

## EQB to consider cap-and-trade petition this month

The Pennsylvania Environmental Quality Board (EQB) will consider a petition for a cap-and-trade regulation at its April 16 meeting. The Clean Air Council, Widener Commonwealth Law School Environmental Law and Sustainability Center, and others submitted the petition on February 28, asking EQB to promulgate a regulation that would create a multi-sector cap-and-trade system to reduce greenhouse gas (GHG) emissions to achieve carbon neutrality in Pennsylvania by 2052.

The petitioners initially submitted the petition to EQB on November 27, 2018. Under EQB's Petition Policy (25 Pa. Code Chapter 23), the Department of Environmental Protection is to notify EQB and the petitioner within 30 days of DEP's receipt of the petition whether the petition meets the policy's eligibility criteria. DEP advised the petitioners on December 26 that the petition met the criteria and would be submitted to EQB for consideration at the first meeting of 2019.

However, DEP did not notify EQB members until, apparently, early February. Upon learning of the petition, Representative Daryl Metcalfe, chairman of the House Environmental Resources and Energy Committee, requested DEP on February 19 to have the petitioners resubmit their petition. The petitioners resubmitted the petition on February 28 with minor changes and additional signatories. DEP notified petitioners and the EQB on March 1 that DEP would review the petition to ensure it still meets the eligibility criteria. DEP has now done that and EQB scheduled the matter for consideration at its April 16 meeting.

### The petition

The petition includes a fully drafted regulation that establishes a cap on covered GHG emissions, based on a 2016 base year, and reduces GHG emissions to carbon neutrality by 2052. The regulation borrows heavily from California's cap-and-trade regulation, which is a multi-sector program that includes Ontario and Quebec. The California regulation, however, does not require a reduction of all GHG emissions to zero.

The Pennsylvania emissions cap would decline by 3 percent each year. Capping GHG emissions means that the covered entities meeting certain thresholds—including the oil and gas, coal, cement, glass, and steel industries and any facility

producing or importing electricity—all must obtain allowances, by auction or allocation, for each metric ton of reportable GHG emissions per year attributable to their operations in Pennsylvania.

According to EPA's Envirofacts database, nearly 400 facilities in Pennsylvania report GHG emissions to EPA under a mandatory reporting rule. The proposed cap and trade program would require these and others not currently required to report GHG emissions to participate in the Pennsylvania program.

The petition states that if the regulation becomes effective for 2020, the initial cap would be equal to 97 percent of 2016 emissions. Limited by the ever-declining cap and availability of allowances, each covered entity must reduce its GHG emissions over time to achieve carbon neutrality by 2052. Allowances would cost a minimum of \$10 each in 2020, with the price increasing by 10 percent plus the rate of inflation each year. Any person may buy from the available allowances regardless of whether that person emits GHG or not. If a covered entity cannot obtain sufficient allowances by auction or allocation, it may participate in the trading system and purchase needed allowances if they are available. Allowances may be freely traded or banked for future use.

The proposed regulation would allow manufacturers of certain products (but not fossil fuel suppliers or electricity generation) facing international and/or interstate competition to apply for some allowances to be distributed to them without cost. This mechanism is intended to prevent "leakage," which refers to the relocation of production or emissions of GHGs to another jurisdiction in which GHG emissions are not commoditized. The number of free allowances directly awarded to such entities would be based initially on the company's 2018 GHG emissions and be reduced by 5 percent each year after.

The petitioners cite the Pennsylvania Air Pollution Control Act and the Environmental Rights Amendment (ERA)—Article I, Section 27 of the Pennsylvania Constitution—as legal authority for their petition. Citing the Pennsylvania Supreme Court's 2017 decision in *PEDF v. Commonwealth*, 161 A.3d 911, the petitioners assert the ERA requires the Commonwealth to control GHG emissions. They contend the ERA affords a right to a "natural climate unaffected by climate disruption,"

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because “a stable climate” should be understood to be a public natural resource, although this right is not expressly included in the Pennsylvania Constitution. The only express Pennsylvania legislation related to climate change and greenhouse gases is the Pennsylvania Climate Change Act (Act 70 of 2008), which provides for a report on potential climate change impacts, duties of the DEP, establishment of a Climate Change Advisory Committee, and a voluntary registry of greenhouse gas emissions. Neither the Air Pollution Control Act nor the Climate Change Act provides express authority to regulate GHG emissions or establish a cap-and-trade system. The petition bypasses legislative consideration of this issue by asking EQB as an administrative body to promulgate a climate change regulation.

### Next steps

The notice of the agenda for the April 16 EQB meeting states DEP recommends that EQB accept the petition for further study. The petitioners may make a short oral presentation in favor of the petition at the meeting. Under its Petition Policy, EQB may deny it the petition if has previously considered the same issue for which there is no new or different information, if the request concerns a matter in litigation, or if the requested action is inappropriate for EQB rulemaking due to policy or regulatory considerations. In 2013, DEP recommended that EQB reject a petition by Ashley Funk *et al.* for a similar regulation to reduce fossil fuel CO2 emissions, citing lack of statutory authority and conflict with federal law. EQB voted 17-3 to accept DEP’s recommendation to deny the petition. The Commonwealth Court subsequently decided in 2016 that the Funk petitioners did not have a clear right to promulgation of the requested regulation and dismissed their petition for mandamus, which the Supreme Court affirmed. *Funk v. Wolf*, 144 A.3d 228.

Despite the petition policy setting certain timelines, EQB is not required to make any decision regarding the petition at the April 16 meeting.

On April 1, the Pennsylvania Chamber of Business and Industry and 14 industry trade groups including PIOGA asked EQB members not to take any action on the petition until they have fully considered its legal and practical implications. Key among those implications are the comprehensive reshaping of Pennsylvania’s entire economy and effects of higher energy prices on low-income rate payers, on municipalities, and on public, private and higher education. Other legal and practical considerations include whether the revenue collected by the auction of carbon allowances constitutes a tax, which constitutionally must be enacted by the General Assembly, and whether the impact to the power generation sector threatens reliability and the PJM Interconnection system. The Chamber and trade associations also recommend that each DEP advisory committee, including the Oil and Gas Technical Advisory Board and the Pennsylvania Grade Crude Development Advisory Council, be given the opportunity to consider the petition, providing necessary evaluation of its impacts by those industry members that would be affected.

If and when EQB accepts a petition for consideration, DEP must prepare a report and recommendation within 60 days (or

longer if the report cannot be completed within 60 days) on whether EQB should promulgate a cap and trade regulation. If EQB decides to proceed with regulatory amendments, DEP will prepare a proposed rulemaking for EQB consideration within 6 months after mailing its report to the petitioners.

This petition and its proposed regulation present a dramatic departure from any current regulation in Pennsylvania and are intended to affect every aspect of the economy of this Commonwealth. Whether or not such a program in Pennsylvania would have any effect on the global climate is a question no one can answer. Every business large and small, those with and without GHG emissions, should engage in the conversation and stay tuned for further developments of the GHG rulemaking petition as 2019 unfolds.