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The Commonwealth Court Enjoined the RGGI Regulations; the Action Moves to the Supreme Court

On July 8, the Commonwealth Court enjoined the Department of Environmental Protection and the Environmental Quality Board from implementing the Regional Greenhouse Gas Regulations, which means the regulations are not effective as of the date of this article (August 5, 2022). DEP and EQB immediately appealed that decision to the Supreme Court where we await further developments from the high court.

As background, under the final RGGI regulations that EQB adopted in July 2021, regulated sources must acquire 50 percent of the necessary CO₂ allowances for 2022 emissions by March 1, 2023 and acquire 100 percent of their allowances for the compliance period by March 1, 2024. DEP set a partial-year emissions cap of approximately 40.7 million tons of CO₂ for the remainder of 2022 and approximately 75.5 million tons for 2023, which will gradually decline to approximately 58 million tons in 2030. The modeled allowance price was in the \$3-4/ton range when DEP developed the regulations but has increased substantially to \$13.90/ton at the last auction on June 1, 2022. The potential financial impact on businesses and consumers is now much greater than originally predicted. At auction prices of

\$13-14/ton, implementation of the RGGI program in Pennsylvania is expected to cost \$700-800 million per year, or nearly \$4 billion over five years at current auction prices.

A group of labor and industry petitioners and a group of elected officials (including the chairs of the House and Senate Environmental Resources and Energy committees) are challenging the regulations in Commonwealth Court. They contend the regulations are an unconstitutional tax and that the Air Pollution Control Act does not provide authority for DEP and EQB to promulgate them. Several business and industry groups including the Pennsylvania Manufacturer's Association, the Pennsylvania Chamber of Business and Industry, and the Industrial Energy Consumers of Pennsylvania filed amicus briefs supporting the challengers. Public interest groups filed amicus briefs supporting the agencies. In separate July 8 opinions in both cases, Commonwealth Court Judge Wojcik held there is a substantial legal question as to whether the regulations are an unconstitutional tax because the revenue to be generated vastly exceeds that necessary to administer the CO₂ budget trading program. The rulemaking record estimated that DEP would use only six percent of auction proceeds to administer the program. DEP acknowledged during the hearing that the estimated receipts for the 2022-23 budget year to be directed into its Clean Air Fund would exceed \$443 million. By comparison, over the past five years, there was roughly \$20-25 million in the Fund annually and the total amount the General Assembly

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appropriated to DEP was \$169 million. Based on this, the Court found the legal issue to be considerable enough to enjoin the regulations. However, the court rejected the argument, for injunction purposes, that DEP does not have authority under the Air Pollution Control Act to promulgate them.

The agencies' July 11 appeal to the Supreme Court acted as an automatic stay of Judge Wojcik's injunction. The elected officials then petitioned to vacate the automatic stay, which the Commonwealth Court granted on July 25, thereby reinstating the injunction. The agencies filed an Emergency Application to Reinstatement the Automatic Stay on July 26 with the Supreme Court, but the Court has not ruled on that application as of August 5.

So, what's next? First, the Supreme Court will review whether the Commonwealth Court had sufficient grounds to enjoin the regulations. The Supreme Court has not yet set an argument date on the appeal. It seems unlikely that a decision will be forthcoming in the third quarter of this year. Second, litigation on the merits of the challenge will continue before the Commonwealth Court. Briefing will take place in September and October, and arguments are currently slated for the Commonwealth Court's 2022 argument session in Philadelphia. And third, the courts must sort out third-party petitions to intervene in the litigation. A group of environmental organizations (including the Sierra Club, NRDC, and Clean Air Council) together with Constellation Energy Corporation applied to intervene in the Commonwealth Court matter but the Court denied the petition, finding their interests to be adequately represented by DEP and EQB. They also have appealed to the Supreme Court.

There are very important issues with potentially significant consequences to be resolved in a relatively short - period. If the regulations are upheld, the regulated budget sources, which currently comprise about 60 electricity generating facilities (most of which are natural-gas fired), must secure 50 percent of their allowances by March 1, 2023 at auction prices that have risen steadily since the regulation was first proposed. The key legal issues before the Commonwealth and Supreme Courts - i.e., when does revenue generated by an environmental program become a tax that must be imposed by the

General Assembly, and to what extent may DEP and EQB rely on general rule-making authority in environmental statutes to promulgate regulations concerning subject matter that is not itself expressly covered in the underlay statute - have implications beyond the RGGI program. Stay tuned!