

## NEPGA v. DEP: The SJC Upholds the Commonwealth's Climate Change Mitigation Program

This article was first published in the Winter 2019 edition of the [Boston Bar Journal](#).



In a unanimous decision last September, the Supreme Judicial Court (“SJC”) upheld the Commonwealth’s latest climate change regulations to reduce greenhouse gas emissions from electric generators, rejecting those generators’ arguments that the regulations violate the Massachusetts Global Warming Solutions Act (the “GWSA”). *New England Power Generators Ass’n, Inc. v. Dep’t of Env’tl. Prot.* (“NEPGA”), 480 Mass. 398 (2018). With the Legislature and the Governor continuing to focus on this issue, the SJC likely will be called upon again to decide other climate change cases.

### A Legacy of Policy Innovation

Massachusetts is one of a handful of states that have pressed the envelope in adopting climate change policy, from spearheading *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (compelling EPA to begin the process to regulate carbon dioxide as a pollutant under the federal Clean Air Act) to coordinating the formation of the country’s first multistate emissions trading market, the Regional Greenhouse Gas Initiative (“RGGI”). As the SJC noted, ever since the Legislature adopted the GWSA in 2008, Massachusetts has been “a national, and even international, leader in the efforts to reduce . . . climate change.” *NEPGA*, 480 Mass. at 399. Among other provisions, the GWSA mandated a reduction in greenhouse gas emissions by 80% below the 1990 level by 2050. M.G.L. c. 21N, § 3(b).

Industry has strenuously opposed these policies, especially the electric generators who have shouldered the most immediate compliance burdens. Regulating greenhouse gases at the state level both raises the costs for power plants and their customers, they argue, and fails to ameliorate the environmental problem, as emissions simply shift to neighboring, unregulated jurisdictions.

*Kain v. Department of Environmental Protection*, 474 Mass. 278 (2016), previously [discussed in these pages](#), spurred more DEP action, including the regulations at issue in *NEPGA*. *Kain* addressed M.G.L. c. 21N, § 3(d), which requires DEP to develop aggregate limits for different sources of emitters. The SJC decided in *Kain* that the agency’s implementation of the RGGI program was insufficient to comply with the statutory mandate. Among other things, the Court ordered DEP to promulgate “regulations that address multiple sources or categories of sources of greenhouse gas emissions, impose a limit on emissions . . ., limit the aggregate emissions released from each group of regulated sources . . ., [and] set [declining] emission limits for each year. . . .” *Id.* at 300.

*Kain* thus laid the foundation for a series of climate-change policies. Shortly thereafter, Governor Baker issued [Executive Order 569](#), initiating a rulemaking process that culminated in the two key regulations contested in *NEPGA*. The “Cap Regulation” was the focus of the plaintiffs’ challenge and imposes annual, declining limits for greenhouse gas emissions on in-state electric generators. 310 Code Mass. Regs. § 7.74. The Clean Energy Standard, 310 Code Mass. Regs. § 7.75, requires utilities to procure more of their power from non-emitting sources. *Id.*

The plaintiffs filed suit challenging the rulemaking on September 11, 2017. Befitting the policy stakes, a single justice of the SJC reserved and reported the case to the full Court before any substantive motions or briefing at the Superior Court. See M.G.L. c. 211, § 4A (empowering the SJC to transfer cases from the lower courts).

### The SJC Upholds Sector-by-Sector Emissions Limits

The electric generators mounted a three-pronged attack on the regulations. First, they alleged that DEP and the Department of Energy Resources lacked the authority to issue the Cap Regulation. They argued that the GWSA provision directly regulating electric generators,

G.L. c. 21N, § 3(c), forecloses other regulations under § 3(d), which generally authorizes sector-by-sector emission limits. 480 Mass. at 399. Second, they argued that the Cap Regulation will *increase* greenhouse gas emissions. *Id.* Finally, they claimed that a sunset clause in the statute barred § 3(d) regulations from being effective beyond 2020. *Id.* at 399-400. The SJC was unpersuaded.

First, the Court concluded that §§ 3(c) and 3(d) complement, rather than conflict with, each other. The electric sector is just one of several categories of emission sources within the scope of § 3(d). *Id.* at 404. The Court relied on conventional tools of statutory interpretation and an assessment of the Legislature's overall policy objectives, noting that although § 3(c) aims specifically at electric generators, nothing in either § 3(c) or § 3(d) precludes electric sector regulations under § 3(d). *Id.* at 406-07. The SJC also rejected the plaintiffs' argument that DEP's interpretation was unreasonable. Because electric generators account for roughly 20% of the state's greenhouse gas emissions, the SJC reasoned that it would be anomalous to exclude electric generators from the declining sector-by-sector limits under § 3(d). *Id.* at 405.

Second, the SJC rejected the plaintiffs' argument that the Cap Regulation is arbitrary and capricious, holding that the generators had not met their burden to show that the regulation lacked "any conceivable grounds upon which [it could] be upheld." *Id.* at 410. The plaintiffs argued that if high-carbon, in-state electricity is replaced by high-carbon, out-of-state electricity, consumers will face higher costs with no environmental gains. The SJC characterized that concern as speculative and found "multiple conceivable bases to support the rule" in the administrative record. *Id.* at 408. Applied together, the SJC concluded that the Cap Regulation and the Clean Energy Standard will encourage the development of clean generation sources in Massachusetts and neighboring states. *Id.* at 409-10.

Last, the SJC disagreed with the plaintiffs' interpretation of a provision in the GWSA stating that § 3(d) regulations "shall expire on December 31, 2020." Rather than invalidating any emission limits effective beyond this date, the SJC concluded that the timing provision only requires DEP to issue new regulations by December 31, 2020, and likened the date to an "implementation deadline[], not [a] termination" date. *Id.* at 411.

### Looking Forward

Although the state has made significant strides to reduce emissions—cutting them by [more than 20%](#) between 1990 and 2016—the formidable economic and technical obstacles that stand in the way of the GWSA-mandated 80% reduction by 2050 mean that *NEPGA* will not be the last climate change case to reach the courts.

Indeed, with the wave of policymaking launched by the GWSA and reinvigorated by *Kain* continuing to build, climate change may reach the SJC again sooner rather than later. On August 9, 2018, Governor Baker signed *An Act to Advance Clean Energy*, 2018 Mass. Acts c. 227. Though less aggressive than a Senate version promoted by environmental advocates, the Act made several important changes, including raising the targets for the state's Renewable Portfolio Standard (which requires utilities to procure energy from renewable sources). The Act also directs the Department of Energy Resources to implement a [Clean Peak Standard](#) to promote clean energy sources to meet peak-period demands, which historically have been met by burning dirtier fuel sources. Governor Baker also signed *An Act Promoting Climate Change Adaptation, Environmental and Natural Resource Protection and Investment in Recreational Assets and Opportunity*, 2018 Mass. Acts c. 209, which authorizes \$2.4 billion in bonds for environmental projects and codifies initiatives begun by E.O. 569, including the statewide [Hazard Mitigation and Climate Adaption Plan](#). Most recently, the state expanded its regional leadership role, [joining with nine other states and the District of Columbia](#) to launch a regional strategy, analogous to RGGI, to reduce emissions from transportation. With the reach of climate change regulations expanding rapidly, the SJC surely will address climate change again soon.