

August 30, 2021

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

Dear Commissioners:

We, the undersigned members of the Pennsylvania State Senate, urge the Independent Regulatory Review Commission (IRRC) to disapprove final Environmental Quality Board (EQB) Regulation #7-559 (IRRC #3274), which would establish a CO₂ budget trading program and merge Pennsylvania into the Regional Greenhouse Gas Initiative (RGGI) over the objections of bipartisan majorities of the General Assembly and Pennsylvania voters.

As a follow-up to our (attached) January 14th letter, we want to emphasize our shared concerns raised by both labor and business leaders, as well as concerns raised by electricity consumers. We also emphasize that the issues raised in our previous letter, let alone the concerns raised in the February 16, 2021 IRRC comment letter, were not properly addressed by the Department of Environmental Protection (DEP) or the EQB in their amendments and responses.

Notwithstanding the modest changes from the proposed RGGI regulation, our substantial policy concerns remain with the final regulation:

- RGGI will trigger the near immediate closure of every coal and many natural gas plants throughout the Commonwealth, which will fundamentally restructure electric generation in Pennsylvania.
- RGGI will lead to the immediate loss of thousands of family sustaining jobs, which will harm families and communities.
- RGGI will effectively prohibit the construction of any new natural gas plants in Pennsylvania, which will impact thousands of future jobs.
- RGGI will trigger significant rate increases for electricity customers, which will have a particularly harmful impact on low- and fixed-income households, who will not have access to direct bill subsidies as offered in most all RGGI states through this regulation.


- RGGI will effectively subsidize coal and natural gas plants in non-RGGI states, like Ohio and West Virginia, which will undermine virtually all of the alleged climate and environmental benefits cited by RGGI proponents.
- DEP's own modeling confirms virtually all of the Pennsylvania CO₂ reductions will be offset by CO₂ increases within non-RGGI PJM states because Pennsylvania does not operate within a bubble, but rather the PJM regional transmission organization.

We are also deeply concerned about the legal and constitutional issues as it impacts the General Assembly. In fact, many of the policy changes cited above are directly relevant to the legal shortcomings of the RGGI regulation. As IRRC noted in its comments, "this regulation falls within the scope" of the Regulatory Review Act's criterion that RGGI "represents a policy decision of such a substantial nature that it requires legislative review." We can think of no other Pennsylvania regulation that would have so profound an impact but relies on so little statutory authority. If Pennsylvania is to join RGGI, this is a decision that must be vetted and decided by the duly elected members of the General Assembly.

DEP argues Section 5(a) of the Air Pollution Control Act (APCA), which was enacted in 1972, provides the legal basis for implementing the RGGI regulation. We find this difficult to accept. To DEP's own admission, cap and trade programs Pennsylvania has entered into were promulgated in response to initiatives at the Federal level. RGGI is not a federal mandate, but rather another instance of usurpation of authority by the Executive Branch. DEP's attempt to bootstrap various definitions within the APCA to make its argument, along with its effort to cite various legal cases that effectively undermine its legal case, should be enough for IRRC to reject this regulation.

We understand the unfortunate reality that DEP may still move forward with promulgation of the regulation regardless of whether IRRC disapproves. We fear this may be the case because DEP has already disregarded IRRC's recommendations, particularly that it "consider delaying the implementation of the rulemaking for one year" to "allow the regulated community an opportunity to adjust their business plans to account for the potential increased costs associated with Pennsylvania joining RGGI." We believe IRRC has the ability to send a powerful, independent message that if, in fact, DEP intends to move forward, it will do so without IRRC's blessing, just as it proposes to do without the blessing of the General Assembly.

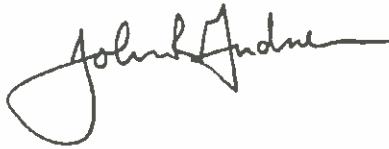
Sincerely,



Senator Jake Corman
President Pro Tempore



Senator Kim Ward
Majority Leader



Senator John Gordner
Majority Whip



Senator Bob Mensch
Caucus Chair



Senator Ryan Aument
Caucus Secretary



Senator Pat Browne
Appropriations Chair



Senator Camera Bartolotta
Caucus Administrator



Senator Mario Scavello
Policy Chair



Senator Elder Vogel
Deputy President Pro Tempore



Senator Gene Yaw
Environmental Resource & Energy Committee Chair



Senator David Argall



Senator Lisa Baker



Senator Michele Brooks



Senator John DiSanto



Senator Cris Dush



Senator Chris Gebhard



Senator Scott Hutchinson



Senator Wayne Langerholc



Senator Dan Laughlin



Senator Scott Martin



Senator Doug Mastriano



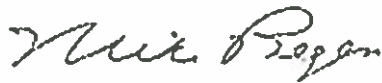
Senator Kristin Phillips-Hill



Senator Joe Pittman



Senator Devlin Robinson



Senator Mike Regan



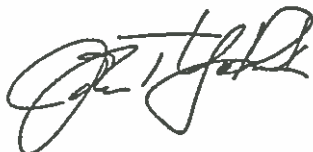
Senator Pat Stefano



Senator Robert Tomlinson



Senator Judy Ward



Senator John Yudichak



January 14, 2021

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Dear Commissioners:

We have serious concerns with the Department of Environmental Protection's (DEP) proposed rulemaking establishing a CO₂ budget trading program (#7-559) and joining Pennsylvania to the Regional Greenhouse Gas Initiative (RGGI). We believe this proposed regulation exceeds the statutory authority granted to the DEP under the Act of Jan. 8, (1960) 1959, P.L. 2119, No. 787 known as the Air Pollution Control Act (APCA) and violates specific provisions of the Pennsylvania Constitution. In addition to the lack of authority to promulgate, the proposed regulation will cause serious economic harm to communities throughout Pennsylvania, the loss of thousands of family-sustaining jobs, and increase the price of electricity for all consumers. Likewise, the legal precedent it would set for future attempts to regulate and/or tax carbon dioxide emissions from other sources (i.e., manufacturers, automobiles, etc.) would be particularly troubling. We urge you to disapprove this proposed regulation as it fails to meet several of the specific statutory requirements under Section 5.2 the Act of Jun. 25, 1982, P.L. 633, No. 81, known as the Regulatory Review Act (RRA).

On October 3, 2019, Governor Wolf directed the DEP through Executive Order 2019-17 to develop a regulation that would facilitate Pennsylvania's entry into RGGI. In coordination with RGGI Inc., the private, non-profit administrator of RGGI, and member states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont), DEP submitted a draft carbon dioxide trading program regulation to, and received approval from, the Environmental Quality Board (EQB) on September 15, 2020, which is now open to public comment and review by IRRC.

The EQB published the proposed RGGI regulation (#7-559) in the Pennsylvania Bulletin and limited public comment from November 7, 2020 to January 14, 2021, only 69 days, which coincided with three national holidays and the end of the 2019-20 Session of the General Assembly, limiting both public and legislative engagement opportunities already compromised by the COVID-19 pandemic.

As an example of the lack of public participation opportunities, the APCA requires in person public hearings "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." However, the EQB expressly rejected a motion at the September 15th meeting to hold such a public hearing on the proposed regulation within any of the counties that hosts coal-fired electric generation plants, and instead held five, all-day virtual public hearings in mid-December. The virtual hearings denied tens of thousands of impacted families who lack reliable broadband internet access the opportunity to raise concerns over the impacts RGGI will cause their family and community.


Additionally, the statutory authority to promulgate the proposed regulation is based on an erroneous interpretation by DEP. RGGI is a multistate program in which each state regulates carbon

dioxide emissions from electric generation plants by imposing a cap and then a tax on those emissions, intended to reduce in-state carbon dioxide emissions and generate revenues to fund various non-fossil fuel related projects. No state, Federal court, or Federal agency mandates exist that would require Pennsylvania to cap and tax carbon dioxide emissions from electric generation units. In fact, under the Pennsylvania APCA, there is no reference to carbon dioxide under the definition of "air pollution," let alone express statutory authorization to regulate, cap and tax carbon dioxide emissions. Furthermore, in contrast to the federal Clean Air Act definition of "air pollutant," the APCA definition also requires an air pollutant to be "inimical to public health...injurious to humans...or which unreasonably interferes with the enjoyment of life or property," unlike carbon dioxide which is necessary to sustain life.

Finally, the proposed regulation is wholly inconsistent with the Pennsylvania Constitution and Pennsylvania Supreme Court precedent. Under Pennsylvania Supreme Court precedent, "the power of taxation, in all forms and of whatever nature lies solely in the General Assembly" and a regulatory fee is "intended to cover the cost of administering a regulatory scheme." The RGGI revenue generating mechanism— which according to DEP will generate more than \$2.4 billion in revenue over ten years—is therefore a tax because only a small portion will be used to pay the expenses of administering the RGGI program. Moreover, the Pennsylvania Constitution precludes the General Assembly from delegating taxing power to an unelected board or commission, such as the EQB or RGGI, Inc., by declaring "[t]he General Assembly shall not delegate to any special commission, private corporation or association, any power...to levy taxes or perform any municipal function whatever." It is clearly evident RGGI constitutes a tax on electric generating units that was never authorized by the General Assembly.

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. Joining RGGI will force the early retirement of coal and natural gas plants across Pennsylvania leading to the loss of thousands of direct and indirect jobs and devastating the economy of host communities. Such a transformational policy that lacks clear statutory and Constitutional authorization should only proceed once such authorization is directly granted by the General Assembly. In fact, every state within RGGI has enacted legislation that specifically governs entry into the initiative or otherwise expressly authorizes the regulation of carbon dioxide. Given these significant legal concerns and the associated negative economic consequences associated with Pennsylvania joining RGGI, we urge IRRC to disapprove the proposed regulation and recommend the DEP seek legislative approval prior to promulgating any regulation to join Pennsylvania to the RGGI.

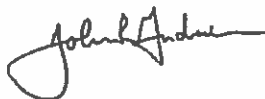
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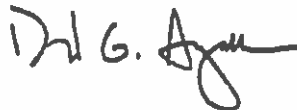
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Cc: The Honorable Tom Wolf, Governor
The Honorable Patrick McDonnell, Secretary, Department of Environmental Protection
Independent Regulatory Review Commission (IRRC)