

Pennsylvania Commonwealth Court Holds RGGI Rule Unconstitutional

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On November 1, 2023, the Commonwealth Court of Pennsylvania held that the Pennsylvania Department of Environmental Protection's (PADEP) CO₂ Budget Trading Program Regulation (RGGI Rule) is an unconstitutional tax, declared the rule to be void, and enjoined PADEP from enforcing it. See *Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 M.D. 2022, 2023 WL 7171547 (Pa. Commw. Ct. Nov. 1, 2023).

After a lengthy rulemaking process, the RGGI Rule was published in the *Pennsylvania Bulletin*. See 52 Pa. Bull. 2471 (Apr. 23, 2022). The RGGI Rule would have linked Pennsylvania's cap-and-trade program to the Regional Greenhouse Gas Initiative (RGGI), which is the regional, market-based cap-and-trade program designed to reduce carbon dioxide 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.

Two days after the RGGI Rule was published, a group of stakeholders filed a petition for review of the rule and an application for preliminary injunction in the commonwealth court. The court held a hearing on the preliminary injunction on May 10 and 11, 2022, and in a July 8, 2022, opinion, the court preliminarily enjoined the regulation as an unconstitutional tax.

In its November 1 decision on the merits, the court reaffirmed its earlier July 8, 2022, opinion, holding that the RGGI Rule constitutes a tax imposed by PADEP in violation of the Pennsylvania Constitution. Undisputed facts of record established that only 6% of RGGI auction proceeds are necessary to cover the cost of administering the program and that the annual revenue anticipated from RGGI would be three times greater than the total amount allocated to PADEP from the General Fund in a single year. The court found that the money to be generated by Pennsylvania's participation in RGGI would be "grossly disproportionate" to the costs of overseeing participation in the program and PADEP's annual needs, and thus was an illegal tax. In coming to its ruling, the court relied on the Pennsylvania Supreme Court's opinion in *Flynn v. Horst*, 51 A.2d 54, 60 (Pa. 1947), which found that it is a firmly established principle of Pennsylvania law that a revenue tax cannot be constitutionally imposed upon a business under the guise of a police regulation, and that if the amount of a "license fee" is grossly disproportionate to the sum required to pay the cost of the due regulation, it should be struck down. The commonwealth court concluded that Pennsylvania's participation in RGGI may only be achieved through legislation duly enacted by the Pennsylvania General Assembly, and not merely through a rulemaking promulgated by PADEP and the Environmental Quality Board. The Commonwealth has not publicly stated whether it will appeal the decision, but would have until November 30, 2023, to do so.

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