

Litigation Surrounding Pennsylvania's RGGI Rule Continues

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As previously reported in Vol. 39, No. 2 (2022) of this *Newsletter*, the Pennsylvania Department of Environmental Protection's (PADEP) CO₂ Budget Trading Program rule, or RGGI Rule, which links the commonwealth's cap-and-trade program to the Regional Greenhouse Gas Initiative (RGGI), was published in the *Pennsylvania Bulletin* in April 2022. See 52 Pa. Bull. 2471 (Apr. 23, 2022). RGGI is the country's first regional, market-based cap-and-trade program designed to reduce carbon dioxide (CO₂) emissions from fossil fuel-fired electric power generators with a capacity of 25 megawatts or greater that send more than 10% of their annual gross generation to the electric grid.

A number of legal challenges were filed in response to the publication of the final rule. On April 25, 2022, owners of coal-fired power plants and other stakeholders filed a petition for review and an application for special relief in the form of a temporary injunction. See *Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). Briefing has been filed and the court heard 30 minutes of oral argument in the case on November 16, 2022. The parties await the court's ruling.

Additionally, on July 13, 2022, natural gas companies Calpine Corp., Tenaska Westmoreland Management LLC, and Fairless Energy LLC filed a third legal challenge to the rule with arguments similar to those brought in the other two cases. See *Calpine Corp. v. PADEP*, No. 357 MD 2022 (Pa. Commw. Ct. filed July 12, 2022). Constellation Energy Corporation and Constellation Energy Generation LLC petitioned to intervene in the case, but later filed a joint motion to stay intervention proceedings on October 31, 2022, which the court granted. The stay on the application for intervention remains in place. Briefing in this case has been filed and oral argument is set for February 8, 2023.

In a third suit filed by the acting Secretary of PADEP against the Pennsylvania Legislative Reference Bureau in February 2022, PADEP filed suit in the Pennsylvania Commonwealth Court seeking to compel the Pennsylvania Legislative Reference Bureau to publish the Pennsylvania Environmental Quality Board's final-form rulemaking for the CO₂ Budget Trading Program in the *Pennsylvania Bulletin*. See *McDonnell v. Pa. Legis. Reference Bureau*, No. 41 MD 2022 (Pa. Commw. Ct. filed Feb. 3, 2022). By law, the House and Senate each have 30 calendar days or 10 legislative days—whichever is longer—to vote on a disapproval resolution to stop a new rule from taking effect. PADEP argued that the periods should have run simultaneously for the House and Senate, rather than one after the other, and the Pennsylvania Legislative Reference Bureau's improper interpretation delayed issuance of the rule. On January 19, 2023, the commonwealth court dismissed the case as moot, as the rule was published in April 2022, without ruling on the merits.

On an interlocutory appeal in PADEP's action, the Supreme Court of Pennsylvania upheld a preliminary injunction of the RGGI Rule granted by the commonwealth court. On July 8, 2022, the commonwealth court granted a preliminary injunction preventing the state from participating in RGGI pending resolution of the case. See Vol. 39, No. 3 (2022) of this *Newsletter*. Governor Wolf appealed the injunction to the Supreme Court of Pennsylvania. On August 31, 2022, the supreme court denied the state's emergency request to reinstate the automatic supersedeas, thereby maintaining the preliminary injunction while litigation on the merits proceeds before the commonwealth court. See *Ziadeh v. Pa. Legis. Reference Bureau*, No. 79 MAP 2022 (Pa. Aug. 31, 2022); Vol. 39, No. 4 (2022) of this *Newsletter*. The regulation remains stayed.

On January 18, 2023, every member of the Pennsylvania Senate Republican Caucus signed a letter to the newly inaugurated Governor Josh Shapiro that urged him to repeal the final RGGI regulation. See Letter from the Senate Republican Caucus to Gov. Shapiro (Jan. 18, 2023). The letter highlighted the economic burden that would be placed on Pennsylvania electric generating units and subsequently passed on to businesses and consumers. The

letter also referenced Governor Shapiro's previous statements that implied doubt as to whether participation in RGGI was the best approach for the commonwealth.

Further information regarding the rule and the history of the rulemaking can be found on PADEP's RGGI webpage at <https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx>.

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