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*Sent via e-mail*

Environmental Quality Board  
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400 Market Street  
Harrisburg, PA 17101-2301  
RegComments@pa.gov

**Re: CO2 Budget Trading Program**

Dear Environmental Quality Board Members:

Thank you for the opportunity to provide comments on Pennsylvania's proposed rulemaking to join RGGI. The Center for Coalfield Justice supports the Commonwealth joining RGGI, subject to appropriate conditions.

The Regional Greenhouse Gas Initiative ("RGGI") is an essential component of this Commonwealth's effort to mitigate climate change by helping to drive reductions in greenhouse gas ("GHG") pollution from the power sector statewide. Yet, cap-and-trade strategies alone will not foster equitable emission reduction and the achievement of Pennsylvania's renewable energy goals. A more robust cap on climate pollution is needed to protect communities on the frontlines of climate change. While climate change affects everyone, it is having a devastating impact on the state's low-income residents, communities of color, immigrants, and other vulnerable populations.

As Pennsylvania prepares to join RGGI, we ask that you consider incorporating policy ideas and regulatory tools that achieve the goal of GHG reductions in all neighborhoods and investments in EJ neighborhoods to help mitigate current and future harms. Therefore, we respectfully ask that you consider our specific concerns and recommendations as you move forward in making Pennsylvania a more just, equitable, and regenerative state.

In our comments below, we ask that the Department use its authority to conduct comprehensive data analysis under the RGGI program. We ask that its final permitting is based on informed decisions that will protect all communities, especially communities of color, indigenous communities, and low-income communities that have historically been disproportionately affected by the siting of power plants and other polluting infrastructure. We request that the Department maintain transparency by publicly publishing data collected and used in the permitting process. Lastly, we ask that the Department amend the model rule by removing the exemption for coal waste fired power plants and combined heat power plants. There is no reason to allow certain fossil fuel power plants to externalize the entire cost of their pollution. As explained further below, we believe that discounted allowances for certain kinds of plants strikes a better balance.

## **The Department has the Authority and Constitutional Obligation to set GHG Limitations to Protect the Commonwealth**

The Department of Environmental Protection (“Department”) has broad authority under Pennsylvania’s Air Pollution Control Act (“Act”).<sup>1</sup> The Act is clear that the Department can issue orders to cease, modify, or reduce air pollutants that the Department deems necessary.<sup>2</sup> The Department may also implement any requirement that it considers appropriate to meet those modifications or reductions.<sup>3</sup> Furthermore, the Act defines CO<sub>2</sub> as air pollution.<sup>4</sup> Therefore, under the Act, the Department has full authority to administer monitoring, conduct studies, and collect a wide breadth of information to make an informed decision and set reasonable emission limits when permitting allowances under the RGGI program.

The Department also has a Constitutional obligation to protect the people and natural resources of this Commonwealth. Article I, Section 27 (hereinafter “Section 27”) of our states Constitution identifies two distinct yet related fundamental rights and corresponding duties. Section 27 explains that the citizens of this Commonwealth have an absolute right to “clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment.”<sup>5</sup> This imposes a duty on the Commonwealth, including the Department, from disregarding these rights through governmental actions or nonactions that would unreasonably cause actual or likely deterioration of those environmental features. Section 27 also states that the people, not the Commonwealth, own the natural resources of Pennsylvania.<sup>6</sup> Moreover, Section 27 provides: “As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”<sup>7</sup> In other words, Section 27 creates a trust, and all agencies of the Commonwealth Government, including the Department, hold a fiduciary duty to take necessary precautions and steps to protect that trust.

Section 27 refers to “public natural resources” as the focus of the Commonwealth’s public trustee duties. This suggests a broad range of assets that would qualify as “public natural resources.” However, Section 27 is not ambiguous as to how the Commonwealth’s duty applies to clean air, as Section 27 expressly states it is our right to have access to “clean air.” Therefore, there is little negotiating that the ambient air quality falls within the state’s fiduciary duties under Section 27 and the Department must take steps to conserve and maintain the quality of the air for present and future generations to come.

Article 1 embodies an express statement by the people of their fundamental rights.<sup>8</sup> Section 27, which is a cornerstone in this Commonwealth’s history, sets fourth fundamental rights.<sup>9</sup> Neither the drafters of the Constitution nor the people of this Commonwealth delegated to the government the

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<sup>1</sup> Air Pollution Control Act, Act of Jan. 8, (1960) 1959, P.L. 2119, No 787 Cl. 35.

<sup>2</sup> *Id.* at §4(9).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at §3.

<sup>5</sup> Pa. Const. Art. I, § 27.

<sup>6</sup> See generally, *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Robinson, 83 A.3d at 947-49 (plurality); Pa. Const. Preamble of Article I; Art. I, § 25).

<sup>9</sup> PEDF, 2017 WL 2645417, \*1-3 (Robinson II, 83 A.3d at 960-63).

authority to strip them of their inherent rights that are protected by Article 1.<sup>10</sup> This means that the rights protected by Section 27 are equal to other rights in Article 1.<sup>11</sup> These rights include the right to free speech and the press; freedom to worship as one pleases; individual right to privacy, right to bear arms, the right to life, liberty, the pursuit of happiness, and property rights.<sup>12</sup>

The Department holds the duty to place residents' rights to clean air on the same footing as economic development. Economic development cannot justify the state to trample on the inherent rights protected by Section 27. The people of this Commonwealth are fully aware of the benefits associated with economic development. Still, they were aware of the burden of such development that could result if proper oversight is not taken to prohibit degradation of health and their environment. Thus, the Department holds the full authority and obligation to research and implement strategic tools to uphold their duty and protect all Pennsylvanian's environment when issuing emission limitations and guidelines under the RGGI program.

### **The Department Must Determine Their Emission Limitations Based off of an Informed Decision**

The RGGI participating states have seen an overall decrease in power plant co-pollutants since the beginning of the program. Additionally, states participating in RGGI have reported several health impacts due to improved air quality.<sup>13</sup> An independent, comprehensive analysis reported that sulfur dioxide and nitrogen oxides decreased in the participating RGGI states every year for the first six years.<sup>14</sup>

One of our primary concerns is that emission allowances might disproportionately end up in the hands of dirtier plants, which may themselves be disproportionately located in disadvantaged communities. Some power producers may shift generation and/or build new power plants in these areas because it is cheaper, which would create "hot spots." Emissions may decrease statewide but actually increase in certain communities. Historically, many of these power plants have been developed in EJ communities, and the Department and the Office of Environmental Justice (OEJ") must take this possible threat seriously. If these plants rely upon allowance purchases rather than reducing emissions, air quality will not be improved in these disproportionately burdened places. Even if RGGI reduces co-pollutants across the board, disadvantaged communities will likely continue to bear a disproportionate share of the pollution burden and might not receive their fair share of co-pollutant reduction benefits. If those local facilities are used more heavily, pollution in these communities could remain high or possibly increase.

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<sup>10</sup> Robinson, 83 A.3d at 947-48 (plurality); see also PEDF, 2017 WL 2645417, \*13.

<sup>11</sup> PEDF, 2017 WL 2645417, \*1 (the people of Pennsylvania voted to make their environmental rights "commensurate with their most sacred political and individual rights."); Widener Compilation, at 7 (House Journal at 486), at 66 (Q&A to Voters)(gives Pennsylvanians a "fundamental legal right to a decent environment"); 1970 Legislative Journal—House, at 2272 (quoting Kury); Robinson, 83 A.3d at 948; 953-54, 962.

<sup>12</sup> Pa. Const. Art. I, §§ 1, 3, 7, 8, 21.

<sup>13</sup> Abt Associates (2017), Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative, 2009-2014, [www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas-0](http://www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas-0).

<sup>14</sup> *Id.* at 22, 27. In addition, the Abt Associates modeling results "show substantial air quality benefits in the non-RGGI states of Pennsylvania and New Jersey due to emission reductions from plants located in RGGI states." *Id.* at 29.

The Department has the luxury of tailoring the RGGI rule to ensure that it fits the Commonwealth's needs. To understand the needs of the different stakeholders in Pennsylvania, the Department must first conduct several studies that will reveal the full impact that RGGI could have on different stakeholders. Next, the Department must use the information gathered from these studies, along with other related reports, to make a well-informed decision on how to implement RGGI.

First, in order to mitigate the impact on disadvantaged communities, the Department must exercise its authority outlined in the Pennsylvania Air Pollution Control Act and conduct a thorough investigation before imposing any emission limitation per permittee. The Department can do this by implementing case studies in low-income and minority communities to estimate the plan's side effects on co-pollutants such as particulate matter. Since the operation of RGGI may not be entirely predictable in Pennsylvania, the Department must investigate a range of scenarios. If this analysis suggests that the system is likely to create, exacerbate, or maintain a significant level of pollution hot spots, the Department should employ countermeasures such as imposing controls on those sources to purchase allowances. Once RGGI is operational, monitoring pollution concentrations remains essential to ensuring hot spots are not developing and that disadvantaged communities are sharing equitably in the benefits of emissions reductions.

Second, Section 27 mandates that the Department make a well-informed decision when considering any air quality permit application. A well-informed decision should be based on but not limited to the following information: data collected from executing community case-studies, testimony from residents (verbal and written), current and proposed ambient air quality (including from nearby waste facilities and highways), permittee violation history, public benefit (what is the likely side effects to local schools and property values), population (race, age, average income level, average property value), local schools and long-term care facilities, local nursing homes, and a cost-benefit analysis (i.e., the number of local and nonlocal jobs vs. pollution to the surrounding community).

Furthermore, the Department must prevent further air quality degradation, particularly in those communities that are already suffering from poor air quality. Meaning that when the Department reviews future permit applications, it must consider the existing air quality in that particular community and the cumulative impact of all regulated pollution sources. In order to better protect vulnerable communities, the Department should not consider each permit application in isolation. Pennsylvania can learn from other cap-and-trade programs run in other states, such as California. California's cap-and-trade program has resulted in an overall decrease in carbon emissions. However, reports found that the EJ communities were actually exposed to larger amounts of air pollution.<sup>15</sup> This was a direct result of operators either increasing generation in those communities and/or developing new power plants in EJ communities in response to the cap-and-trade program.

Since the goal of RGGI is to decrease pollution, the Department should not allow fossil fuel power plants to increase their emissions once RGGI is implemented. Although RGGI's market based approach to pollution control offers a number of advantages, avoiding hot spots in EJ Communities requires the Department to do more than take a check-the-box approach and apply a pay-to-pollute solution. The Department must rely upon site-specific data to inform the full scope of existing and

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<sup>15</sup> Justine Calma, How California can Make its Cap-and-Trade Program More Equitable, [Grist](#), July 18, 2018, citing Lara Cushing, et. Al. Evidence From California's Cap-and-Trade Program (2011-2015), [PLOS Medicine](#), July 10, 2018.

potential degradation and to impose additional conditions that are necessary to prevent and remedy degradation.

### **RGGI Must Include Provisions For Adaptive Management And Transparency.**

Local pollution concentrations are broadly relevant to environmental policy because of their potential negative impact on public health and welfare. The possibility of hot spots – or at least of a failure to reduce concentrations in all communities proportionately – cannot be dismissed as it is impossible to predict the operation of any market correctly, whether for pollution allowances or otherwise. Therefore, adaptive management is crucial. RGGI should contain specific mechanisms to study the impacts and make adjustments for effects that are unexpected or undesirable. A vague commitment to the concept of adaptive management is not sufficient; specific, mandatory follow-up measures must be integrated into the regulations where possible. We know there are often unforeseen flaws that require modification after a cap-and-trade system like RGGI is in place. That is why it is so essential to conduct the appropriate studies and report the findings to the public.

In the interest of transparency, we urge the Department to publish an annual report on power plant emission levels on a statewide basis. These reports should be broken down into no less than six regions; Northeast, Northcentral, Northwest, Southwest, Southcentral, and Southwest. By breaking the reporting down into regions, it would help the Department and other stakeholders understand the cumulative and localized impacts of RGGI once implemented. This will also assist the Department in taking mitigation measures if one area of the state is experiencing more significant impacts from RGGI than others.

The Department and the Office of Environmental Justice should seek to increase the likelihood that communities will be apprised of projects with potentially adverse consequences. Dependable access to information is critical to the ability of community members to know what environmental risks they may face or are currently facing in their communities. The Department should employ mechanisms such as drafting and publishing a factsheet for each air quality permit issued related to emission/RGGI credit limitations.<sup>16</sup> The factsheet should be issued for all air quality permits issued, not just the ones issued in EJ communities. To maintain transparency, this information should be made available on a public website. The factsheet should include but not be limited to: what information was considered from the public testimony and why other testimony was dismissed, what is the public benefit to issuing the permit, what are the possible health risks in issuing the permit, description of the type of facility under review, type of pollutants evaluated in the permit, documentation that the applicable emission limitations and standards including a citation of same are considered in development in the draft permit, and documentation that air quality standards will not be violated. Providing this information to the public is not only good public policy, but it also shows the community that the Department is looking at the entire picture of how a community may or may not be affected by the implementation of RGGI.

### **Department Must Ensure that RGGI Revenue has a Direct Tie to Environmental Justice Communities**

Pennsylvania must refocus its climate programs to invest primarily in EJ communities. The funds generated from RGGI should first be used to pay for the operating cost of the program. Next, no

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<sup>16</sup> The Department already publishes a similar fact sheet in the NPDES context.

less than fifty percent of the funds generated should be directed to a newly created fund to invest in projects that will either remediate environmental harm in low-income and EJ communities or invested into programs that will prevent future harm in such communities. This would include investments into projects such as renewable energy infrastructure, energy efficiency development, and pollution mitigation projects in Pennsylvania's most impacted communities.

Additionally, we are requesting that the Department ensure that EJ communities who do not see an immediate decrease in emission levels receive no less than twenty percent of the funds earned from RGGI to fund environmental and health mitigation projects. Projects should be prioritized in the communities where emission levels do not decrease in the first five years under the RGGI program. Projects such as but not limited to solar power infrastructure, home weatherization, and utility credits would ensure that marginalized communities share in the benefits of the RGGI program even if they do not immediately experience the benefits of reduced air pollution.

Currently, the draft rule would only allow funding of projects that reduce air pollution. But it would be prudent of the Department to also look at options that would enhance the quality of life in EJ communities. Projects such as green space development, remediation of industrial sites, lead removal programs from soil and water systems, reduction of food deserts, and affordable housing projects. Investments should also be made into manufacturing jobs as well. It could easily be argued that the manufacturing of batteries and solar panels would result in the reduction of air pollution. Therefore, by investing in these conventional and less-conventional ways, the Department could economically stimulate EJ and low-income communities while meeting the goals of the RGGI program.

### **The Department Should Not Allow Certain Fossil Fuel Power Plants to Externalize the Full Cost of Pollution.**

RGGI is a cap-and-invest program that rests on two central pillars: lower CO<sub>2</sub> and generate funds which can be reinvested back into the Commonwealth. However, under Pennsylvania's draft rule of RGGI, the Department has removed one of these pillars completely for specific kinds of plants. Under the current rule, the Department has made an exemption for certain types of polluters called set-aside allowances. Set-aside allowances allow some fossil fuel power plants (i.e. waste coal and combined heat and power sources) to pollute without paying into the program.

Pennsylvania is scarred by hundreds of abandoned and un-reclaimed coal refuse piles containing hundreds of millions of tons of waste coal. The waste coal has been and is presently leaching pollution into our waterways. There is an ever-present, high risk of fire with these coal refuse piles. Many of the former legally responsible companies have vanished, leaving the Commonwealth with a tremendously expensive problem.

The coal refuse-to-power solution offers environmental benefits by combining the production of energy with the removal of coal refuse piles and by reclaiming land for productive use. However, these plants still emit hazardous air pollutants and present significant public health disadvantages. Moreover, waste coal is less efficient compared to other coal power plants. Surprisingly, the current draft rule provides coal waste power plants a generous handout by allocating set-aside credits. While we recognize that the coal refuse-to-power solution may improve water quality and allow land to be repurposed, these benefits do not justify corporate welfare in the form of set-aside allowances. Especially since these facilities emit hazardous air pollutants and are less efficient than those facilities that must pay under the RGGI program. Instead, the Department can acknowledge the potential

benefits to land and water by offering a discounted rate for coal-waste allowances. For example, sell coal-waste allowances at half the cost of regularly priced CO<sub>2</sub> allowances. This would allow the Department to earn funds through the RGGI program, make progress on lowering emissions, and reduce the coal waste inventory. The entire cost of coal waste pollution should not be the community's burden.

The Department has also placed an exemption on certain combined heat and power ("CHP") energy sources. Though CHP systems are more efficient than coal and natural gas facilities, they too still pollute our Commonwealth. Thus, we recommend removing the exemption and charging a minimum of twenty-five percent (25%) the price of regular allowances for these plants. Charging a reduced rate acknowledges the efficiency of CHP plants while also not allowing those operators to externalize the entire cost of pollution onto the community.

In conclusion, we urge the Department to consider the following suggestions to the draft RGGI rule:

- When issuing air pollution permits, the Department must base its final determination on an informed decision. This decision must be based on a macro level. Information such as the testimony from residents, current and proposed ambient air quality, permittee's violation history, public benefit, population statistics, nearby schools, long-term care facilities, nursing homes, and cost-benefit analysis must be considered.
- Adaptive management is crucial. RGGI should contain specific mechanisms to study the impacts and make adjustments for effects that are unexpected or undesirable. A vague commitment to the concept of adaptive management is not sufficient; specific, mandatory follow-up measures must be integrated into the regulations where possible. We know there are often unforeseen flaws that require modification after a cap-and-invest system like RGGI is in place. That is why it is so essential to conduct the appropriate studies and report the findings to the public.
- The direct effect of RGGI is likely to be regressive: it will disproportionately burden low-income households with higher energy prices as producers pass emissions-reduction costs on to consumers. Therefore, Pennsylvania should use auction revenues to counter this effect. One advantage to RGGI, as opposed to more conventional regulation, is that while both may increase prices for consumers, allowance auctioning provides a funded mechanism for countering the effect.
- The Department should not allow certain fossil fuel power plants to externalize the polluting cost completely. RGGI can be tailored to fit the needs of the Commonwealth. Currently, the Commonwealth requires a cap-and-invest program that will lower emissions and earn funds. Therefore, by allowing certain fossil fuel power plants to not pay for their emissions, the state loses one of the central pillars of an effective cap-and-invest program. Instead, if the RGGI program charged a reduced rate for the same power plants, the goal of lowering emission levels and generating funds are both met without the burden of pollution falling on the state and the taxpayer.

Thank you for your consideration.

/S/

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