

The Future of Pennsylvania's RGGI Rule Remains Uncertain

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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 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.

Three 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, which was 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*. Briefing has been filed and the court heard 30 minutes of oral argument in the case on November 16, 2022. 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. 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. Despite the end of the preliminary injunction, the court may still make a decision on the merits in the coming months.

The acting Secretary of PADEP filed suit in the Pennsylvania Commonwealth Court against the Pennsylvania Legislative Reference Bureau (Bureau) in February 2022, seeking to compel the Bureau to publish the 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 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. See Vol. 40, No. 1 (2023) of this *Newsletter*.

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 was heard on February 8, 2023. This case is still pending.

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 in the two remaining pending cases. 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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