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**Senate of Pennsylvania**

August 30, 2021

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Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
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Dear Commissioners,

On behalf of the constituents I represent, I urge the Independent Regulatory Review Commission (IRRC) to disapprove final Environmental Quality Board (EQB) Regulation #7-559 (IRRC #3274), which would establish a CO<sub>2</sub> budget trading program and merge Pennsylvania into the Regional Greenhouse Gas Initiative (RGGI).

My constituents will inarguably be the most adversely affected if this regulation is promulgated. I represent three coal-fired power plants, one natural gas-fired power plant, and the world's largest waste coal-fired power plant with the collective capacity to produce nearly 6,000 MW of electricity. These plants provide family-sustaining wages, property taxes to neighboring school districts, support ancillary services throughout the region, and power our homes and businesses here in the Commonwealth and in other states in the PJM Interconnection.

On October 3, 2019, Governor Wolf issued an executive order to unilaterally join Pennsylvania into the RGGI. According to the Department of Environmental Protection (DEP) and the EQB, the purpose of this rulemaking is to reduce carbon dioxide (CO<sub>2</sub>) emissions from electric generating units (EGUs); however, in order to generate revenue from the program, CO<sub>2</sub> must continue to be emitted. The manner in which the program is designed is counterintuitive. Carbon must continue to be emitted for the program to operate and produce revenue; however, RGGI will make the power plants uncompetitive in the marketplace, which will force them to close. If carbon is not being emitted by operational EGUs, the program will cease to produce revenue, and affected communities will be in economic devastation because promised revenue will not come to fruition.

On June 22, 2020, Governor Wolf prolonged the rulemaking process to grant DEP a six-week extension to develop the proposed rulemaking regarding Pennsylvania's entrance into RGGI. DEP stated, "we plan to continue our conversations and outreach among the environmental justice community, affected communities, and general public throughout this summer." While the messaging around the extension of the proposed rulemaking was to engage affected communities, to my knowledge none occurred during that time.

On multiple occasions, I have personally invited the Administration to visit my district and to talk with constituents whose livelihoods are in jeopardy if RGGI is to take effect. In the 22 months since Governor Wolf unilaterally ordered DEP to merge Pennsylvania into RGGI, neither Governor Wolf nor his cabinet have stepped foot in my district for the purposes of engaging in such a discussion. The lack of engagement from the Administration is parallel to their lack of genuine compassion for those most affected by this proposed regulation.

I have tried to engage the Administration. Despite my efforts made in good faith, the concerns of my constituents have received little attention. I have repeatedly attempted to have an open dialogue with the Administration to demonstrate the impacts RGGI will have on affected communities. These communication attempts have included the following:

- On October 18, 2019, the Senate Environmental Resources and Energy Committee was briefed on RGGI. During this meeting, I had the opportunity to question DEP. I stated the following, “so I hope you understand why I take this very seriously and very personally, and I would expect that you and the Governor will at least come to my district and meet with the thousand employees whose livelihood they feel very threatened by right now because of this carbon tax.”<sup>1</sup> DEP and the Governor did not follow through with this request.
- On November 14, 2019, on behalf of Armstrong and Indiana Counties, I addressed a letter to the Governor to express concerns over Pennsylvania’s entrance into RGGI. I requested the Administration visit Armstrong and Indiana Counties, tour the facilities, and meet with their employees in order to better understand the costs RGGI will inflict on the region. Unfortunately, the Administration did not fulfill this request either.
- On February 12, 2020, I addressed a letter to the Governor encouraging his administration to explore the recent announcement from the U.S. Department of Energy’s Office of Fossil Energy’s National Energy Technology Laboratory (NETL) regarding Carbon Capture Technology (CCT). NETL had announced \$64 million in federal funding for cost-shared research and development projects under the funding opportunity. I encouraged the Wolf Administration to explore CCT because it utilizes existing resources in our Commonwealth, while encouraging evolving technologies to develop here. CCT is an underexplored policy option that would also limit carbon emissions without the cost of joining RGGI. Despite this outreach to the Governor’s office, I received no direct response.
- On July 14, 2020, I wrote to the Governor again to address the lack of response and to persuade the Administration to engage with communities who will be most affected if RGGI comes into fruition.

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<sup>1</sup> <https://environmental.pasenategop.com/102219/>

- On July 17, 2020, Governor Wolf sent a response letter to a local newspaper that was addressed to me; however, my offices have no record of receipt. In his letter, he apparently indicated that he directed the Departments of Conservation and Natural Resources (DCNR), the Department of Environmental Protection (DEP), and the Department of Community and Economic Development (DCED) to work together to explore approaches to support viable carbon capture utilization and storage (CCUS) projects. The lack of coordination amongst the cabinet became obvious when I questioned DEP about CCUS during a Senate Appropriations budget hearing, and they were seemingly unaware of the effort. Clearly his directive has not been met with substantive engagement from the agencies and I am unaware of any substantial progress in bringing CCUS to affected communities like those I represent.
- In November/December of 2020, I participated in a conference call with DEP to review the regulatory process and to discuss best practices to engage affected communities.
- On March 8, 2020, I participated in a zoom conference call with DEP and the Delta Institute. This call was used to understand the role of the Chicago-based organization and what affected communities should be engaged in the process. It is important to note that the Delta Institute is not involved in the policy development of this proposed regulation. They were hired to develop principles for how Pennsylvania should spend potential revenues from RGGI. This investment plan is not included in the final-form rulemaking because DEP does not have the authority to allocate those funds.
- On March 24, 2021, on behalf of Armstrong, Cambria, and Indiana Counties, I addressed a letter to Governor Wolf imploring him to fulfill the request of these three counties to visit the region and engage in an open dialogue with communities that will be most affected if the carbon tax is implemented. The Governor's office acknowledged receipt of the letter, with a commitment to respond. No further response occurred.
- During the Senate Appropriations Committee budget hearings, I had the opportunity to question the Governor's cabinet secretaries regarding RGGI. When asked specific questions, the departments were unable to give substantive answers, only demonstrating a lack of coordination and communication within the Administration. On May 11, 2021, after continued non-response from the Administration, a letter was sent to DCED, DEP, Department of Education, Department of Revenue, and Department of Labor and Industry imploring them to answer unanswered questions concerning Pennsylvania's entrance into RGGI. Unfortunately, I did not receive a single response from any of the departments.
- In May of 2021, I exchanged emails with the Delta Institute. They provided an update of their work and asked for recommendations for additional stakeholders they should engage. Again, this engagement is related to investment of RGGI revenue and not the actual policy and costs associated with RGGI. The investment plan is not part of the final-form rulemaking, meaning that this final-form rulemaking does not give a full picture of what this regulation will entail.
- On July 13, 2021, I addressed a letter to DEP in response to comments made during the EQB meeting that occurred previously in the day. During the meeting, DEP clearly stated that they had been responsive to all comments they had received up until that point. This was a blatant disregard for the truth. I personally still have outstanding communications with DEP that have not been responded to.

- On July 23, 2021, DEP responded to my previous letter. It was not until continual prompting that I was even acknowledged by the Department and worthy of a response. In their response, they included their own interpretation of engagement between the Department and myself. If anything, their list demonstrates a clear lack of meaningful engagement. They listed six points of engagement, which included two meetings (referenced above), two email exchanges, and two recognitions of comments they received from me. This is not representative of an open dialogue with meaningful engagement given the magnitude of impacts to the communities I represent because of this rulemaking.

While this has been my experience during the regulatory process, I believe it highlights a fundamental concern with this proposed regulation as a whole. The regulatory process has been fast tracked. While DEP and EQB emphasize an urgency to join RGGI, their engagement with affected communities clearly lacks the same urgency. The Administration has no urgency in engaging those who will actually be affected by this regulation. After 22 months of this proposed regulation's debut, Governor Wolf's own cabinet lacks the knowledge to answer basic questions about the proposed regulation and what will happen to the most affected communities if it is implemented.

This final-form rulemaking does not address recommendations, comments, or objections conveyed by the House or Senate Environmental Resources and Energy Committees or raised by IRRC. The following areas specially have not been addressed.

#### 1. Statutory Authority

According to the DEP, they believe the authority to promulgate the final-form rulemaking under the APCA, specifically Section 5(a)(1). DEP stated that "when the APCA was enacted, the General Assembly was concerned with air pollution generally and that it be remedied no matter what the source." However, this cannot be generally stated as the intent of the General Assembly. In 2009, the DEP published a report, "Evaluation of the Pennsylvania Air Quality Program 2002 – 2007." In this report, they claimed that in 1992, the APCA was amended by the General Assembly in order to implement the 1990 mandated federal programs in the Federal Clean Air Act Amendments of 1990 (Clean Air Act or CAA). These mandates specifically dealt with widespread ozone nonattainment issues. When the APCA was enacted and even amended, the intent of the legislation was to allow the DEP to follow federal guidance and implement federally mandated programs that addressed issues with the ozone. CO<sub>2</sub> is not a universally recognized air pollutant today, let alone in 1960 or even 1992. DEP admits the definition needed to include CO<sub>2</sub> as an "air pollutant" is "by extension." There is no clear statutory connection between "CO<sub>2</sub>" and "air pollutant." CO<sub>2</sub> is essential to everyday life, unlike other air pollutants that are actually regulated. Regulating CO<sub>2</sub> through a multi-state conglomerate of energy dependent states not approved by the General Assembly was not the true intent of the legislation when enacted.

To DEP's own admission, every cap-and-trade program that has been implemented through the APCA has been promulgated in response to initiatives at the Federal level. These include the Acid Rain Program, NOx Budget Trading Program, the CAIR NOx and SO2 Trading Program. Unlike other programs promulgated by the APCA, RGGI is not a federal mandate. It is a usurpation of authority by the Executive Branch.

In addition, Pennsylvania would be the only state in RGGI that did not allow their state legislature to have a voice in the process. Every other participating state had legislative approval to join RGGI, and clearly stated their entrance in statute. Pennsylvania would be alone among the RGGI states. Participation by executive order does not guarantee longevity of the program depending on the current administration and what their policy preferences may be. The only way to solidify Pennsylvania's energy policy is to involve the duly elected General Assembly.

## 2. Fee vs. Tax

The Administration argues that under Section 6.3(a) of the APCA, "the Department has the authority to establish fees to support the air pollution control program."<sup>2</sup> In the 2009 DEP report mentioned earlier, they evaluated the effectiveness of programs adopted to implement Clean Air Act Amendments of 1990. This is relevant because in this report they evaluated funding under Section 6.3 of the APCA. DEP concluded that Section 6.3 of the APCA interpreted the meaning to be "fees sufficient to cover the indirect and direct costs of administering air quality programs."<sup>3</sup> RGGI is not designed to collect fees that sufficiently cover the cost of administering the program. Revenue collected through RGGI is estimated to exceed administrative costs. Instead, RGGI is designed to tax EGUs for the privilege of emitting carbon. The regulation as proposed is not congruent with the true intent of Section 6.3 of the APCA because it is not designed to be a fee.

## 3. Public Hearings

During this regulatory process, the Administration regularly refers to "affected communities." The 41<sup>st</sup> Senatorial District is well within the scope of "affected communities" if this regulation is implemented. Pursuant to Section 7(a) of the APCA,

"public hearings shall be held by the board or by the Department, acting on behalf and at the direction or request of the board, in any region of the Commonwealth affected before any rules or regulations with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion...in the case where it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for any area of the Commonwealth which encompasses more than one region or parts of more than one region, public hearings shall be held in the area concerned."<sup>4</sup>

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<sup>2</sup> Department of Environmental Protection; Environmental Quality Board. (2021). *Final-Form Rulemaking Environmental Quality Board [25 P.A. Code CH. 145] CO2 Budget Trading Program*. p.11

<sup>3</sup> Department of Environmental Protection. (2009). *An Evaluation of the Pennsylvania Air Quality Program*.

<sup>4</sup> Department of Environmental Protection; Environmental Quality Board. (2021). *Comment and Response Document. CO2 Budget Trading Program*, p. 12.

DEP argues that “in any region of the Commonwealth affected” is not consistent with “in-person” public hearings; however, the precedent up until this regulation has been in-person public hearings. Understanding that circumstances of the COVID-19 pandemic might not have allowed for in-person public hearings, the Administration should have delayed its effects and waited until it was safe to hold in-person public hearings in affected regions, instead of bypassing the law and fast tracking this regulation.

Because all of the public hearings were virtual, DEP knowingly excluded the most affected communities. The most affected communities happen to be in rural areas, which have limited access to the internet. The most affected residents happen to be those with full-time jobs that required them to be at work during the times and dates of the hearings. On October 3, 2019, when Governor Wolf signed the Executive Order, he stated, “we need to make sure the transition to a cleaner energy mix does not leave workers and communities behind.”<sup>5</sup> Governor Wolf, DEP, and EQB have not fulfilled this promise and left workers and communities behind throughout the formation of this regulation.

#### 4. Delay of Implementation for One Year

IRRC asked the EQB to delay rulemaking for one year. Rather than utilizing that time to fully comprehend the cost of joining RGGI, EQB blatantly disregarded the recommendation and continued to steamroll through the process. DEP stated that they could not do so because it would “compromise this Commonwealth’s ability to meet the GHG emissions reductions goals;” however, there are no emission reduction goals in state or federal statute.

In their rationale for not following IRRC’s recommendation, EQB outlined the three-year compliance schedule carbon emitting EGUs must follow. The RGGI model operates on a three-year compliance schedule with only partial compliance required for the first two years. RGGI began their new compliance schedule at the beginning of 2021. While DEP anticipates entrance on January 1, 2022, this is not required. DEP created quarterly on-ramps to compliance to account for any delay in publication of the final-form rulemaking. However, if Pennsylvania does not join by the beginning of 2022 and joins later in the year, compliance of carbon-emitting EGUs is not until March 1, 2023. In other words, the Commonwealth will not be able to collect any revenues for an additional year. This a disingenuous reason to promulgate the rulemaking. Meeting a deadline should not be a driving force behind pushing a regulation through the regulatory process. The Administration should focus their efforts on ensuring they fully understand the costs of this regulation. This is nothing more than a money grab. This recommendation was not taken seriously and that is evident in their response.

In closing, carbon dioxide is not considered an air pollutant according to the standards set forth in the intent of the General Assembly when the APCA was enacted. If carbon dioxide was considered an air pollutant under the APCA, it would have to be “...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...” Carbon dioxide is essential to sustaining life and thus not injurious to life by its very nature.

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<sup>5</sup> <https://pacast.com/m?p=17469>

To DEP's own admission, motor vehicle emissions are the leading cause of air pollution in Pennsylvania. If DEP was genuine in their efforts to combat climate change, they would engage the General Assembly in developing meaningful policy that addresses air pollution rather than regulating a compound that is not universally considered to be an air pollutant. DEP had the opportunity to evaluate alternatives to RGGI during their "Comment and Response" document. Instead of taking advantage of this opportunity to evaluate alternatives in a meaningful way, they used this section to glorify RGGI. DEP was only required to evaluate the status quo and an auction program that would only cover the cost needed to administer RGGI. DEP essentially stated that RGGI was the only path forward. This is arguable because DEP failed to consider other alternatives such as revamping the Alternative Energy Portfolio Standard to adjust to future standards, seriously exploring carbon capture utilization and storage, or considering the many other suggestions DEP laid out in their very own "Pennsylvania Climate Action Plan."<sup>6</sup> RGGI is not the only solution to combat climate change nor is it the very best or right choice for Pennsylvania.

This proposed regulation has the ability to cripple our economy and devastate entire communities. Unlike the other nine states in RGGI, Pennsylvania is the second largest exporter of energy in the nation. Power production in this Commonwealth has had the ability to adapt to market conditions and shift with changing environmental goals. RGGI does not incentivize change. It causes premature retirement of coal-fired and natural gas power plants, while disincentivizing investment in newer, cleaner plants. The costs to the local economy I represent will be unimaginable. I would have more faith in the Administration's ability to implement the single, most significant energy policy reform in decades if it was not for the fact that they chose not to seriously engage during the entirety of this process and chose to disregard the Senate and House Environmental Resources and Energy Committee's concerns and IRRC's comments.

I encourage IRRC to disapprove this regulation and require the Administration and DEP to fully address the concerns of affected communities and the comments made during the regulatory process. Thank you for the opportunity to share my concerns about this final-form rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to be "K. J. ...", written in a cursive style.

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<sup>6</sup><http://www.depgreenport.state.pa.us/elibrary/PublicAccessProvider.ashx?action=ViewDocument&overlay=Off&overrideFormat=Native>