

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-559 (IRRC #3274)

CO2 Budget Trading Program

February 16, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the November 7, 2020 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) (RRA). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

1. Comments, objections or recommendations of a committee.

This proposed rulemaking will establish a program to limit the emissions of carbon dioxide (CO₂) from fossil-fuel-fired electric generation units (EGUs) with a nameplate capacity equal to or greater than 25 megawatts by entering the Commonwealth into the Regional Greenhouse Gas Initiative (RGGI). According to the EQB, the purpose of the rulemaking is to reduce anthropogenic emissions of CO₂, a greenhouse gas, and a major contributor to climate change impacts, in a manner that is protective of public health, welfare and the environment.

The proposal has generated significant interest from the regulated community and members of the General Assembly. Commentators and legislators have provided detailed arguments and strong opinions on the merits of joining or not joining RGGI. This Commission appreciates and thanks all of the people that have participated in the regulatory review process.

Both the House and Senate Environmental Resources Committees (Committees) voted to submit letters to this Commission and the EQB identifying numerous objections to the proposed rulemaking. The objections relate to the following:

- The EQB lacks statutory authority under the Air Pollution Control Act (APCA) (35 P.S. § 4001—40015) to promulgate the regulation;
- The proceeds generated through the auction procedures of the rulemaking and RGGI are not a fee under the APCA, but rather an illegal tax;
- The Department of Environmental Protection (DEP) violated the APCA's mandate for public hearings to be held in impacted communities. Included with this objection is a concern that citizens without internet access or broadband capability were excluded from participating in the virtual hearings that were held;

- The proposal will have a negative fiscal impact on the Commonwealth’s economy. The coal industry, fossil-fuel-fired EGUs, large industrial users of electricity, small businesses, labor unions and individuals will be harmed financially;
- CO₂ is not an “air pollutant” as defined by the APCA. The proposal does not prevent or reduce greenhouse gases because generation will shift to fossil-fuel-fired EGUs in other states and emissions from those EGUs will pollute the environment of the Commonwealth. This is referred to as leakage. Any reduction of pollution would be insignificant, thus, the proposal fails to meet the APCA’s standard that regulations must produce a meaningful reduction of “air pollution”;
- The modeling used by the EQB to justify the rulemaking is outdated and does not provide an accurate estimate of the economic impact that the rulemaking will have. The modeling also does not account for leakage;
- The federal government is moving forward with climate change policies; and
- The potential costs of the rulemaking outweigh any meaningful benefits that may result from it, especially during the time of the COVID-19 pandemic.

Under the RRA, the comments, objections or recommendations of a Committee is one of the criteria the Commission must consider when determining if a regulation is in the public interest. Our comments below address many of the issues raised by the Committees. When this proposal is delivered as a final-form regulation to this Commission and the Committees for review, the issues raised by the Committees, and the EQB’s response to those issues, will be one of the criteria used by this Commission to determine if the regulation is in the public interest.

2. Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

In addition to the Committee objections, we have received letters of opposition from other legislators. These letters include a letter signed by the four members of the House and Senate Republican Leadership teams, a letter from 29 members of the Senate, a letter from the Chair of the Senate Community, Economic and Recreational Development Committee, a letter from the Chair of the Senate Finance Committee, a letter from the Chair of the Senate Communications and Technology Committee, and two separate letters signed by a total of 76 members of the House of Representatives. We also received a letter signed by eight members of the United States House of Representatives from Pennsylvania. These letters raise similar concerns to those raised by the Committees and also other issues. We note that the Senate letter signed by 29 members states the following: “The proposed regulation joining Pennsylvania to RGGI represents the single, most significant energy policy reform since the deregulation of electric generation in the 1990’s.”

We are aware of activity in the 2019-2020 legislative session addressing the issue of the Commonwealth joining a carbon trading program with other states. The intent of House Bill 2025 was to stop this proposed rulemaking from moving forward by requiring legislative approval before the Commonwealth could enter into a carbon trading program like RGGI. House Bill 2025 passed the House on July 8, 2020, by a vote of 130-71. It passed the Senate on

September 9, 2020, by a vote of 33-17. Governor Wolf vetoed the bill on September 24, 2020. Similar bills have been introduced this legislative session.

Commentators have pointed out that ten of the 11 states that currently participate in RGGI have done so with specific authority granted by their respective legislative branches. The impetus for this proposed rulemaking was Executive Order 2019-07 (EO), Commonwealth Leadership in Addressing Climate Change through Electric Sector Emissions Reductions. This EO directed the DEP to use its existing statutory authority under the APCA to develop this proposed rulemaking to abate, control or limit CO₂ emissions from fossil-fuel-fired EGUs.

Finally, before this proposed rulemaking was presented to the EQB for consideration, the DEP presented the rulemaking to three advisory panels for consultation or review. The three advisory boards were: the Air Quality Technical Advisory Committee, the Citizens Advisory Council, and the Small Business Compliance Advisory Committee. All three panels declined to support the rulemaking.

Another criterion of the RRA that this Commission must consider when determining if a regulation is in the public interest is whether the regulation represents a policy decision of such a substantial nature that it requires legislative review. We believe the Committee action and concerns, the issues raised by members of the General Assembly, the legislative action from the last session of the General Assembly, the lack of consensus from three EQB advisory panels and the manner in which other states have joined RGGI clearly indicate that this regulation falls within the scope of that criterion. We ask the EQB to explain why it is appropriate to implement this carbon trading program through executive order and the rulemaking process instead of the legislative process.

3. Protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.

In the Preamble to this rulemaking, the EQB requested comments on potential approaches for implementing the regulation that would address equity and environmental justice concerns and potential approaches that would assist the transition of workers and communities as the Commonwealth moves towards cleaner electric generation. Legislators and organizations that advocate for environmental protection, renewable energy, energy efficiency, low-income residents and environmental justice concerns have provided comments in support of the rulemaking. Many individuals and businesses have provided similar comments. The comments provide suggestions as requested by the EQB. The comments also concur with the EQB's stated need for the regulation, the modeling and data used to support it and the statutory authority behind it, as well as highlight the fact that under Article 1, Section 27 of the Pennsylvania Constitution, Pennsylvanians have a right to clean air and pure water.

Some of the comments from these organizations have provided suggestions for amending the regulation to provide further environmental protections. These suggestions include: modifying or eliminating set-aside allowances for certain industries; inclusion of data collection mechanisms to ensure emissions are not shifted to generation facilities that fall below the 25 megawatt threshold of the rulemaking because the facilities could have a negative impact on environmental justice communities; and ensuring that imported power does not contribute to

leakage. We encourage the EQB to consider all of the recommendations provided by commentators as a means of further protecting the public health, safety and welfare of citizens of the Commonwealth and its natural resources and meeting the goal of this rulemaking.

4. Whether the agency has the statutory authority to promulgate the regulation.

In the Regulatory Analysis Form (RAF) and the Preamble submitted with this proposal, the EQB has explained its statutory authority for the rulemaking. The EQB states Section 5(a)(1) of the APCA (35 P.S. § 4005(a)(1)) grants the EQB authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in the Commonwealth. In addition, Section 6.3(a) of the APCA (35 P.S. § 4006.3(a)) authorizes the Board by regulation to establish fees to support the air pollution control program authorized by the APCA and not covered by fees required by Section 502(b) of the Clean Air Act (CAA).

The EQB further states that CO₂ is a regulated “air pollutant” under the APCA and the CAA. The EQB explains that the Commonwealth Court has endorsed the DEP’s position that the General Assembly, through the APCA, gave the authority to the DEP to reduce greenhouse gas emissions, including CO₂. *Wolf v. Funk*, 144 A.3d 228, 250 (Pa. Cmwlth. 2016). The EQB also contends that the U.S. Supreme Court recognized that similarly broad language in the CAA authorized the U.S. Environmental Protection Agency (EPA) to regulate CO₂ emissions *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The Committees, individual legislators and public commentators opposed to the proposal disagree that the EQB has the statutory authority to promulgate the rulemaking. First, commentators state that CO₂ is not included in the definition of “air pollutant” under Section 3 of the APCA. (35 P.S. § 4003). They contend that CO₂ is naturally occurring, not inimical to humans or animals and is necessary for human life. In addition, CO₂ was not considered a greenhouse gas under a federal court ruling regarding the CAA and the cited statutory authority for this rulemaking is the APCA. Therefore, the EQB does not have statutory authority to regulate CO₂.

Second, commentators believe Section 4(24) of the APCA (35 P.S. 4004(24)) allows the DEP to formulate “interstate air pollution control compacts or agreements,” but any such agreement must be submitted to the General Assembly. Commentators argue that that submittal has not occurred.

Third, commentators argue that the general rulemaking authority granted to the EQB under Section 5(a)(1) of the APCA for the “prevention, control, reduction and abatement of air pollution” is not a broad grant of authority to enter into a multistate agreement such as RGGI. It is also argued that joining RGGI will have minimal impact on the air pollution in the Commonwealth because of leakage. Therefore, the proposal fails to meet the standard of preventing, controlling, reducing and abating air pollution required by the APCA.

Fourth, it is argued that Section 6.3(a) of the APCA only allows the EQB to establish fees to cover the costs of administering the air pollution control plan. The projected amount of fees collected through the auction mechanism of the proposed regulation and RGGI far exceeds the costs of administering the program. Since the EQB projects that five percent of the auction

proceeds will be used for administrative purposes and one percent will be allocated to RGGI, the remaining proceeds would qualify as a tax. Since the power to tax lies solely with the General Assembly, the revenue raising mechanism of the regulation is illegal.

Finally, concerns have been raised regarding the EQB's compliance with Section 7(a) of the APCA. (35 P.S. § 4007(a)). This section states, in part, the following: "Public hearings shall be held by the board or the department... 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." It is argued by commentators that the virtual public hearings held by DEP, do not satisfy this requirement.

This Commission acknowledges that several of the commentators that have written in support of this proposal have addressed each of the issues above and provided counter arguments. We ask the EQB to consider all of the arguments on both sides of these issues and provide a point-by-point analysis of why this proposal is within the statutory authority granted by the APCA and also consistent with the intent of the General Assembly when that statute was enacted.

5. Whether the regulation is consistent with the intent of the General Assembly; Possible conflict with or duplication of statutes or existing regulations; Implementation procedures.

Another concern relates to the Clean Air Fund (Fund) established under Section 6(l) of the APCA. (35 P.S. § 4006(l)). It is our understanding that proceeds collected from the auction of allowances are to be deposited into the Fund. Information provided in the RAF indicates that the auction of allowances under RGGI could produce \$300 million in proceeds during the first year of implementation and the administrative costs of the carbon trading program would be approximately \$15 million.

The DEP's existing regulations provide direction on how money from that Fund can be disbursed. (See 25 Pa. Code Chapter 143, relating to disbursement from the Clean Air Fund). Chapter 143 was promulgated in 1974 and amended in 1979. Section 143.1(a) states that monies paid into the fund may be disbursed "at the discretion of the Secretary for use in the elimination of air pollution." Section 143.1(b) provides direction on how the money can be spent.

The current balance of the Fund is approximately \$26 million dollars. The DEP anticipates that this rulemaking will raise over \$2 billion dollars between 2022 and 2030. We are concerned that the General Assembly did not contemplate or envision the Fund growing to that amount and that it could be spent at the discretion of the Secretary under the guidance provided by a regulation promulgated over 40 years ago. We ask the EQB to explain how this process of collecting proceeds and distributing funds of this magnitude is consistent with the intent of the General Assembly when the APCA was enacted.

A corollary to this concern is how the proceeds from the auction will be distributed. In the RAF, the EQB projects that 31 percent will be used for energy efficiency projects, 32 percent will be used for renewable energy projects and 31 percent will be used for greenhouse gas abatement. Many of the commentators that support the rulemaking provided suggestions on how the auction proceeds could be allocated. Some of the suggestions would appear to be outside of the

parameters established by 25 Pa. Code Chapter 143. Since potential use of the proceeds is not a part of this rulemaking process, we cannot comment on it. However, we agree with comments submitted by the Pennsylvania Office of Consumer Advocate that suggest the DEP should “seek further authority” to allow for a broader use of the proceeds. Alternatively, the DEP could initiate a rulemaking to amend existing Chapter 143 to allow for a broader use of the proceeds.

6. Need for the regulation; Economic or fiscal impact.

Commentators that support the rulemaking agree with the EQB’s modeling and analysis that demonstrate the economic, health and environmental benefits that will result from the Commonwealth joining RGGI. Commentators that oppose the rulemaking question the need for it. Questions raised about the need for the rulemaking are numerous, but revolve around two main issues. The first, as noted by the Senate Committee, is the fact that CO₂ emissions from fossil-fuel power generation in the Commonwealth have been reduced by 38 percent since 2008. This trend is likely to continue because of the price of natural gas and the development of renewable energy. Second, the rulemaking will push the generation of electricity to states like West Virginia and Ohio that do not participate in RGGI. If these states increase their production of fossil-fuel-generated electricity, as predicted by some commentators, the overall health benefits to this region of the country, and Pennsylvania specifically, will be minimal and come at a steep economic cost.

We agree with a commentator that stated the goal of reducing greenhouse gases through RGGI and this rulemaking are laudable. However, the declining emissions from fossil-fuel-fired EGUs that has occurred over recent years without participation in RGGI and the leakage that will occur if the Commonwealth does join RGGI raises the question of whether the rulemaking, and its potential benefits, are needed compared to the potential negative fiscal impact that is predicted by the Committees, certain legislators and some members of the regulated community. To assist this Commission in determining if the rulemaking is in the public interest, we ask the EQB to explain why the benefits of the rulemaking outweigh the costs associated with its implementation.

7. Whether the regulation is supported by acceptable data.

Commentators have also raised concerns about the modeling employed by the EQB to quantify the economic and health benefits of the rulemaking. They question if the data considered is acceptable and appropriate. First and foremost, commentators are concerned that the underlying assumptions and data used for the modeling have not been made available to the public. Other issues raised relate to the following:

- Emissions reductions in the Commonwealth have been overstated because of leakage; therefore, the monetized health benefits are also overstated;
- The modeling compares cumulative data for the time from 2019-2030, but the Commonwealth will not join RGGI until 2022;
- The model uses an estimate of future natural gas prices which could be much lower than predicted;

- The model does not account for new natural gas generation, but it does account for new renewable generation;
- The modeling was conducted before New Jersey and Virginia joined RGGI;
- The actual cost of buying an allowance will be higher than projected;
- The modeling fails to account for the economic downturn related to the COVID-19 pandemic; and
- The model fails to account for the expansion of other federal and state regulations and initiatives that impact the production and distribution of electricity.

We urge the EQB to share the underlying assumptions and data used for its modeling and address the issues identified above to demonstrate the validity of the data upon which the regulation is based.

8. Economic or fiscal impact; Direct and indirect costs to the Commonwealth, to its political subdivision and to the private sector; Adverse effects on prices of goods and services, productivity or competition.

Commentators believe that the requirement to purchase allowances by coal and older natural-gas-fired EGUs will result in those units becoming uneconomical to operate. As a result, these EGUs will close, impacting the coal mining industry of the Commonwealth and hundreds of small businesses and labor unions that support those industries. Another concern is that the price of electricity will increase. The price that electric utilities pay for electricity from fossil-fuel-fired generators will increase and the additional cost will be passed on to residential, commercial and industrial rate payers. Low-income residents and those economically affected by the COVID-19 pandemic, small businesses and large industrial users will be impacted. Large industrial users of electricity may base a decision to locate or relocate a business based on the price of electricity in the Commonwealth. Finally, local governments where the coal-related industries and small businesses operate will be negatively impacted because of the tax loss that will result from the rulemaking. One commentator has stated that the fiscal impact of the rulemaking will be the loss of over 8,000 jobs, the loss of \$2.82 billion in total economic impact, the loss of \$539 million in employee compensation, and the loss of \$34.2 million in state and local tax revenue.

In the RAF and Preamble submitted with the proposed rulemaking, the EQB explains that although prices for electricity may increase the first year or two of participating in RGGI, the prices will stabilize and eventually decrease. The EQB and commentators also believe any potential economic disruption caused by the rulemaking will be negligible because of growth of other segments of the economy.

After reviewing the documentation submitted by the EQB, Committee and legislative comments and comments from the regulated community, it is clear that there is no consensus on how this rulemaking will affect the economy of the Commonwealth. We ask the EQB to review the concerns of those commentators that have raised these issues and provide updated and revised information in the RAF related to the potential economic and fiscal impact of the rulemaking.

9. Compliance with the provisions of the RRA.

In addition to a more thorough analysis regarding potential fiscal or economic impact requested above, we request additional information and more complete answers to the following sections of the RAF. First, Section 17 of the RAF asks an agency to identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor organizations and other public and private organizations. It also asks an agency to evaluate the benefits expected as a result of the regulation. The EQB provides a detailed explanation of the expected environmental, health and economic benefits of the regulation for society as a whole. It also provides a dollar estimate of the potential cost to residential customers in terms of monthly electricity bills. However, the explanation does not provide a similar estimate for small businesses and other businesses. We ask the EQB to provide that information in the RAF submitted with the final regulation.

Second, Section 19 of the RAF asks an agency to estimate any costs or savings to the regulated community associated with legal, accounting or consulting procedures. We ask the EQB to estimate the cost associated with an owner or operator having an account representative required to participate in allowance auctions under RGGI.

10. Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for the regulation impacting small businesses.

A comment letter signed by 40 Representatives of the General Assembly identifies two possible alternatives for achieving the goal of the rulemaking that will be less costly and intrusive to small businesses. First, the letter states that the current regulatory environment and existing market forces have already significantly reduced CO₂ emissions in the Commonwealth. The “status quo is a far less costly and intrusive method than RGGI at achieving tremendous reductions in carbon emissions.” Second, the letter states the DEP could achieve its objective with a “gradually declining CO₂ emissions budget without the exorbitant costs proposed by this submission.” This could be accomplished by calculating a price to auction emissions that would cover the cost needed to administer RGGI. We ask the EQB to consider these options, and if it decides to proceed with the current rulemaking, provide an explanation of why these alternatives are not appropriate.

11. Implementation procedures.

This rulemaking is based on the RGGI Model Rule, but as explained by the EQB, it differs in five main areas. As it relates to this comment, the differences are: a waste-coal set-aside; the establishment of a strategic use set-aside allocation; a set-aside provision for cogeneration units, including combined heat and power (CHP) systems; and a limited exemption for cogeneration units that are interconnected and supply power to a manufacturing facility.

In the Preamble to the rulemaking, the EQB requested comments “on ways to appropriately address the benefits of cogeneration in this Commonwealth, including the allocation of CO₂ allowances similar to the waste-coal set-aside provision.” Comments for and against these set-asides and exemptions have been submitted. Some comments request a complete exemption for waste-coal and cogeneration energy production and others request that the set-asides and

exemptions be eliminated from the rulemaking. Technical comments have also been provided including suggestions for improving the manner in which the set-asides and exemptions can be implemented. We will review the EQB's response to these technical comments and any changes it may make to the final regulation to determine if the regulation is in the public interest.

In addition, we ask EQB to consider delaying the implementation of the rulemaking for one year. This additional time would allow the regulated community an opportunity to adjust their business plans to account for the potential increased costs associated with Pennsylvania joining RGGI.

12. Clarity; Implementation procedures.

Section 145.304. Applicability.

Subsection (a) states that once this rulemaking becomes effective, it will apply to “an owner or operator of a unit that, at any time on or after January 1, 2005, served or serves an electricity generator with a nameplate capacity equal to or greater than 25 MWe.” This provision is unclear because it does not specify that only units that are operating would have to comply with the regulation. We suggest that the final regulation be amended to improve the clarity of this requirement.

Section 145.314. Account certificate of representation.

This section specifies what must be included in a complete account certificate of representation for a CO₂ authorized account representative or a CO₂ authorized alternate account representative. We are concerned that this section does not require the owner or operator of a unit to verify anything. We recommend that the final-form regulation be amended to require the owner or operator of a unit to sign or verify in some manner that the representative is authorized to represent their interests under the CO₂ budget trading program.