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VIA ELECTRONIC FILING

The Honorable George Bedwick, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

August 25, 2021

RE: Regulation #7-559: EQB CO2 Budget Trading Program

Dear Chairman Bedwick,

On behalf of the Pennsylvania Chamber of Business and Industry, the largest, broad-based business advocacy organization in the Commonwealth, thank you for the opportunity to comment on Regulation #7-559, EQB's final-form rulemaking to implement a CO2 Budget Trading Program. The PA Chamber's membership draws from more than 9,000 member companies who represent all industrial and commercial categories and sizes; all of them rely on not just a reliable, affordable supply of energy, but a rational, predictable and well-functioning regulatory environment in which to operate.

This letter will outline our outstanding concerns with this final-form rulemaking, which we argue have not been appropriately addressed and as such this final-form regulation is not in the public interest. The PA Chamber filed comments into EQB's docket on January 14, 2021 and raised many of these issues in that letter, which we do not believe were meaningfully addressed in Board's comment and response document and associated rulemaking documents. We have also publicly stated our position on these matters in press releases and legislative testimony.

The PA Chamber recognizes a changing climate will present significant challenges, and addressing these challenges will require a private sector that can develop and implement solutions and technologies. The PA Chamber advocates for balanced environmental policy that promotes stewardship and economic growth. Legislatures have embedded in state and federal air quality law statements of policy that resonate with this approach. Market-based programs can be more efficient than command-and-control approaches, but costs must not exceed benefits and flexibility with respect to compliance and implementation is key. Therefore, it is vital that regulations and rulemakings to address climate change and to implement energy and environmental policy are well-crafted and conform to the underlying authorizing statutes. The public and regulated community are not well-served if a legally infirm or deficient rulemaking is authorized for promulgation, only to be overturned in court.

With this in view, we respectfully submit the following comments for your consideration.

1. **The final-form rulemaking and associated regulatory documents do not appropriately evaluate the emissions impact that may result from leakage to PJM states not participating in RGGI.**

As noted in our comments and those of others, Pennsylvania is the largest power-producing state in the 13-state PJM grid, which manages the dispatch of power throughout the Midwest and Mid-Atlantic, through a variety of competitive electric markets. These highly competitive markets have produced continued reductions in both commodity costs and emissions. Not all states within PJM participate in RGGI – states to

our west, including Ohio, West Virginia, Indiana and Illinois do not. Given the highly competitive nature of these market auctions, there remains the significant potential, as noted in modeling conducted by PJM and Penn State, for the shifting of fossil-fuel generation to non-RGGI PJM states should Pennsylvania enter into RGGI. The rulemaking documents quantify the purported benefit of joining RGGI explicitly on the basis of expected emissions reductions in Pennsylvania, with no adjustment for the expected increase in neighboring states. We believe our concerns with these issues are contained within DEP's comment and response item #194, which raises the impact to Pennsylvania's environment from these upwind emissions. The response does not address emissions from upwind states, and the RAF contains no mention of their potential impacts aside from stating without further elaboration that "this leakage has no bearing on the environmental, health or economic benefits of this final-form rulemaking." The RAF provides public health benefits from anticipated reductions of SOx and NOx emissions that will occur in Pennsylvania, but does not offset these reductions from potential increased generation from non-RGGI, upwind PJM states who have much higher emissions intensities than Pennsylvania, as noted in our comments. Further, the anticipated climate benefits are based on reductions of greenhouse gas emission in Pennsylvania, not the net decrease across PJM.

The EQB's failure to adequately address leakage significantly undercuts any purported emission reductions and benefits in Pennsylvania. For example, the EQB estimates that CO_2 emissions within the Commonwealth would be reduced between 97 to 227 tons by 2030 under the final-form rulemaking and uses these reductions to estimate climate and public health benefits. (RAF, at 1.) Yet the EQB also acknowledges that the final-form rulemaking will only result "in a net emissions reduction of 28 million tons of CO_2 across the broader PJM region through 2030." (RAF, at 41.) This means the amount of leakage for CO_2 alone is between 69 million to 199 million tons (i.e., the difference between Pennsylvania's reductions and reductions across the PJM footprint). This is consistent with analysis conducted by the Penn State Center (upon which DEP relies), which estimated that "86% of the CO_2 reductions from Pennsylvania's joining RGGI would be offset by emissions increases" in other states. The EQB fails to adequately justify the economic impact of the final-form rulemaking in light of the magnitude of emissions shifting.

Beyond not controlling for leakage to such non-RGGI jurisdictions, we also note that, contrary to the form and function of every other air quality rule that implements the Clean Air Act and Air Pollution Control Act, the rulemaking itself does not contain explicit standards of performance or enforceable limits for any individual facility with respect to emissions. The only limitation is the number of allowances from Pennsylvania that will be added to the RGGI pool of credits available for facilities to purchase and retire to offset emissions pursuant to its compliance obligations. The Air Pollution Control Act defines what rules and regulations the EQB may promulgate to protect air quality, including "maximum allowable emission rates of air contaminants" and the prohibition or regulation of the combustion of fuels and sources. Black's Law Dictionary defines regulation as "the act or process of controlling by rule or restriction." Given that this proposed rulemaking does not explicitly limit the rate or output of emissions from any fuel source (individually or in aggregate) in Pennsylvania, or meaningfully addresses its potential output replaced by facilities in upwind states, we question whether it conforms to the statutory authority of the Air Pollution Control Act in terms of actually being a regulation on air contamination sources. We must also note that in place of any controlling limit on the rate or output of emissions in Pennsylvania (again noting that the only limitation is the number of allowances Pennsylvania produces each year to be auctioned off across all RGGI states), the final-form rulemaking's obligation to regulated sources to secure and retire allowances for every ton of CO2 emitted is, in practice and effect, a tax on those emissions.

2. **The final-form rulemaking and associated documents do not provide a meaningful response to our suggestion to adopt federal definitions of non-EGU facilities for the purposes of defining RGGI-related compliance obligations on industrial combined-heat and power (CHP) units.**

RGGI's model rule, which the Department and EQB have noted inform this rulemaking, provides substantial flexibility to states with respect to the applicability of RGGI-implementing state rulemakings to industrial facilities that use natural gas or other fuels to produce heat and power on-site. EQB is attempting to justify this rule in large part on the public health benefits of reducing federally regulated criteria pollutants, such as NOx and SOx. Criteria pollutants are codified in Section 109 of the Clean Air Act. The state's Air Pollution Control Act explicitly requires, with some stated exceptions, that state regulations that limit emissions from such criteria pollutants must be no more stringent than required by the federal Clean Air Act. We noted in our comments that Pennsylvania is in attainment of the national ambient air quality standards for these emissions in much of the state. The EQB did not meaningfully respond to why it is appropriate or necessary to achieve additional reductions of these emissions through this rulemaking. The EQB does, however, plainly state on p. 24 of the RAF that "this final-form rulemaking will be more stringent than federal requirements."

Further, we also suggested in comments that, given this same rationale of the state's Air Pollution Control Act requiring state rules to not be more stringent than federal requirements with respect to criteria pollutants, this rulemaking simply adopt the federal definition of non-EGU facilities for the purposes of defining when a CHP unit would have compliance obligations. Instead, the final-form rulemaking includes a complicated, "two-tier" approach regarding when some CHP units have to procure and retire credits on their own accord and when some CHP units may request the state procure and retire credits on the units' behalf. In response to our comments suggesting adoption of the federal non-EGU definition (see item #230 in the comment-and-response document), EQB simply stated that the federal non-EGU definition suggested by the Chamber had "minimal and tangential relevance to air emissions, particularly GHGs." This statement is incorrect and not meaningfully responsive. This non-EGU standard has been explicitly written into multiple federal air quality regulations, including EPA's final 2015 rule, "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." EQB's non-responsive statement also does not grapple with whether this rule exceeds federal requirements for these units.

3. **There was no meaningful evaluation of alternatives as required by statute.**

The final-form rulemaking and associated regulatory documents make the claim that this rulemaking would implement "least-cost CO2 emission reduction reductions for the years 2022 through 2030." Question #24 of the RAF states without further explanation or elaboration that "there are no less intrusive or less costly alternative regulatory provisions available." Narrowly, we continue to maintain the position that there is a less costly alternative regulatory provision with respect to the definition of non-EGU CHP facilities, as discussed above. More broadly, it is the burden of the agency to make a good faith effort to identify alternative approaches. DEP's modeling explicitly notes that the expected power generation mix in Pennsylvania in 2030 as a result of participating in RGGI looks nearly identical to the business-as-usual case of not participating in RGGI.

4. **There was not a meaningful response to IRRC's suggestion to delay implementation for one year.**

IRRC encouraged EQB to delay this rulemaking for one year, and EQB's response is not persuasive. EQB responds in comment-and-response item #23 that such a delay would compromise the state's "ability to meet GHG emissions reductions goals." However, the legislature has not written into statute any such goals, nor has Congress or EPA imposed any binding goals on the state. As a matter of fact, EPA noted in a Feb. 12, 2021 memorandum to its regional offices that while federal courts vacated the Trump administration's rule for greenhouse gas emissions for power plants (the Affordable Clean Energy Rule), "the court . . . did not expressly reinstate the CPP [Obama administration's Clean Power Plan rule, which the Trump ACE rule replaced], EPA understands the decision as leaving neither of those rules, and thus no CAA section 111(d)

regulation, in place with respect to greenhouse gas (GHG) emissions from electric generation units."[1] EPA has also not finalized companion regulations to regulated greenhouse gas emissions from newly constructed fossil-fuel generation unites under Section 111(b) of the Clean Air Act.

The only instances in which the state legislature explicitly legislated on the topic of greenhouse gas emissions was the Climate Change Act of 2008 which directed DEP to produce reports identifying the impact to the state from climate change and potential strategies to adapt or mitigate against such effects, and Act 175 of 2014 which required DEP to present its proposed implementation plan for the Clean Power Plan (regarding emissions of greenhouse gas from power plants) to the legislature for approval prior to submittal to EPA.

EQB's response to item #23 further elaborates on why it declined to delay implementation for one year given that there is a three-year compliance period in the RGGI program. We must note that the final-form rulemaking contains a quarterly on-ramp to compliance in 2022 to account for a potential delay in final publication of the rule (in short, compliance obligations commence in the next quarter of 2022 following final publication in the Pennsylvania Bulletin). We submit to IRRC that there does not appear to be a rational basis for declining a full one-year delay while also inserting provisions into the final-rule that would enter Pennsylvania into RGGI as late as the third quarter of 2022.

Further, a one-year delay is prudent, given that energy policy at PJM and at the federal level remains fluid and dynamic. PJM and affected stakeholders are participating in a variety of FERC dockets regarding the structure of various market rules, some of which relate to the accommodation of state-level clean energy policy. EPA is expected to release for comment various proposed regulations for air quality, which will affect many of the EGUs and CHP facilities implicated in this rulemaking. Congress is also debating a national clean energy standard in some form – if not an outright standard, an attempt to reach certain zero- or low-carbon energy mixes through a combination of penalties and incentives.

5. Section 6.3 of the Air Pollution Control Act, regarding fees, does not provide the appropriate statutory basis for this rulemaking, as claimed by EQB.

DEP is authorized to collect fees under Section 6.3 of the Air Pollution Control Act. However, the establishment of fees is limited to two scenarios: 1. Establishment of fees sufficient to cover the indirect and direct costs of administering clean air programs; and 2. Establishment of an annual emission fee for regulated pollutants to cover the reasonable direct and indirect costs of administering air permit programs. The fees established in the final-form rulemaking exceed these scenarios and are therefore unlawful.

IRRC will recall it recently approved a final-form EQB regulation for Title V fees for major source of air emissions, set at $93 per ton (with annual inflation escalators) of federally regulated criteria pollutants up to 4,000 tons, as required by the Air Pollution Control Act (IRRC #7-536). This rulemaking excluded major sources from having to pay such fees for their greenhouse gas emissions; DEP staff in past advisory committee meetings noted it intended to exclude greenhouse gas emissions from this fees schedule given uncertainty with respect to federal litigation over EPA greenhouse gas rules for power plants and whether CO2 is a regulated pollutant. We would again note the Feb. 12, 2021 memo from EPA to regional offices, interpreting the DC Circuit's January 19, 2021 opinion as leaving no requirements on states to regulate greenhouse gas emissions from existing power plants under Section 111(d) of the Clean Air Act. EPA has also not finalized companion regulations for states to regulate newly constructed power plants under Section 111(b) of the Clean Air Act. DEP staff also indicated in committee discussions regarding the air quality fees

[1] EPA Memorandum to Regional Administrators RE: Status of Affordable Clean Energy Rule and Clean Power Plan, Feb. 12, 2021. https://www.epa.gov/sites/default/files/2021-02/documents/ace_letter_021121.doc_signed.pdf

that it may address greenhouse gas emissions through a cap-and-trade regulation, like the one presently before IRRC.

In the final-form rulemaking before IRRC regarding RGGI, EQB attempts to justify obligating certain power plants and industrial facilities to secure allowances based on the same provisions of the APCA that authorized EQB to amend its fee schedule and collect the fees of $93/ton for federally regulated emissions, which IRRC recently approved.

Importantly, Section 6.3 of the Air Pollution Control Act authorizes DEP to collect fees for federally regulated air pollutants, but only up to 4,000 tons per year. A facility that emits 4,000 tons per year of a federally regulated pollutant would pay the same amount for those emissions as a facility that emits 40,000 tons per year, and these fees are paid directly to DEP for the purposes of administering its Clean Air Fund program. In contrast, with the RGGI rulemaking before IRRC, we note that facilities with compliance obligations would be afforded the option to purchase allowances at quarterly auctions or from non-governmental actors through RGGI's secondary trading markets, and therefore question whether this constitutes a fee (which is generally understood to mean a payment to the government for certain services). Purchasing allowances through secondary trading markets is not a payment to the government. More importantly, the RGGI final-form rulemaking would require any facility with compliance obligations to secure allowances for every ton of greenhouse gas emissions, even if those annual emissions exceed 4,000 tons. As noted above in this letter, the final-form rulemaking does not limit any one facility's emissions of greenhouse gas emissions; nor would the final-form rulemaking cap compliance obligations at 4,000 allowances per year. If the EQB is claiming Section 6.3 of the Air Pollution Control Act authorizes participating in RGGI on the basis that purchasing allowances is a fee, then this final-form regulation must either be amended to limit compliance obligations to 4,000 tons of greenhouse gas per facility (even if that facility emits more annually) or it must be rescinded.

We must also note that Section 6.3 of the Air Pollution Control Act regarding fees directs EQB to "establish by regulation a permanent annual air emission fee" for pollutants from major sources regulated under Section 502(b) of the Clean Air Act. Section 502(b) in turn looks towards other sections of the federal Clean Air Act, including Section 7411, as to which sources have compliance obligations. We note once again that the courts have vacated the federal air quality rules for EGUs that are major sources of greenhouse gas emissions.

Returning to Section 6.3 of the Air Pollution Control Act and its language directing EQB to establish by regulation "a permanent annual air emission fee," in this context, the article "a" denotes a singular fee structure. The Air Pollution Control Act does not authorize EQB to establish two fee structures for federally regulated pollutants – one at $93 per ton up to 4,000 tons per year (as established in the recent fee increase approved by IRRC), and another at a dollar per-ton amount established at quarterly auctions and secondary markets with no annual limitation on the amount of emissions considered for compliance obligations (as contemplated in the CO2 budget trading program presently before IRRC).

Further, EQB is also limited in its authority to establish fees under Section 6.3 of the APCA to a level sufficient to the cost of administering state and federal air permit programs. This section does not authorize EQB to establish a fee schedule that results in DEP collecting fees sufficient to manage its permit programs plus invest in worker retraining, energy efficiency, alternative energy grants and loans and all other manner of potential revenue uses contemplated by the agency. More pointedly, Section 6.3(c) reads that "in no case shall the amount of the permanent fee be more than that which is necessary to comply with section 502(b) of the Clean Air Act." This again speaks to the legislature codifying there will be one, not multiple, fee schedules. Further, in its documents to IRRC justifying the recent amendments to the state's air quality fee schedule last year, EQB noted the fee increases were necessary to "ensure that fees are sufficient to cover the costs of administering" its air programs. The rulemaking regarding RGGI currently before IRRC contains no discussion as to why the recently approved increases to air quality fees are now resulting in fee collections no

longer sufficient to administer air permit programs required to implement Section 502(b) of the Clean Air Act. The U.S. EPA has not delegated any additional air quality rulemakings to the the state to manage in the time between the effective date of the aforementioned air quality fee increase and this final-form rulemaking regarding a CO2 Budget Trading Program. Given the absence of a demonstration by the EQB that additional revenues are necessary to administer air programs, we must therefore presume that the additional revenue collected by participating in RGGI **would** be more than that which is necessary to comply with Section 502(b) of the Clean Air Act, and therefore in violation of the APCA. If EQB is going to rely on Section 6.3 of the APCA to justify this rule, IRRC must send this rule back to the agency for it to define why additional fee revenues are needed.

We would further note that in response to question #21 of the RAF, which per the Regulatory Review Act, directed EQB to provide "a **specific** estimate of the costs and/or savings to the state government associated with the implementation of the regulation . . ." [emphasis added], the EQB provided no estimates in terms of staff time, agency resources or costs associated with administering the rulemaking. There is instead a general claim that there may be some nominal permit engineer review times associated with reviewing new or modified operating permits, whose costs would be "offset by auction proceeds." First, this response is deficient with respect to providing the required analysis of specific costs. Second, if the only costs of administering RGGI are to evaluate permits for new or modified operating permits, IRRC must not miss that this means Title V operating permits effectuating Section 502(b) of the Clean Air Act. As discussed above and below, the costs of administering such a permit program is, per the statute, to be addressed with the annual fee schedule (which IRRC recently approved) - and with it, the annual limitation of 4,000 tons as the maximum a facility's fee obligations would be assessed against. Therefore, the EQB's response to the question is an acknowledgment that this rulemaking exceeds the authorization of the Air Pollution Control Act and grounds for disapproval of this regulation.

Moreover, Section 6.3 of the APCA does not authorize EQB to use fees however the agency deems appropriate, even if that use is informed by public comment; the legislature limited the use of such fees in Section 6.3 explicitly to "to cover the reasonable direct and indirect costs of administering the operating permit program required by Title V of the Clean Air Act, other related requirements of the Clean Air Act and the reasonable indirect and direct costs of administering the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, Compliance Advisory Committee and the Office of Small Business Ombudsman." EQB attempts to justify the RGGI rulemaking on the basis that the Governor's Executive Order 2019-07 obligated it to develop a rulemaking to reduce greenhouse gas emissions, and that this rulemaking would do so through certain uses of fee revenues. Notably, the legislature did not include implementing executive orders as among the catalysts for fees. Further, as laudable as the outcomes of the proposed potential uses of revenues may be – reducing greenhouse gas emissions through adoption of alternative technology, funding workforce development, addressing environmental justice – these uses are beyond any reasonable interpretation of administration of an environmental permitting and enforcement program, which is the extent to which the legislature authorized the use of fees for in Section 6.3 of the Air Pollution Control Act.

We must also note that the spending plan itself is not formally part of this rulemaking, as the EQB notes on p. 22 of the RAF – "The Department plans to develop a draft plan for public comment outlining reinvestment options separate from this final-form rulemaking." Even putting aside that these reinvestment options exceed the statute's defined uses of fees, should IRRC approve this regulation as proposed, it will have endorsed the use of a hypothetical spending plan's benefits – a draft plan that will quite likely still be out for public comment when this rulemaking takes effect – as justification for this final-form rulemaking.

Further, Section 6.3(d) requires that the fee schedule for regulated pollutants "considers the size of the air contamination source, the resources necessary to process the application for plan approval or an operating permit, the complexity of the plan approval or operating permit, the quantity and type of emissions from the

sources, the amount of fees charged in neighboring states, the importance of not placing existing or prospective sources in this Commonwealth at a competitive disadvantage and other relevant factors." Even if IRRC were to determine that Section 6.3 authorizes EQB to promulgate multiple fee schedules (one for non-GHG criteria pollutants and another one for the under RGGI that does not have the 4,000/ton annual cap on the fees as required by statute), EQB's final-form regulation to establish a CO2 budget trading program does not contain a meaningful evaluation of these considerations required by this section of the statute. As noted in this letter and our other communications on this matter, this final-form rulemaking contains no measures to guard against the potential for leakage to non-RGGI states within PJM, which would be in conflict with the statute's policy of "not placing existing or prospective sources in this Commonwealth at a competitive disadvantage." The same may be said for the EQB's dismissal of our reasonable suggestion to simply adopt the federal definition of non-EGU CHP facilities for the purposes of determining compliance obligations. Pennsylvania EGUs and CHP facilities would also be disadvantaged as compared to similar sources in non-RGGI states, such as Ohio and West Virginia.

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In closing, this final-form rulemaking exceeds statutory authorization, is deficient with respect to key provisions of the Regulatory Review Act, and is inappropriately dismissive of the concerns and suggestions offered by IRRC, the PA Chamber and other commentators. Therefore, we respectfully urge the Commission to deem this rulemaking as not being in the public interest and to disapprove it. We close in noting our thanks and appreciation to you, your fellow Commissioners and your staff for your diligence with respect to this rulemaking and for your consideration of the comments of the PA Chamber and other commentators. We remain available to discuss this or other matters in further detail as needed.

Sincerely,

Kevin Sunday
Director, Government Affairs

CC: The Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection
The Honorable Gene Yaw, Chairman, Senate Environmental Resources and Energy Committee
The Honorable Carolyn Comitta, Minority Chair, Senate Environmental Resources and Energy Committee
The Honorable Daryl Metcalfe, Chairman, House Environmental Resources and Energy Committee
The Honorable Greg Vitali, Minority Chair, House Environmental Resources and Energy Committee