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Court Holds Pennsylvania 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 CO2 Budget Trading Program Regulation is an unconstitutional tax, declared the rule to be void, and enjoined DEP from enforcing it. See *Bowfin KeyCon Holdings, LLC et al v. Pennsylvania Department of Environmental Protection and Pennsylvania Environmental Quality Board* (No. 247 M.D. 2022). The Regulation 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 percent of their annual gross generation to the electric grid.

The Court reaffirmed its earlier July 8, 2022 opinion in which it preliminarily enjoined the Regulation as an unconstitutional tax. In this November 1 decision on the merits, the Court held that the Regulation constitutes a tax imposed by DEP in violation of the Pennsylvania Constitution.

Undisputed facts of record established that only 6 percent 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 DEP 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 DEP's annual needs. Relying on the Pennsylvania Supreme Court's opinion in *Flynn v. Horst*, 51 A.2d 54, 60 (Pa. 1947), which found that

[n]o principle is more firmly established in the law of Pennsylvania than the principle 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 of the business the 'license fee' act will 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 the Rulemaking promulgated by DEP and EQB.

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