

April 1, 2019

Dear Members of the Environmental Quality Board,

On behalf of the membership of our respective organizations, the state's leading business and industrial groups, we write to express our concern with respect to the rulemaking petition submitted to the Board by the Clean Air Council and various co-petitioners, urging the Board to implement an economy wide carbon cap-and-trade program.

Title 25 Chapter 23 codifies the Department's Statement of Policy for processing rulemaking petitions at the Environmental Quality Board. It is important to note that while DEP must make a recommendation to the Board to accept a petition, the Board is under no obligation to act either immediately or at any time following DEP's recommendation on acceptance or refusal of the petition. Of note, § 23.5 affords the Board the opportunity to reject the petition due to policy or regulatory considerations, if the matter is currently subject to litigation, or the petition involves an issue previously considered by the Board.

We encourage individual members of the Environmental Quality Board to take no action with respect to this petition until members have fully contemplated the policy implications this petition would have on Pennsylvania's economy as a whole and the affected stakeholders of the industry each EQB member represents, regulates or regularly interacts with. Should the Board vote to accept the petition, we strongly encourage DEP's report to the Board evaluating the petition to fully and comprehensively address these issues. We also encourage EQB members to be cognizant that various federal regulations addressing greenhouse gas emissions from the industries affected by this petition are in litigation. Further, we also encourage EQB members, particularly those in executive leadership with Commonwealth agencies, to be responsive to legislative inquiries on this issue from the standing committees.

Core among the EQB's deliberations must be to consider whether there has in fact been clear statutory authority given by the legislature to establish and implement such a sweeping environmental regulatory program that would affect Pennsylvania's entire economy. The petition cites general purposes of the Air Pollution Control Act but no specific programmatic authorization, because there is none for this type of program. More broadly, the members of the EQB must be judicious in considering whether or not the revenues collected by the auction, sale or transfer of carbon allowances constitute a tax, which constitutionally must be enacted by the General Assembly.

Beyond constitutional concerns, we urge there be further deliberation by the Department Labor and Industry and the Department of Community and Economic Development on the impacts this petition would have on workforce and economic growth in the state.

Has the Public Utility Commission contemplated the impacts to consumers, households, commercial and industrial customers and low-income customers? Has the Public Utility Commission consulted with PJM Interconnection on any potential impacts to reliability as a result of this petition's impact on the power generation sector? The Public Utility Commission has also, in part with support from various Cabinet executives (according to an Aug. 8, 2017 letter signed by Gov. Wolf and the secretaries of Aging, Community and Economic Development, Environmental Protection, Health, and Human Services), explored how to lessen the burden on low-income ratepayers. Has the Public Utility Commission evaluated the impact this petition would have on low-

income ratepayers? Has the Public Utility Commission consulted with the Department of Education, the Pennsylvania State System of Higher Education, state-related universities, independent colleges and universities and other institutions of K12 and secondary education on the impact this petition would have in terms of operating costs and, by extension, tuition costs for students?

Has the Department of Transportation contemplated the impacts to the costs of building roads and bridges should the cost of steel, concrete, asphalt, iron and cement increase significantly? Does the Department of Transportation consider the imposition of a cap-and-trade program and the associated revenues to be collected from the sale or transfer of auctions or allowances, specifically as it relates to oil and petroleum marketers, refiners or distribution companies, to be a tax on “products used in motor transportation”? If so, does the use of these funds from such a sale or transfer then implicate the constitutional prohibition on using such revenues for any purpose other than the construction, maintenance and repair and safety on public highways and bridges?

Has the Department of Agriculture contemplated the burden this petition may place on farmers and various sectors of the agricultural industry?

Given that the Department of Environmental Protection’s 2018 draft Climate Action Plan endorses a cap-and-trade program on the electricity sector, is DEP prejudiced to recommend accepting this petition?

Broadly, the petition is silent with respect to the economic impacts to individuals, households, and affected sectors, as well as impacts to General Fund collections and overall employment. Does DEP or the petitioners have an estimate on those costs? Should the Board accept the petition, will DEP’s report on the petition (pursuant to § 23.6) include an estimate of these costs?

The petition is also silent with respect to the cost to the Commonwealth and DEP to establish the trading program. Does DEP or the petitioners have an estimate on the costs associated with respect to staffing, resources and enforcement? Should the Board accept the petition, will DEP’s report on the petition (pursuant to § 23.6) include an estimate of these costs?

Gov. Wolf’s Jan. 2018 executive order on greenhouse gas emissions sets a general goal for the state to achieve 26% net reductions for 2005 levels by 2025 and 80% net reductions by 2050. Has DEP or the Board contemplated that the limits that would be established with this petition be in conflict with those goals by significantly exceeding them?

Given the potentially massive economic impact to the Commonwealth’s households and businesses, it seems advisable that, prior to voting on whether to accept the petition, EQB members should be afforded the opportunity for DEP’s various advisory committees to present or report information of relevance to the Board as it relates to § 23.5. These committees include the Citizens Advisory Council, the Small Business Compliance Advisory Committee, the Air Quality Technical Advisory Committee, the Climate Change Advisory Committee, the Oil and Gas Technical Advisory Board, the Conventional Oil and Gas Advisory Committee, the Pennsylvania Grade Crude Development Advisory Council, the Agricultural Advisory Board, the Coastal Zone Advisory Committee, the Aggregate Advisory Board, the Mining and Reclamation Advisory Board, and the Climate Change Advisory Committee.

The EQB's petition policy provides Board members may refuse to accept a petition if it concerns a matter in litigation. It must be noted that various federal regulations addressing greenhouse gas emissions from various industries are in litigation or in regulatory development. These include the repeal of the Clean Power Plan (CAA Section 111(b) regulations relating to new gas and coal-fired power plants and Section 111(d) regulations relating to existing gas and coal-fired power plants, both of whose final form rulemakings are in litigation in the DC Circuit) and replacement with the Affordable Clean Energy Rule; FERC's consideration of climate impacts from GHG emissions from end use when deliberating on interstate natural gas pipelines; and, perhaps most notably, *Clean Air Council v United States*, (E.D. PA, 2;17-cv-04977)¹ challenging changes to certain federal climate actions as unconstitutional.

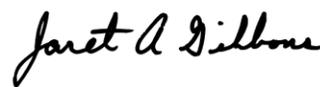
Finally, the EQB's petition policy provides that Board members may refuse to accept a petition if it involves an issue previously considered by the Board when the petition does not contain new information, or if any new information it does contain was unavailable when the Board considered a similar petition earlier. In October 2012, petitioner Ashley Funk filed a petition asking this Board to promulgate regulations to reduce from fossil fuel CO2 emissions by 6% per year. She filed a substitute petition in September 2013 that cited many of the same background facts and legal arguments (including the Environmental Rights Amendment) that the petitioners cite here. DEP recommended the Board deny the petition, noting that the Board had not been given statutory authority to direct DEP to take an action of this nature. At its April 2014 meeting, the Board voted 17-3 to accept DEP's recommendation to deny the petition. The Commonwealth Court, subsequently in July 2016 after considering a complaint in mandamus to force EQB, DEP and other state agencies to adopt a climate change regulation, held that Ms. Funk and the other petitioners do not have a clear right to have the agencies promulgate the requested regulation and dismissed their complaint. *Funk v. Wolf*, 144 A.3d 228, 250. The state Supreme Court unanimously affirmed that dismissal. The Board should carefully consider the past petition, the facts and legal arguments in support and in opposition to a climate change regulation, and the ensuing litigation before deciding on whether or how to proceed with the current petition.

In closing, we hope that the issues and considerations identified in this letter are fully contemplated by the members of the Environmental Quality Board prior to voting on whether to accept the petition.

Sincerely,



Gene Barr
President & CEO
Pennsylvania Chamber of Business and
Industry



Jaret Gibbons
Executive Director
Appalachian Region Independent Power
Producers Association

¹ This case was dismissed by the Court in February but plaintiffs have publicly stated they may appeal.



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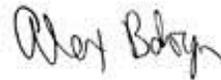
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