. For example, a customer interested in purchasing a Green-e® Energy certified product from a newly developed project would be able to source such a product from a non-RGGI state, but not from Pennsylvania. Similarly, a Pennsylvania customer interested in reducing its Scope 2 emissions might better achieve those goals by purchasing RECs from a wind farm in Texas rather than from a local solar facility. These are perverse incentives that should be avoided.

As noted above, this potential impact on Pennsylvania’s voluntary renewable electricity markets could be eliminated or at least diminished by clarifying that allowances may be retired in connection with all or a portion of the voluntary renewable electricity sales from facilities located within the Commonwealth. We do not believe this would necessarily require a change to the Proposed Rule, which already has an allowance set-aside that could be used for this purpose, but we would suggest that a clarification or confirmation that the set-aside could be used for this purpose would help provide certainty for voluntary renewable electricity customers.

## **6. The Proposed Rule is Well Within DEP’s and EQB’s Authority Under the APCA**

The APCA provides ample legal authority for the promulgation and implementation of a cap and trade program to regulate CO<sub>2</sub> emissions from the power sector as set forth in the Proposed Rule.

### **a. The APCA Authorizes the Regulation of CO<sub>2</sub> Emissions**

Carbon dioxide, a greenhouse gas present in the atmosphere that contributes to a condition that may be inimical to public health, safety or welfare, is clearly subject to regulation under the APCA.

The APCA gives EQB the power and the duty to “[a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution”<sup>19</sup> that may, among other things, “prohibit or regulate any process or source or class of processes or sources.”<sup>20</sup> In addition, the APCA directs the EQB to “[e]stablish and publish maximum quantities of air contaminants that may be permitted under various conditions at the point of use from any air contaminant source in various areas of the Commonwealth so as to control air pollution.”<sup>21</sup>

Under the APCA, gases are included in the definition of “air contaminant,” and “air contamination” is “the presence in the outdoor atmosphere of an air contaminant which contributes to any condition of air pollution.” “Air pollution” includes “any form of contaminant, including . . .

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<sup>19</sup> 35 Pa. Stat. § 4005(a)(1) (2020).

<sup>20</sup> *Id.*

<sup>21</sup> 35 Pa. Stat. § 4005(a)(2) (2020).

smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases . . . or any other matter in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.”<sup>22</sup> EQB has repeatedly recognized this authority and relied upon the APCA to regulate greenhouse gas emissions.<sup>23</sup> Accordingly, the Commonwealth Court has recognized that the APCA bestows upon DEP a duty to promulgate regulations to reduce greenhouse gas emissions.<sup>24</sup>

#### **b. The APCA provides authority for a Cap-and-Invest Market-based Program**

The APCA provides broad authority to control air emissions, including through market-based programs such as the Proposed Rule.<sup>25</sup> Pennsylvania has repeatedly relied upon this broad authority to adopt cap-and-trade programs for other air contaminants, and no court has found that the Commonwealth lacks authority to regulate air contaminant emissions through these programs, which have long been an effective part of Pennsylvania’s efforts to protect its air resources.

In 1997, Pennsylvania established the Ozone Transport Commission NO<sub>x</sub> Budget Trading Program;<sup>26</sup> in 2000, the NO<sub>x</sub> SIP Call NO<sub>x</sub> Budget Trading Program;<sup>27</sup> and in 2008, the CAIR NO<sub>x</sub> Trading Program.<sup>28</sup> In adopting each of these programs, EQB relied upon its authority under APCA Section 5(a)(1).<sup>29</sup> EQB correctly found this authority to be sufficient and did not draw on its separate statutory authority to implement the federal Clean Air Act.<sup>30</sup> In fact, under the APCA, Pennsylvania has gone beyond the federal mandates of the Clean Air Act to create broader trading programs. For example, the 2008 rule responded to EPA’s Clean Air Interstate Rule (“CAIR”). CAIR required only power plants be covered, but EQB required other industrial sources to hold allowances as well.<sup>31</sup>

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<sup>22</sup> 35 Pa. Stat. § 4003 (2020).

<sup>23</sup> EQB relied on the APCA to require new motor vehicles purchased in Pennsylvania to comply with California’s GHG standards. Pennsylvania Clean Vehicles Program, 36 Pa. Bull. 7424 (Dec. 9, 2006) (relying on 35 Pa. Stat. § 4005(a)(1), (a)(7), and (a)(8)). DEP has also found “a strong scientific basis to show that methane meets the definition of air contaminant, air contamination, and air pollution under section 3 of the APCA. As a GHG and ozone precursor, methane is, among other things, inimical or may be inimical to the public health, safety, or welfare.” DEP, Technical Support Document for the General Plan Approval and/or General Operating Permit for Unconventional Natural Gas Well Site Operations and Remote Pigging Stations (BAQ-GPA/GP-5A, 2700-PM-BAQ0268) (June 2018) at 10.

<sup>24</sup> *Funk v. Wolf*, 144 A.3d 228, 250 (Pa. Commw. Ct. 2016) (*dicta*).

<sup>25</sup> 35 Pa. Stat. § 4005(a)(1) (2020). Opponents have argued that Pennsylvania is executing an “interstate air pollution control compact or agreement” which they say should be submitted to the General Assembly. This is clearly not the case: Through the Proposed Rule, Pennsylvania will independently establish a regulatory program compatible with RGGI. Other states may then independently amend their own regulations to allow acceptance of Pennsylvania allowances. It is also worth noting, because it demonstrates the non-binding nature of participating in RGGI, that the non-binding Memorandum of Understanding in use by some states, which neither DEP nor EQB have signed, includes no enforcement mechanism and allows unilateral withdrawal, as New Jersey demonstrated before reentering last year. Regional Greenhouse Gas Initiative, *Memorandum of Understanding* (Dec. 20, 2005); available at: <https://www.rggi.org/program-overview-and-design/design-archive/mou-model-rule> (last visited Jan. 13, 2021).

<sup>26</sup> 27 Pa. Bull. 5683 (Nov. 1, 1997).

<sup>27</sup> 30 Pa. Bull. 4899 (Sept. 23, 2000).

<sup>28</sup> 38 Pa. Bull. 1705 (Apr. 12, 2008).

<sup>29</sup> See 27 Pa. Bull. at 5683; 30 Pa. Bull. at 4899; 38 Pa. Bull. at 1705.

<sup>30</sup> 35 Pa. Stat. §§ 4004(1), 4005(a)(8).

<sup>31</sup> See 38 Pa. Bull. at 1712; see also, Additional Requirements, 25 Pa. Code §§ 145.211 – 145.223.

**c. DEP has the Authority to Require Regulatory Fees for Allowances and to Put Those Proceeds into the Clean Air Fund**

Importantly, the EQB has the authority require regulated entities to pay fees for emission allowances and put those proceeds into the Clean Air Fund.<sup>32</sup> The APCA not only directs fees into the Clean Air Fund,<sup>33</sup> but also includes specific authority for the Clean Air Fund to receive contributions from “any private source.”<sup>34</sup> APCA also provides DEP the authority to administer the Clean Air fund “for use in the elimination of air pollution.”<sup>35</sup>

Pennsylvania Administrative Code provides that “[m]onies paid into the Clean Air Fund may be disbursed at the discretion of the Secretary for use in the elimination of air pollution.”<sup>36</sup> The Code further provides that “the full and normal range of activities of the Department shall be considered to contribute to the elimination of air pollution.”<sup>37</sup> The explicitly non-exhaustive list of appropriate expenditures that follows includes equipment, consultants, studies, training, educational materials, administrative support, and “[p]ayment, in whole or in part, of the costs of a public project necessary to abate air pollution whether or not the exclusive purpose of that project is the abatement of air pollution.”<sup>38</sup>

In addition to supporting measures that directly reduce air pollution, auction fees can and should be used to support communities affected by power plant closures in order to facilitate the Commonwealth’s transition to a cleaner electric grid, as discussed in Section 3 above. The transition to cleaner power is already happening and will continue; inherent in that transition are social and economic changes in communities that have previously relied upon emissions-intensive generation for jobs and tax base. Making change possible and productive for these communities is integral to the elimination of air pollution.

**d. The Fees in the Proposed Rule are not Taxes.**

Allowance auction fees under the Proposed Rule do not constitute taxes requiring legislative authorization. Under Pennsylvania law, “[a] tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue ‘to a general fund, and is spent for the benefit of the entire

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<sup>32</sup> 35 Pa. Stat. § 4006.3 (2020). Significantly, the RGGI auction fees are a regulatory measure, distinct from fees established “to cover the indirect and direct costs of administering” the various regulatory programs, which are also authorized by the APCA and referred to by Pennsylvania Courts as “license fees.” *See, e.g., National Biscuit Co. v. Philadelphia*, 98 A.2d 182, 188 (Pa. 1953). A “license fee,” is intended “to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.” *Id.* The Commonwealth Court has recognized such “license fees,” are distinct from the types of fees that would be imposed by the Proposed Rule, which are intended to regulate the conduct of the business on which the fee is imposed. *White v. Commonwealth, Med. Prof. Liability Catastrophe Loss Fund*, 571 A.2d 9, 11 (Pa. Commw. Ct. 1990). “The classic ‘regulatory fee’ is imposed by an agency upon those subject to its regulation. *It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive.* Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency’s regulation related expenses.” *San Juan Cellular*, 967 F.2d at 685 (citations omitted) (emphasis added).

<sup>33</sup> 35 Pa. Stat. § 4009.2(a) (2020).

<sup>34</sup> 35 Pa. Stat. § 4009.2(b) (2020).

<sup>35</sup> 35 Pa. Stat. § 4009.2(a) (2020).

<sup>36</sup> 25 Pa. Code § 143.1(a) (2020).

<sup>37</sup> 25 Pa. Code § 143.1(b) (2020).

<sup>38</sup> *Id.* (“For projects where multiple purposes will be served, monies from the Clean Air Fund may be used to cover that proportion of the total expense that is estimated to be attributable to abate the air pollution portion of the project.”)

community.”<sup>39</sup> While allowance auction fees would raise revenue, they are imposed by a regulatory measure, and they are held in a special fund and charged and expended for a specific purpose. “The question of whether an enactment is a tax or a regulatory measure is determined by the purposes for which it is enacted, and not by its title.”<sup>40</sup> The primary purpose of the Proposed Rule is not to raise revenue, but rather “to reduce anthropogenic emissions of CO<sub>2</sub>, a greenhouse gas (GHG) and major contributor to climate change impacts, in a manner that is protective of public health, welfare and the environment.”<sup>41</sup>

Several other characteristics of allowance auction payments under the Proposed Rule demonstrate that they do not constitute taxes: First, sources will choose to purchase allowances at auction and may alternatively choose to eliminate emissions or purchase allowances on the secondary market; second, these fees do not work like taxes: they are not deposited in the general fund, fee amount is variable, and allowances are fungible, which means proceeds from any given purchase may go outside Pennsylvania;<sup>42</sup> and finally, unlike a tax, payment of a fee confers a value on the purchaser: the permission to emit a pollutant while producing electricity for sale.<sup>43</sup>

#### **e. The Proposed Rule is in the Public Interest under the Regulatory Review Act (RRA)**

The Independent Regulatory Review Commission (IRRC) is tasked with formal review of the Proposed Rule at the close of the public comment period.<sup>44</sup> The IRRC should find the Proposed Rule to be in the public interest; this finding is supported by the criteria provided by the RRA. The Proposed Rule will minimize consumer costs while protecting public health and the Commonwealth’s natural resources. The Proposed Rule is clear, feasible, reasonable, supported by data, and developed in full compliance with Pennsylvania’s robust procedural safeguards.<sup>45</sup> As described above, numerous reputable organizations have looked at the question of Pennsylvania participating in RGGI at the proposed emissions budget, and found that it would reduce CO<sub>2</sub> and other harmful emissions while minimizing costs to Pennsylvanians, including through significant investments made possible through use of RGGI funds.<sup>46</sup>

Finally, while the Proposed Rule is important to the Commonwealth’s efforts to mitigate climate change, it is not a policy decision of such a substantial nature as to require legislative review. Opponents have argued these actions are outside the scope of the APCA and that such air emissions

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<sup>39</sup> *Nigro v. City of Philadelphia*, 2010 U.S. Dist. LEXIS 88897, No. 10-987 (E.D. Pa.) (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm’n*, 967 F.2d 683, 685 (1st Cir. 1992)).

<sup>40</sup> *White*, 571 A.2d at 11 (citing *City of Wilkes-Barre v. Ebert*, 349 A.2d 520 (Pa. Commw. Ct. 1975)).

<sup>41</sup> Proposed Rule, “Background and Purpose,” 50 Pa. Bull. 6212 (Nov. 7, 2020).

<sup>42</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *See also National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (finding a penalty for failure to purchase health insurance was a tax in part because it was collected by the Internal Revenue Service in the same manner and at the same time as income taxes).

<sup>43</sup> *See Trailer Marine Transport Corp. v. Vasquez*, 977 F.2d 1, 6 (1st Cir. 1992) (holding a toll for using a road was not a tax in part because it was payment for use of the road).

<sup>44</sup> 71 Pa. Stat. § 745.5(g) (2020).

<sup>45</sup> 71 Pa. Stat. § 745.5b (2020).

<sup>46</sup> Penn State Center for Energy Law and Policy, “Prospects for Pennsylvania in the Regional Greenhouse Gas Initiative,” (Dec. 2020); available at: [https://celp.psu.edu/files/2021/01/CELP\\_RGGI.pdf](https://celp.psu.edu/files/2021/01/CELP_RGGI.pdf) (last visited Jan. 13, 2021); Pennsylvania Dept. of Environmental Protection, “Pennsylvania RGGI Modeling Report” and modeling presentations and results (Sept. 25, 2020); available at: <https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx> (last visited Jan. 13, 2021).

control programs may only be promulgated by the Pennsylvania Legislature. This is incorrect. Rather, the Pennsylvania Legislature has already provided ample authority for the Proposed Rule by enacting the APCA, which provides an intentionally broad delegation of authority that directs EQB to fashion air quality programs to protect the Commonwealth's air resources. For the reasons set forth above, the Proposed Rule falls squarely within the purpose of—and the powers provided by—the APCA.<sup>47</sup>

## **7. Conclusion**

EQB should move swiftly to finalize the Proposed Rule in time to begin participation for 2022. Unnecessarily extending the regulatory process would only delay implementation of this important public health protection and create more uncertainty for Pennsylvania's clean electricity resources.

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<sup>47</sup> 35 Pa. Stat. §§ 4001-4015 (2020).