Testimony of Anthony R. Holtzman, Esq.

Good afternoon, Chairman Metcalfe, Chairman Vitali, and the other members of the House Environmental Resources and Energy Committee. My name is Anthony Holtzman. I am pleased to join you today to discuss certain constitutional and statutory issues that pertain to the Regional Greenhouse Gas Initiative, or "RGGI." In particular, I'm going to explain why, in my estimation, Pennsylvania's constitutional and statutory law does not provide the Executive Department with the authority to join or implement RGGI. At the outset, I want to be clear that I am not representing or being paid by any client today. Nor am I appearing on behalf of my law firm. The opinions that I will express today are my own, but formed based on many years of experience with state and federal constitutional and environmental law issues.

The Pennsylvania Constitution does not provide the Executive Department with the authority to join RGGI.

In order to formally join RGGI, the Commonwealth would need to execute the RGGI Memorandum of Understanding, or "MOU," which operates like an agreement between the signatory states.

Article IV of the Pennsylvania Constitution, which establishes the powers of the Executive Department, does not contain any provision that supplies the Governor or any other official or entity with the authority to sign onto an interstate compact or agreement, like RGGI.

And, while Article I, Section 27 of the Pennsylvania Constitution imposes duties on the Commonwealth to "conserve and maintain" Pennsylvania's "public natural resources," it does not operate to expand the powers of the Governor or the executive branch agencies that operate under his purview. The Commonwealth Court, in fact, has expressly acknowledged this point.[1]

Because the Pennsylvania Constitution does not provide the Governor or any other Executive Department official or entity with the power to enter into interstate compacts or agreements, the General Assembly alone possesses that power.

The General Assembly, in this regard, has plenary power and therefore, unless the Constitution says otherwise, it has authority over and may enact legislation regarding any subject. As our Supreme Court has explained, "the General Assembly has jurisdiction of all subjects on which its legislation is not prohibited[.]"[2]

Our Supreme Court, in fact, has recognized that the Constitution vests the General Assembly with the compacting power and that, if a statute delegates that power to an executive branch actor, the delegation must "evince[] the *Legislature's* 'basic policy choice' to participate in [the] interstate agreements" in question.[3]

The result is that, in order for the Executive Department to sign onto the RGGI MOU, it must be statutorily authorized to do so.

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1 *See Funk v. Wolf*, 144 A.3d 228, 249 (Pa. Cmwlth. 2016), *aff'd* 158 A.3d 642 (Pa. 2017)

2 *Kotch v. Middle Coal Field Poor Dist.*, 197 A. 334, 338 (Pa. 1938)

3 *Whitlatch v. PennDOT*, 715 A.2d 387, 389 (Pa. 1998) (emphasis added)

There is no Pennsylvania statute that provides the Executive Department with the authority to sign onto RGGI.

The two potentially applicable statutes are the Air Pollution Control Act, or "APCA," and the Uniform Interstate Air Pollution Agreements Act, or "UIAPAA."

Section 4(24) of APCA provides that the Pennsylvania Department of Environmental Protection may "formulate" interstate air pollution control agreements "for the submission thereof to the General Assembly."[4] By the plain terms of this provision, the Department may *formulate* interstate air pollution agreements, but may not actually *execute* them. Instead, it must submit them to the General Assembly for consideration.

Section 3 of the UIAPAA authorizes the Department to enter into multi-state "administrative agreements" that provide for "cooperation" and "coordination" of non-binding efforts to control cross-border air pollution.[5] These "administrative agreements" may provide for, among other matters, the "coordinated administration" of the states' respective air pollution control programs, "[c]onsultation concerning technical" issues, and the "development of recommendations" concerning air quality standards.[6]

The RGGI MOU is *not* an "administrative agreement" of the type that UIAPAA contemplates. Under the RGGI MOU, each signatory state makes a *binding* commitment to propose and implement a regional carbon dioxide budget trading program, which is predicated on the state's *mandatory participation* in regional, revenue-raising allowance auctions.[7] This arrangement stands in stark contrast to the paradigmatic UIAPAA "administrative agreement" that, for example, allows for the sharing of ambient air monitoring data or the convening of periodic technical conferences among agency staff members.

The Executive Department lacks the authority to implement RGGI.

Even if the Executive Branch had the authority to sign onto the MOU, it does not have the authority to adopt regulations to implement RGGI.

Our Supreme Court has long held that, under the Pennsylvania Constitution, the power to impose a tax is vested solely in the General Assembly.[8] Under prevailing Pennsylvania case law, something qualifies as a "tax" if it is a "revenue-producing measure."[9] Regulatory "fees," by contrast, are merely "intended to cover the cost of administering a regulatory scheme."[10] And therefore, as Pennsylvania's courts have explained, whether an income-producing mechanism

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4 35 P.S. § 4004(24)

5 35 P.S. § 4103

6 35 P.S. § 4103(b)

7 RGGI MOU §§ 1, 2.A

8 *See, e.g., Mastrangelo v. Buckley*, 250 A.2d 447, 452 (Pa. 1969)

9 *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973)

10 *Rizzo v. City of Philadelphia.*, 668 A.2d 236, 237-38 (Pa. Cmwlth. 1995)

imposes a "tax" or a "fee" turns on the volume of income that the mechanism generates and the proportion of the income that goes to cover the program's administrative costs.[11]

Under this standard, RGGI's quarterly auction mechanism – which is the heart of the program – would qualify as a "tax," not a "fee," because the proceeds of the auctions are grossly disproportionate to the costs of administering the program. Through 2017, in fact, the RGGI signatory states had directed less than 6% of the proceeds toward the program's administration.[12] RGGI's auction mechanism is designed to raise substantial sums of revenue – in fact, it has raised more than $3 billion to date – and the signatory states have used the vast majority of this revenue to either support policy initiatives (such as energy efficiency and renewable energy initiatives) or bolster state coffers through transfers to general funds.[13] The auction program therefore imposes a tax that only the General Assembly can impose.

This conclusion, by the way, is consistent with the Environmental Quality Board's limited authority under APCA to establish emission fees. Under Section 6.3 of APCA, the EQB may *only* establish "fees sufficient to cover the indirect and direct costs of administering" APCA and the Clean Air Act.[14] The EQB therefore may not adopt regulations that would require regulated entities to pay emission "fees" (by purchasing emission allowances) that would generate revenues that were far in excess of the "indirect and direct costs of administering" APCA and the Clean Air Act. And yet the EQB would need to take *precisely* that approach in order to implement RGGI.

Even apart from RGGI's tax implications, moreover, no Pennsylvania executive agency has the statutory authority to adopt regulations to implement RGGI. APCA is the only potential source of that authority – and it does not authorize the adoption of regulations to implement RGGI.

To this end, as our Supreme Court has explained, it is a "well settled principle that the power and authority to be exercised by administrative agencies must be conferred by the legislature."[15] As our Supreme Court has also explained, when it comes to a legislative delegation of rulemaking power, the delegation "must be clear and unmistakable as a doubtful power does not exist."[16]

Under these principles, regardless of whether APCA authorizes the regulation of carbon dioxide emissions generally, and it is my opinion that it does not, the statute does not authorize the adoption of regulations to implement RGGI. While APCA gives the Department the authority to impose various requirements regarding air emissions – including recordkeeping, reporting, monitoring, and sampling requirements[17] – and gives the EQB the authority to issue certain categories of regulations regarding air emissions,[18] the statute is devoid of any clear authorization for any agency to issue regulations that adopt the detailed "cap-and-trade" system, including the carbon dioxide allowances regime, that lies at the heart of RGGI. The result is that, if a

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11 *See, e.g., Greenacres Apts., Inc. v. Bristol Tp.*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984)

12 *See* RGGI, Inc., *The Investment of RGGI Proceeds in 2017*, at 12, Chart 4 (Oct. 2019), *available at* https://www.rggi.org/sites/default/files/Uploads/Proceeds/RGGI_Proceeds_Report_2017.pdf.

13 *Id*.

14 35 P.S. § 4006.3(a)

15 *Dep't of Envtl. Res. v. Butler Cnty. Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982)

16 *Eagle Envtl. II, L.P. v. PaDEP,* 884 A.2d 867, 878 (Pa. 2005) (internal quotations omitted)

17 *See* 35 P.S. § 4004(4), (5), & (6)

18 *See generally* 35 P.S. § 4005

Pennsylvania agency were to issue regulations of that type, the regulations would be *ultra vires* and void.

Section 5(a)(1) of APCA provides that the EQB may adopt regulations that, among other things, "establish maximum allowable emission rates of air contaminants" and "prohibit or regulate any process or source or class of processes or sources[.]"[19] Although, with enough effort, it may be possible to read these phrases so broadly that they would allow for regulations that implement the RGGI program, courts are not supposed to take that approach. Again, the applicable rule of statutory interpretation is that, in every case, a delegation of rulemaking power "must be clear and unmistakable as a doubtful power does not exist."

Separately, there is a reasonable argument that APCA does not even authorize the regulation of carbon emissions generally. Ambient carbon dioxide, in this regard, arguably does not constitute "air pollution" within the meaning of the statute because, unlike other conventional pollutants (for example, lead, mercury, particulates, nitrogen oxides, and sulfur oxides), the inhalation of carbon dioxide or direct exposure to it at typical atmospheric concentrations is not "inimical to the public health, safety or welfare" or "injurious to human, plant or animal life or to property" and does not "unreasonably interfere[] with the comfortable enjoyment of life or property."[20] By its plain wording, in other words, and unlike states like New York that expressly authorize the regulation of "carbon dioxide" – and without further requirements at the federal level – APCA indicates that it does not allow for the regulation of substances whose sole environmental consequence is that they contribute to global climate change.

Finally, even if the presence of carbon dioxide in the atmosphere constitutes "air pollution," an attempt by the EQB to employ RGGI's carbon trading program to regulate emissions of that gas would not meaningfully "prevent[], control, reduc[e], and abate[]" climate change, as required for the agency to adopt regulations under APCA.[21] On a percentage basis, the contribution by Pennsylvania's fossil-fuel-fired power plants to total worldwide greenhouse gas emissions is miniscule.[22] As a result, even if the implementation of RGGI were to result in the complete elimination of carbon emissions from all regulated power plants in Pennsylvania (which it is not designed to do), it would not materially impact the concentration of ambient carbon dioxide in the outdoor atmosphere. And this reality does not even account for the likelihood that Pennsylvania's participation in RGGI would result in at least some greenhouse gas emissions "leakage," as power

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19 35 P.S. § 4005(a)(1)

20 35 P.S. § 4003 (defining "air pollution")

21 *See* 35 P.S. § 4005(a)(1) (EQB may "[a]dopt rules and regulations, for the prevention, control, reduction and abatement" of air pollution)

22 According to Pennsylvania's most recent Climate Action Plan, sources in the Commonwealth collectively emitted approximately 287 million metric tons of greenhouse gases (CO_2 equivalent) in 2015, and the "energy production" sector (which includes all electricity generation, coal mining, and natural gas and oil production) accounted for approximately 32% of those emissions, or approximately 92 million metric tons. PaDEP, *Pennsylvania Climate Action Plan 2018*, at 16, 32-33 (April 29, 2019). In comparison, the Intergovernmental Panel on Climate Change ("IPCC") has recently estimated worldwide greenhouse gas emissions at approximately 49.5 *billion* metric tons (as of 2010). IPCC, *Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, at 113 (2014). Using these figures, Pennsylvania's energy production sector's annual contribution to total worldwide greenhouse gas emissions is approximately 0.19%. Taken by themselves, the power plants that would be subject to the RGGI requirements contribute an even smaller percentage.

plants in nearby states would generate more electricity (and emissions) to compensate for operational reductions that occurred among power plants in the Commonwealth.

Conclusion.

It is for these reasons, honorable members of the committee, that Pennsylvania's Executive Department does not currently have the authority to join or implement RGGI. I would be happy to try to answer your questions, if any, about these issues.