

Oral Argument Heard Regarding Pennsylvania's RGGI Rule

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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.

On May 24, 2023, the Pennsylvania Supreme Court heard arguments on whether a lower court was right to prevent Pennsylvania's participation in RGGI. One of the predominant topics at oral argument was the issue of whether the credits that power plants would have to purchase under the regulation are considered a tax or a fee. The petitioners believe the credits to be an unconditional tax while the Commonwealth contends that the credits are a fee as authorized under the Air Pollution Control Act.

The corresponding lower court case was filed on April 25, 2022, by owners of coal-fired power plants and other stakeholders requesting review and a temporary injunction, which was initially granted. See *Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022); Vol. 39, No. 3 (2022) of this *Newsletter*. On March 24, 2023, the Supreme Court of Pennsylvania granted requests to dismiss the preliminary injunction because the petitioners had failed to pay the bond required to secure the preliminary injunction. See Vol. 40, No. 2 (2023) of this *Newsletter*. Petitioner Bowfin KeyCon Holdings, LLC, which has an interest in some of the subject coal-fired power plants, filed an appeal of the bond amount in summer 2022, claiming that the bond was infeasible or impossible to pay and asked the court to reduce it to a negligible amount.

The state's future plans for its RGGI regulation remain unclear, but it is unlikely to take action prior to a decision on the merits. 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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