

Preliminary Injunction Granted for RGGI Rule

August 1, 2022

FNREL Mineral and Energy Law Newsletter

Pennsylvania – Mining

(By **Joseph K. Reinhart**, **Sean M. McGovern**, **Gina N. Falaschi** and **Christina Puhnaty**)

On July 8, 2022, the Commonwealth Court of Pennsylvania granted a preliminary injunction preventing the State from participating in the Regional Greenhouse Gas Initiative (RGGI) pending resolution of a case. 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, which links the commonwealth's cap-and-trade program to 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 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, and a group of state lawmakers filed a challenge as well. See *Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). The commonwealth court held a hearing on May 10 and 11, 2022, on the application for special relief.

Because the commonwealth court had not granted the application for preliminary injunction by July 1, 2022, the date on which compliance was to begin under the rule, sources were obligated to begin tracking CO₂ emissions for compliance purposes and planned to participate in the upcoming RGGI CO₂ allowance action in September 2022.

On July 8, 2022, the commonwealth court granted a preliminary injunction. The order and opinion enjoined the administration and enforcement of RGGI until further order. The court found there is substantial legal question with respect to whether RGGI is an unconstitutional tax given the revenue expected to be generated versus the cost to administer the regulations. The court also found that the petitioners would face immediate and irreparable harm if the rulemaking is ultimately held invalid because the cost of compliance, including lost profits, would not be recoverable because PADEP and Pennsylvania's Environmental Quality Board (EQB) enjoy sovereign immunity. The court concluded an injunction is reasonably suited to abate the effects of the rulemaking should it be deemed invalid.

Upon appeal of the preliminary injunction by PADEP and the EQB to the Supreme Court of Pennsylvania, the July 8 ruling was automatically stayed, which occurs as a matter of procedure when a state entity appeals to the supreme court. On July 25, 2022, the commonwealth court reinstated its earlier preliminary injunction ruling that a group of state lawmakers who filed one of two legal challenges against the rule had satisfied their burden of proof to establish the requirements to vacate the stay.

On July 12, 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). Oral argument before the commonwealth court on the merits of these three cases will not likely occur prior to September 2022, at the earliest.

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>.

Copyright © 2022, The Foundation for Natural Resources and Energy Law, Westminster, Colorado

Babst | Calland
Attorneys at Law

PITTSBURGH, PA | CHARLESTON, WV | HARRISBURG, PA | LAKEWOOD, NY | STATE COLLEGE, PA | WASHINGTON, DC