IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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85 MAP 2022

87 MAP 2022

RAMEZ ZIADEH, ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD, Petitioners

v.

PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, et al., Respondents

SENATE PRESIDENT PRO TEMPORE JAKE CORMAN, et al., Senate Intervenor Respondents,

HOUSE SPEAKER BRYAN CUTLER, et al., House Intervenor Respondents,

APPEAL OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, SIERRA CLUB, AND CLEAN AIR COUNCIL, Possible Intervenors

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BRIEF OF APPELLANTS CITIZENS FOR PENNSYLVANIA'S FUTURE, CLEAN AIR COUNCIL, and SIERRA CLUB

APPEAL FROM THE ORDERS OF THE COMMONWEALTH COURT ENTERED ON JUNE 28, 2022 AND JULY 8, 2022, AT 41 MD 2022

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INTRODUCTION

Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. Pa. Const. art. I, § 27 (Environmental Rights Amendment ("ERA")). These public natural resources are held in trust for the people, who are the trust beneficiaries; the Commonwealth is the trustee, but not the owner of the resources nor a beneficiary of the trust. The most significant threat to those public natural resources is climate change, caused by the unchecked emission of greenhouse gases. The first question before this Court is whether beneficiaries—who have legally enforceable interests in the public natural resources trust that our Constitution creates—are entitled to intervene and advocate for their interests in a case involving the trustee's long-delayed attempt to take action on this significant threat to the trust corpus. The answer is yes. Where our Constitution creates the roles of trustee and beneficiaries of our public natural resources trust, where the litigation will indisputably have an impact on the corpus of the trust, and where the beneficiaries set forth why their interests are not adequately represented by the trustee, this Court should find that the involvement of the trustee alone is not adequate to represent the beneficiaries' interest. This Court should therefore reverse the Commonwealth Court's order denying the application to intervene of Appellants here, also known as Nonprofit Intervenors.

The second question before this Court concerns the Commonwealth Court's decision to wrongly enjoin the efforts of the trustee, here the Department of Environmental Protection (the "Department"), to take action on this threat. The Commonwealth Court wrongly granted the request for a preliminary injunction brought by individual members of the Pennsylvania Legislature ("the Legislative Intervenors") seeking to enjoin Pennsylvania's CO_2 Budget Trading Program, known as the Regional Greenhouse Gas Initiative ("RGGI") Regulation. The Commonwealth Court's decision rests on a series of legal errors, each of which independently render its decision invalid. Taken together, the Court's application of the wrong legal standard for each preliminary injunction requirement builds on the next, further compounding the Court's legal errors. The ultimate result undermines long-standing precedent by conflating, or entirely ignoring, essential prerequisites and improperly lowering Legislative Intervenors' burden of proof. This Court should reverse the decision and vacate the preliminary injunction.

STATEMENT OF JURISDICTION

The Court ordered Nonprofit Intervenors to jointly brief two appeals: the first, an appeal of the Commonwealth Court's denial of Nonprofit Intervenors' application for intervention; and the second, an appeal of the Commonwealth Court's issuance of a preliminary injunction to Legislative Intervenors.

The Court has jurisdiction over the first because it is an immediately appealable collateral order. Under Pa. R.A.P. 313(b), a collateral order is "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost."

The denial of intervention here is a separate order from the main cause of action in the underlying matter, which concerns a challenge to the RGGI Regulation and Legislative Intervenors' application for a preliminary injunction to block implementation of the Regulation.[1] The question of Nonprofit Intervenors' intervention was the subject of a separate hearing (held over a month after the preliminary injunction hearing), a separate order, and a separate opinion. In this appeal, Nonprofit Intervenors ask this Court to find that their legally enforceable interests under Pa. R.C.P. 2327 are not being adequately represented by other parties in this proceeding under Pa. R.C.P. 2329(2); this issue is separable from the underlying challenges to the RGGI Regulation. *See K.C. v. L.A.*, 128 A.3d 774, 779

[1] While the underlying matter originally commenced as a mandamus action against respondent Legislative Review Board, those issues were overtaken by the Legislative Intervenors' counterclaims and preliminary injunction application. As a result, the claims originally brought, concerning the interpretation of the Regulatory Review Act, are arguably no longer the main cause of action in the case. Nonprofit Intervenors sought to intervene with regard to Legislative Intervenors' counterclaims and did not seek to take a position on the Regulatory Review Act issues.

(Pa. 2015) (holding an application for intervention is "separable from the main cause of action").

Nonprofit Intervenors' right here is "too important to be denied review." Pa. R.A.P. 313(b). The question of whether Nonprofit Intervenors may intervene in these proceedings concerns rights "deeply rooted in public policy" that "go beyond the particular litigation at hand." *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 312 (Pa. Cmwlth. 1999); *see also Geniviva v. Frisk*, 725 A.2d 1209, 1214 (Pa. 1999). Nonprofit Intervenors established legally enforceable interests in the hearing below, *see* R. 2538a, and seek to protect their right to intervene in a proceeding that affects their health, safety, property rights, and constitutional right to clean air and preservation of the environment. Pa. Const. art. I, § 27. These interests are unquestionably a matter of public policy. *Dept. of Env't Res. v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979).

Finally, Nonprofit Intervenors' right here will be irreparably lost if review is postponed. A party must appeal a denial of intervention within thirty days or lose the right to appeal the order entirely. *In re Barnes Found.*, 871 A.2d 792, 794 (Pa. 2005). The goal of intervention is to participate in the proceedings as a party to preserve an interest that is not adequately represented by the existing parties to the litigation. That right is necessarily lost if a denial of intervention is not able to be appealed before the main proceedings have concluded. *K.C.*, 128 A.3d at 780. This

Court's decision in *Markham v. Wolf* controls and sets out a clear rule that this Court has jurisdiction over an appeal of a denial of intervention under the collateral order doctrine. 136 A.3d 134, 138 n.4 (Pa. 2016) (citing *In re Barnes*, 871 A.2d at 794-95).

This Court has jurisdiction over the second appeal because it is an immediately appealable preliminary injunction. Pa. R.A.P. 311(a)(4). Nonprofit Intervenors' appeal of the Commonwealth Court's issuance of a preliminary injunction to Legislative Intervenors is within this Court's jurisdiction because Nonprofit Intervenors' intervention application was granted for purposes of the preliminary injunction proceedings, rendering Nonprofit Intervenors "party" to those proceedings and the Order appealed. *See* Pa. R.C.P. 2330(a); *see also* Pa. R.A.P. 908. Nothing in the Commonwealth Court's intervention order, the appeal of which is described above, has an effect to "undo" the preliminary injunction proceedings; rather, the intervention order prevents Nonprofit Intervenors' *future* participation. Under this Court's decision in *In re Barnes*, a proposed intervenor who appeals an order denying intervention preserves their right to appeal other orders below, giving this Court jurisdiction over this portion of the appeal. 871 A.2d at 794-95 (denying right to appeal final order when order denying intervention not appealed).

ORDER IN QUESTION

There are two orders at issue in this combined appeal. The first (under appeal in 85 MAP 2022) states in relevant part:

> AND NOW, this 28th day of June, 2022, upon consideration of the Applications for Leave to Intervene filed by . . . [Nonprofit Intervenors], and after hearing on the issue, the Applications are DENIED.

The second (under appeal in 87 MAP 2022) states in relevant part:

> AND NOW, this 8th day of July, 2022, upon consideration of the Application for Relief in the Nature of a Preliminary Injunction . . . the Application is GRANTED.
>
> . . . [T]he Department of Environmental Protection is ENJOINED from implementing and enforcing Rulemaking until further order of Court . . . .

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The first order under appeal here concerns intervention under the Pennsylvania Rules of Civil Procedure. Pa. R.C.P. 2327 governs intervention and provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . . (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. 2329 further provides that:

> Upon the filing of the [intervention] petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention

> may be refused, if . . . (2) the interest of the petitioner is already adequately represented….

As the Commonwealth Court correctly explained, "[t]he effect of Rule 2329 is that if the petitioner is an entity within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present." R. 2529a (citing *Larock*, 740 A.2d at 313).

As this Court explained in its seminal decision on "standard of review," *Morrison v. Department of Public Welfare*, matters which are ultimately left to the discretion of the trial court often contain threshold questions of law that must be reviewed de novo. 646 A.2d 565, 571 (Pa. 1994). The *Morrison* principles governing the standard of review have been consistently applied and reiterated by this Court in many contexts. *See, e.g.*, *In re Doe*, 33 A.3d 615, 622-24, 622 n.10 (Pa. 2011) (citing *Morrison*, and explaining that although "the trial court's ultimate determination as to whether the minor is mature and capable of giving informed consent to an abortion" is reviewed for abuse of discretion, the court reviews threshold "questions of law under the de novo standard of review without affording deference to the trial court's legal conclusions"); *Bowling v. Off. of Open Records*, 75 A.3d 453, 467, 475 (Pa. 2013) (distinguishing between discretionary matters and issues of law under the Right-to-Know Law and noting the applicability of a plenary broad scope of review, citing *Morrison*). Threshold legal issues regarding intervention are thus questions of

law subject to de novo review by this Court, while the factual findings are reviewed for abuse of discretion. *See Acorn Dev. Corp. v. Zoning Hearing Bd. of Upper Merion Twp.*, 523 A.2d 436, 437 (Pa. Cmwlth. 1987) (citing *Wilson v. State Farm Mutual Auto. Ins. Co.*, 517 A.2d 944 (Pa. 1986)).

Similarly, for the second order under appeal—the grant of the preliminary injunction to the Legislative Intervenors—different standards of review govern depending on the issue presented. An appellate court typically reviews a trial court order granting a preliminary injunction for abuse of discretion. *Marcellus Shale Coal. v. Dep't of Env't Prot. of Pa.* ("*MSC II*"), 185 A.3d 985, 995 (Pa. 2018). However, consistent with *Morrison*, this Court has specifically held that in a review of a preliminary injunction, issues of statutory interpretation—a question of law—must be reviewed de novo. *See MSC II*, 185 A.3d at 995. Whether a trial court applied the correct substantive law or committed legal error are also questions of law to be reviewed de novo. *See Barak v. Karolizki*, 196 A.2d 208, 220 (Pa. Super. 2018) ("Which rule of law to apply is itself a question of law."); *Bowling*, 75 A.3d at 468.

Nonprofit Intervenors challenge the Commonwealth Court's conclusions regarding (1) whether Legislative Intervenors demonstrated a clear right to relief as a matter of law; (2) whether they met the legal standard for irreparable harm *per se*; and (3) whether the Commonwealth Court was required to balance harms and consider the public interest. These questions of law must be reviewed de novo. *Id.*

Where the trial court made a factual determination—here, any weighing of the preliminary injunction factors by the Commonwealth Court are reviewed for abuse of discretion.

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court err in determining that DEP adequately represents the interests of Nonprofit Intervenors, where the record establishes that Nonprofit Intervenors are presenting unique arguments and evidence?

   Suggested Answer: Yes

   Answer Below: No

2. Did the Commonwealth Court err by failing to consider Nonprofit Intervenors' right to intervene as beneficiaries of the Article I, Section 27 public trust, and failing to interpret that right based on underlying principles of Pennsylvania trust law, *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017)?

   Suggested Answer: Yes

   Answer Below: No

3. Did the Commonwealth Court err in determining that the legal issue of "adequate representation" under Pa. R.C.P. 2329 was controlled by inadmissible lay witness testimony on the issue, and did the Commonwealth

Court err in concluding that the lay witnesses had in fact failed to provide such testimony, when the witnesses testified that DEP has provided inadequate representation of their interests under Article I, Section 27, and when the Application for Intervention—which the Commonwealth Court failed to analyze—further articulated the legal reasons why DEP's representation is inadequate here?

Suggested Answer: Yes

Answer Below: No

4. Did the Commonwealth Court err in its analysis of whether the proceeds that DEP anticipates receiving through the sale of RGGI allowances at auction should be considered a tax, rather than a fee to be used in administering air pollution reduction programs, where the court applied the wrong legal standard and also failed to consider the significant costs associated with power plant carbon pollution and weigh those costs against the expense of administering air pollution reduction programs, and where the proceeds DEP anticipates receiving are required to be deposited in a segregated account and used for the specific purpose of conserving and maintaining public natural resources devalued by air pollution?

Suggested Answer: Yes

Answer Below: No

5. Did the Commonwealth Court err in determining that Petitioners suffered irreparable harm *per se* despite failing to show a) any evidence of significant material harm, or b) that the RGGI Regulation violated any clear statutory mandates?

   Suggested Answer: Yes

   Answer Below: No

6. Did the Commonwealth Court err in failing to properly assess and balance the harms alleged by Petitioners with the harms Nonprofit Intervenors demonstrated would occur if the RGGI Regulation were enjoined?

   Suggested Answer: Yes

   Answer Below: No

7. Did the Commonwealth Court err in failing to properly assess the public interest in implementing and enforcing the RGGI Regulation?

   Suggested Answer: Yes

   Answer Below: No

STATEMENT OF THE CASE

This case commenced under the Commonwealth Court's original jurisdiction on February 3, 2022 when the Department filed a petition for review seeking to compel the Legislative Reference Bureau to publish the RGGI Regulation in the *Pennsylvania Bulletin*. Certain individual legislators and senators were granted leave

to intervene ("Senate" or "House Intervenors"; collectively, "Legislative Intervenors"), and on March 25, 2022, they filed an application for a preliminary injunction. Nonprofit Intervenors sought to intervene on April 25, 2022.

On May 4, 2022, the Commonwealth Court issued an Order scheduling an evidentiary hearing to simultaneously hear testimony on the Applications for Preliminary Injunction in this and the unconsolidated but parallel 247 MD 2022 case. *See* R. 779-80a. The Order granted leave to Nonprofit Intervenors to participate in that hearing. *Id*. In accordance with the Order, Nonprofit Intervenors filed a witness list, submitted expert reports, and agreed to factual stipulations with the other parties. R. 781-86a.

On May 10 and 11, the court held the hearing on the Applications for Preliminary Injunction. Nonprofit Intervenors participated fully, proffering the testimony of two lay witnesses and two expert witnesses. R. 1448-52a, 1483-86a, 1495-96a, 1505-09a. The expert witnesses testified regarding public health and climate change impacts of the RGGI Regulation and the requested injunction. In accordance with the court's post-hearing orders, Nonprofit Intervenors timely filed a post-hearing brief and response brief. *See* R. 1790-1866a; R. 1983-2018a.

Subsequently, the court turned to Nonprofit Intervenors' application for intervention. On June 24 and 27, the Commonwealth Court held a hearing on Nonprofit Intervenors' intervention application. R. 2020-2517a. On June 28, 2022,

Judge Michael H. Wojcik of the Commonwealth Court issued an Order denying the Application for Intervention. R. 2019a. Judge Wojcik issued an Opinion in support of the June 28 Order on July 8, 2022. R. 2518-40a. Also on July 8, 2022, Judge Wojcik issued the Order and Opinion granting the preliminary injunction. R. 2541-80a. Nonprofit Intervenors' appeals of both the denial of intervention and the grant of the preliminary injunction timely followed, and both are addressed in this brief.

SUMMARY OF ARGUMENT

The Commonwealth Court committed errors of law and abused its discretion when it denied Nonprofit Intervenors' application for intervention and when it granted Legislative Intervenors' application for a preliminary injunction.

Nonprofit Intervenors' intervention application should have been granted. The Commonwealth Court correctly determined that Nonprofit Intervenors established a "legally enforceable interest" in this proceeding under Rule 2327(4). R. 2538a; *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 922-23 (Pa. 2013). Nonprofit Intervenors established that their members are suffering injuries to their health, recreational opportunities, and enjoyment of environmental features of the Commonwealth because of the air pollution and climate change that the RGGI Regulation will mitigate. All these injuries infringe upon Nonprofit Intervenors' members' interests under the ERA.

However, despite the establishment of these legally enforceable interests, the Commonwealth Court refused intervention under Rule 2329, determining that those interests were "adequately represented" by the Department. This was error for three independent reasons.

First, as a matter of law in cases where the Environmental Rights Amendment is implicated, the Commonwealth in its role as ERA trustee cannot adequately represent the distinct interests of ERA trust beneficiaries such as Nonprofit Intervenors.

Second, the record in this case establishes that the Department is not adequately representing Nonprofit Intervenors' interests. The Department has not raised any ERA defenses of the RGGI Regulation. This is unsurprising, as the Department has an interest in limiting the scope of its ERA obligations to regulate greenhouse gas emissions; it is in any trustee's interest to not advocate for imposing additional legal duties on itself. Furthermore, Nonprofit Intervenors were the only party in the preliminary injunction proceedings to present evidence from individuals harmed by air pollution, from a public health expert, and from a climate change expert to support the RGGI Regulation.

Third, the errors in the Commonwealth Court's opinion were compounded by the court's determination that Nonprofit Intervenors' lay witnesses needed to testify to the ultimate legal issue of "adequate representation." That legal issue was briefed

by counsel for Nonprofit Intervenors in their intervention applications, which the Commonwealth Court erroneously overlooked, focusing exclusively on lay witness testimony to evaluate the issue. In any event, the witness testimony did in fact establish the many ways in which Nonprofit Intervenors' interests diverge from the Department's and are not adequately represented, including ongoing conflicts between Nonprofit Intervenors and the Department regarding the scope of the Department's duty to regulate greenhouse gas emissions and the obligations of the Department to spend Clean Air Fund monies consistently with the ERA.

The Commonwealth Court also erred in granting Legislative Intervenors' application for a preliminary injunction.[2] First, the Commonwealth Court erred in finding that the Legislative Intervenors had demonstrated a clear right to relief because the Commonwealth Court applied the wrong legal standard and because the

[2] Nonprofit Intervenors are aware that the Department is separately challenging the preliminary injunction granted to Bowfin in the appeal docketed at 79 MAP 2022 in this Court. Nonprofit Intervenors are not filing an amicus brief in that case to avoid presenting the Court with duplicative filings. However, if this Court agrees that the Commonwealth Court should have granted Nonprofit Intervenors' application for intervention, or that Nonprofit Intervenors were parties to the preliminary injunction proceedings pursuant to the Commonwealth Court's May 4, 2022 order allowing them to participate in those proceedings, Nonprofit Intervenors respectfully request that this Court consider their arguments made here in conjunction with the 79 MAP 2022 proceeding. If this Court determines the Commonwealth Court did not err in denying Nonprofit Intervenors intervention, and that Nonprofit Intervenors were not parties to the preliminary injunction proceedings, Nonprofit Intervenors respectfully request that their arguments made here be considered as an amicus filing in the 79 MAP 2022 proceeding.

RGGI Regulation creates a permissible fee, not a tax. Second, the Commonwealth Court erred in finding that there was irreparable harm *per se*, because the Commonwealth Court again applied the wrong legal standard and Legislative Intervenors failed to show any evidence of harm. Third, the Commonwealth Court erred by applying the wrong legal standard to conclude that it did not need to balance the harms, and by ignoring the evidence of extensive harms to the Nonprofit Intervenors and the public interest.

ARGUMENT

I. The Commonwealth Court Erred in Denying Nonprofit Intervenors' Application for Intervention.

A. In Environmental Rights Amendment Cases, the Commonwealth, as ERA Trustee, Cannot Adequately Represent the Distinct Interests and Individual Rights of ERA Beneficiaries Such as Nonprofit Intervenors.

Nonprofit Intervenors have sought to intervene and participate in the defense of the RGGI Regulation as beneficiaries of the public natural resources trust and holders of the individual environmental rights protected by Pennsylvania's Environmental Rights Amendment. The ERA provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. This Court has explained that the "Environmental Rights Amendment mandates that the Commonwealth, as a trustee, conserve and maintain

our public natural resources in furtherance of the people's specifically enumerated rights." *Pa. Env't Def. Found. v. Commonwealth* ("*PEDF II*"), 161 A.3d 911, 934 (Pa. 2017) (internal quotation omitted). The ERA's protection of "public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna." *Robinson Twp.*, 83 A.3d at 955 (plurality opinion); *see also PEDF II,* 161 A.3d at 931 (explaining that the broad language of the ERA was intended to "discourage courts from limiting the scope of natural resources covered"). The Commonwealth's public natural resources are affected—indeed, consumed in a way that removes them from the corpus of the trust and violates individuals' rights to clean air and a healthy environment—by the gratuitous emission of CO_2 and other greenhouse gas pollution that causes climate change. *See, e.g.*, 52 Pa. Bull. 2471, 2473-74 (April 23, 2022) (assessing the impacts of climate change from CO_2 and other greenhouse gas emissions); *PEDF II*, 161 A.3d at 939 (noting that the Commonwealth "must manage the entire corpus according to its fiduciary obligations as trustee"). The RGGI Regulation begins to remedy that diminution of trust resources by putting a price on power plant carbon pollution, ensuring that ERA beneficiaries receive a measure of appropriate compensation and remediation for this loss. Thus, it is indisputable that Nonprofit Intervenors' ERA rights are implicated in these proceedings.

Although the Commonwealth is presently defending the RGGI Regulation, the manner of the Commonwealth's defense does not and cannot adequately represent Nonprofit Intervenors' distinct interests and rights. Moreover, as discussed further below in Section I.B, the facts of this case highlight how those interests have diverged and why intervention is necessary.

1. As ERA Rights Holders, Nonprofit Intervenors Have Interests that the Trustee Does Not Share and Cannot Adequately Represent.

As this Court has emphasized, the ERA is located in Article I of Pennsylvania's constitution, which contains Pennsylvania's Declaration of Rights. *PEDF II*, 161 A.3d at 916, 918 (citing *Robinson Twp.*, 83 A.3d at 960-63). The placement of the ERA in Article I, Section 27, along with such rights as the right to property (Section 1), religious freedom (Section 3), freedom of speech (Section 7), and security from searches and seizures (Section 8), was intentional. As each of the three sentences in the ERA refers to "the people," the plain text of the ERA underscores that environmental rights are granted to individuals.

The ERA recognizes two sets of rights in the people. *See PEDF II*, 161 A.3d at 930-32. The first clause protects the "right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment." *Id.* at 931 (citing *Robinson Twp.*, 83 A.3d at 951). The second clause, discussed in the next section, creates a constitutional public trust where the corpus

is public natural resources, the Commonwealth is the trustee, and the people, including present and future generations, are "the named beneficiaries" of the trust. *Id.* at 931-32.

The rights and interests of the Commonwealth and ERA rights holders are inherently divergent under the first clause of the ERA. Only individuals possess the enumerated rights in the first clause, not the Commonwealth. As this Court has explained, where constitutional rights are guaranteed to "the people," the "text suggests that the rights protected thereby are . . . personal." *Commonwealth v. Hawkins*, 718 A.2d 265, 269 (1998) (analyzing the Article I, Section 8 right to security from searches and seizures). In these circumstances, "this Court has repeatedly refused to recognize the vicarious assertion of constitutional rights." *Id.*; *see also Commonwealth v. Omar*, 981 A.2d 179, 190 n.1 (Pa. 2009) (Castille, C.J., concurring) ("Generally speaking, constitutional rights cannot be asserted vicariously.").

The Commonwealth here is not asserting those ERA rights guaranteed to individual Pennsylvanians. Those rights remain unasserted—and unprotected—without the presence of the rights holders in the litigation. To the extent the Commonwealth has the ability to assert the personal interests of Pennsylvanians, it could do so under a *parens patriae* theory. *See Commonwealth v. Monsanto Co.*, 269 A.3d 623, 636-41 (Pa. Cmwlth. 2021). In the *Monsanto* case, the court allowed the

Commonwealth to explicitly assert, as a stand-alone claim, "its own quasi-sovereign interest in preserving its waters, soils, air, fish, wildlife, and the health and well-being of its citizens." *Id.* at 641. The *Monsanto* court permitted the Commonwealth to bring a separate claim based on its status as an ERA trustee. *Id.* at 642. That is not the case here. Indeed, the Department has never argued that it is adequately representing Nonprofit Intervenors' distinct interests in this case, and the Department consented to the intervention of Nonprofit Intervenors. R. 702a. Nonprofit Intervenors should be permitted to intervene to assert their members' rights under the first clause of the ERA.

2. Trust Law Establishes that ERA Beneficiaries Have a Right to Intervene in Lawsuits Affecting the Trust Because the Interests of the Trustee and the Interests of a Beneficiary Are Not the Same.

The Commonwealth Court completely failed to analyze and consider trust law and its implications on Nonprofit Intervenors' rights to intervene under the ERA. Whether an ERA beneficiary has the right to intervene in litigation against the ERA trustee is an issue of first impression in this Court. However, the Court has consistently looked to trust law principles to address questions arising under the ERA, and it should continue to do so here. *See Pa. Env't Def. Found. v. Commonwealth* ("*PEDF VI*"), 279 A.3d 1194, 1205 (Pa. 2022) (explaining that this Court "appl[ies] fundamental principles of Pennsylvania trust law" to address issues

arising under the ERA, and citing provisions of the "Uniform Trust Law as adopted in Pennsylvania" to guide the Court's analysis).

The late Chief Justice Baer noted that, as the Court heads down this path for interpreting the ERA, courts and practitioners may look to Professor John Dernbach's "four-step process for determining which charitable and non-charitable private trust law principles to apply to a specific public trust application." *Pa. Env't Def. Found. v. Commonwealth* ("*PEDF IV*"), 255 A.3d 289, 320 (Pa. 2021) (Baer, C.J., dissenting) (citing John Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. Mich. J. L. Reform 77 (2020)). The four-part analysis proceeds by looking at: (parts 1-2) the text and purpose of the ERA, to determine whether the text and purpose answer the question; and (parts 3-4) if not, looking to underlying trust law principles and applying the principles that most fully effectuate the terms and purpose of the trust. *See* Dernbach *supra*, at 124-. That analysis, explained below, leads to the conclusion that the ERA beneficiaries have a right to intervene in this case.

a. The Text and Purpose of the ERA Supports the Right of Beneficiaries to Intervene.

To the extent this Court has interpreted the text establishing the ERA trust, the Court has explained that "Section 27 itself establishes that the purpose of the trust is to 'conserve and maintain' the public natural resources." *PEDF II*, 161 A.3d at 933 n.26. The text does not speak directly to the rights of beneficiaries to intervene

in lawsuits. However, the text does set up a clear distinction between the Commonwealth's role as trustee and the people's role as beneficiaries. *See* Pa. Const. art. I § 27 ("As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."). As discussed above, this textual distinction supports a holding that Nonprofit Intervenors have a right to intervene here. *See Robinson Twp.*, 83 A.3d at 974 (holding that the ERA "create[s] a right in the people to seek to enforce" it).

b. Underlying Principles of Trust Law Support the Right of Nonprofit Intervenors to Intervene Because Permitting Intervention Would Most Fully Effectuate the Terms and Purpose of the Public Trust.

The ERA is fundamentally not the same as a private trust. However, to the extent the Court determines that the text of the ERA does not answer the question of Nonprofit Intervenors' intervention rights, underlying principles of private trust law, charitable trust law, and public trust law all support intervention here.

Private trust law principles support the rights of beneficiaries to intervene in cases where, as here, the beneficiaries object to the trustee's representation, seek to intervene, and argue that their interests diverge from the interests of the trustee. Specifically, 20 Pa. C.S. § 7726, which is modeled after § 301(b) of the Uniform Trust Code, provides that a "person may not represent another who is *sui juris* and files a written objection to representation with the trustee." Caselaw that gave rise to § 301(b) holds that a beneficiary's right to due process includes notice and an

opportunity to be heard in a judicial proceeding that affects the corpus of the trust. *See* Comment to Uniform Trust Code § 301(b) (citing *Barber v. Barber*, 837 P.2d 714, 716-17 (Alaska 1992)). Additional caselaw similarly holds that, when the trustee and the beneficiary have divergent interests, the beneficiary is a necessary party to the litigation. *See, e.g.*, *Iatridis v. Zahopoulos*, 190 N.E.3d 1074 (Mass. App. Ct. 2022) ("[I]t has been held that where the trustee has an interest adverse to that of the beneficiary . . . the beneficiaries must be brought into the action." (quoting Bogert & Bogert, The Law of Trust and Trustees § 593 (rev. 2d ed. Supp. 2021))) .

Charitable trust law also supports the right of Nonprofit Intervenors to intervene in this proceeding. The Commonwealth Court found that Nonprofit Intervenors who are Appellants here had a legally enforceable interest "by virtue of injury to their members." *See* R. 2538a. This Court has explained that while "[p]rivate parties generally lack standing to enforce charitable trusts," such parties may do so if they "hav[e] a special interest in the trust." *In re Milton Hershey Sch.*, 911 A.2d 1258, 1262 (Pa. 2006); *see also id.* at 1260-61 (discussing use of a five-factor test for such analysis). Here, by virtue of the legally enforceable interests established by Nonprofit Intervenors in advancing their members' interests in environmental rights and protecting their members from injury, Nonprofit Intervenors established a "special interest" in this litigation that supports intervention. *See* R. 2538a.

Finally, public trust law also supports the rights of beneficiaries to intervene in litigation affecting the trust. *See, e.g.*, *Price v. Akaka*, 3 F.3d 1220, 1224-25 (9th Cir. 1993) (citing common law of trusts to hold that a federal public trust "by its nature creates a federally enforceable right for its beneficiaries"); *Paepcke v. Pub. Bldg. Comm'n of Chicago*, 263 N.E.2d 11, 18 (Ill. 1974) ("If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time."). This Court's interpretation of the ERA public trust in Robinson similarly held that "[t]he Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations." *Robinson Twp.* 83 A.3d at 974.

These various underlying sources of trust law principles all stand on the side of permitting Nonprofit Intervenors to intervene here to protect the interests and rights of ERA trust beneficiaries. The result of applying Professor Dernbach's 4-step analysis here, examining the text and purpose of the ERA and underlying trust law principles, is that permitting intervention is required in this public trust context.

c. A Trustee Does Not Have an Interest in Expanding the Scope of Its Obligations to Beneficiaries.

A trustee does not have an interest in expanding the scope of its obligations to trust beneficiaries. Here, the Commonwealth has an interest in narrowly interpreting its ERA obligations, including its obligations to regulate greenhouse gases so as not to take on additional trustee duties. For example, several of the Nonprofit Intervenor groups recently petitioned the Commonwealth to more broadly regulate greenhouse gases; but the Commonwealth, not inclined to take on additional trustee duties or the broader public policy implications of a more expansive view of those duties, has not acted on that petition since deciding to evaluate it further over 3 years ago. Nonprofit Intervenors presented testimony at the intervention hearing about this petition and the Commonwealth's lack of action. R. 2112-22a. Similarly, in its defense of the RGGI Regulation, the Commonwealth has not raised ERA arguments regarding its duties to broadly regulate greenhouse gases to protect trust assets. *See, e.g.*, Br. of Senate Intervenors at 31 (arguing that the Commonwealth did not address these ERA arguments in its briefing and that the issue has been waived) (filed in Commw. Ct. Docket No. 41 MD 2022). The Commonwealth Court erred in not engaging with this clear divergence between the trustee and beneficiary interests. The Court's analysis of DEP's position with regard to the ERA was limited to its observation that the "Rulemaking represents the Commonwealth's most recent attempt to comply with its constitutional duty." R. 2537a. This is surely true; however, it does not address

either whether DEP is successfully fulfilling that constitutional duty or whether its attempt to fulfill that duty adequately represents Nonprofit Intervenors' distinct interests.

The Commonwealth Court's failure to recognize this divergence of citizen and governmental interests mirrors a recent case addressing whether intervention may be denied because an existing governmental party "adequately represent[s]" the interests of a private intervenor under the similar federal intervention standard. Fed. R. Civ. P. 24(a)(2). In *Berger v. N.C. State Conference of the NAACP*, the United States Supreme Court held that in cases involving "a request to intervene by a private party who asserted a related interest to that of an existing government party," the private intervenor's burden to show their interests are not adequately represented "'should be treated as minimal.'" 142 S. Ct. 2191, 2203-04 (2022) (quoting *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972)). Although the government and citizen interests may be "related," the Court held that they are generally not "identical." *Id.* at 2203. Thus, intervention should generally be granted because the government party not only must defend the specific case, but also must "bear in mind broader public-policy implications" that diverge from the private citizen's interests. *Id.* at 2204. The Supreme Court also reiterated its *Trbovich* precedent holding that the government should not be "presumed an adequate representative" simply because it is defending the same action that the intervenor seeks to defend. *Id.* Here, the

Commonwealth Court erred by applying that very presumption. *See* R. 2537a (focusing solely on the fact that the Commonwealth is defending the RGGI Rulemaking).

The Commonwealth Court's error was compounded by its failure to apply its own precedent holding that government interests and citizen interests are likely to diverge when citizens have a broader goal than the government. In *Larock*, citizens were *entirely opposed* to a proposed quarry, while the "Zoning Board's and the Township's goals [were] to protect the interests of the Township, which [could] include settlement of the matter that would allow the quarry." 740 A.2d at 314; *see also Wexford Sci. & Tech., LLC v. City of Pittsburgh Zoning Bd. of Adj.*, 260 A.3d 316, 325 (Pa. Cmwlth. 2021) (citing *Larock*, 740 A.2d at 314). Recognizing this inherent conflict and divergence of interests, the court readily concluded that the citizens' interests were not adequately represented by the Township and that it was error to deny the citizens intervention. *Larock*, 740 A.2d at 314.

The same divergence is at play here. As in *Larock*, if there is a settlement in this case regarding, for example, how Clean Air Fund proceeds from RGGI auctions will be spent, Nonprofit Intervenors' and the Commonwealth's divergent interests will be plain. As discussed below, Nonprofit Intervenors provided testimony regarding the history of their conflicts with DEP on how Clean Air Fund monies are spent. R. 2121-22a, 2280a, 2285-87a. This Court can also look to its own line of

PEDF precedent, wherein the Court has routinely addressed citizens' claims that the Commonwealth unconstitutionally misspent ERA trust funds, for an indication of how the Commonwealth's interests diverge from those of the ERA beneficiaries here. Given this clear and unavoidable divergence of interests, Nonprofit Intervenors' members are not fully and adequately represented by the Commonwealth here.

B. The Facts Here Demonstrate that the Department is Not Adequately Representing Nonprofit Intervenors' Legally Enforceable Interests.

Even if the Department as a trustee of public natural resources could theoretically represent the interests of the beneficiaries of the trust, the proceedings here demonstrate that the Department is not adequately representing Nonprofit Intervenors' legally enforceable interests in this case. Indeed, the Department has never argued that it is adequately representing Nonprofit Intervenors' distinct interests in this case.

Nonprofit Intervenors set forth this fundamental distinction in their application for intervention:

> Proposed Intervenors have an interest to ensure that their constitutional right to clean air and a stable climate is protected and vindicated. DEP's interest, by contrast, lies not only in defending the RGGI Regulation, but also in balancing its twin duties as a protector of the environment and a resource-constrained permitting agency allowing certain kinds of pollution.

R. 573a.

The testimony presented at the preliminary injunction hearing and the intervention hearing bore out these different roles. For example, the Department's project manager for the RGGI Regulation, Allen Landis, testified that in devising the RGGI Regulation, the Department balanced various harms in creating a set-aside account to allocate allowances for waste coal facilities, meaning that such facilities can continue burning waste coal without needing to purchase allowances equal to their carbon dioxide pollution. Instead, the Department may transfer up to 12.8 million allowances to this set-aside annually, which can then be transferred to each waste coal facility (equal to actual emissions) without cost. R. 1237-38a. The Department also created a set-aside account for allowances for combined heat and power plants, which are facilities that burn fuel such as gas to generate both electricity and useful thermal energy. R. 1238a. At the intervention hearing, various Nonprofit Intervenor witnesses testified as to the problems with these set-aside accounts. R. 2278a, 2356-57a. More than mere disagreement, this evidence shows how the Department is fundamentally differently situated, with a role that requires it to balance its duty to conserve the air resources of the Commonwealth with its need to allow some pollution.

The rulemaking petition urging adoption of an economy-wide greenhouse gas budget trading program, discussed above, provides another example. While distinct from the RGGI Regulation in scope and applicability, the rulemaking petition

presents substantially similar questions of Pennsylvania law regarding the Department's authority to regulate greenhouse gas emissions. R. 567a. The outcome of the present action could affect the disposition of the separate rulemaking petition. R. 567a, 2119-20a. Thus, Nonprofit Intervenors' interests in this action include not only upholding the RGGI Regulation, but also protecting an interpretation of Pennsylvania statutory and constitutional law that provides the Department with the strongest possible authority—*and obligation*—to protect the air and climate for Nonprofit Intervenors' members. While the Department shares Nonprofit Intervenors' interest in upholding RGGI, it does not necessarily share Nonprofit Intervenors' interest in increasing its own regulatory obligations, and it may therefore settle or otherwise litigate this case in a way that does not adequately represent Nonprofit Intervenors' and their members' interests. *See Larock*, 740 A.2d at 314 (error to deny intervention where interests of proposed intervenors and government diverged and government was willing to compromise proposed intervenors' interests).

Moreover, the Department failed to adequately represent Nonprofit Intervenors at the preliminary injunction hearing, when the Department did not present any expert evidence regarding the harms to Nonprofit Intervenors' ERA rights that the RGGI Regulation will help to mitigate and, correspondingly, the harms that would occur if the rule were preliminarily enjoined. While the

Department offered evidence from its policy-makers regarding the rule, Nonprofit Intervenors were the only party at the preliminary injunction proceedings to present expert evidence regarding impacts to individual environmental rights and trust resources from the air pollution emitted by power plants that the RGGI Regulation covers.

Nonprofit Intervenors presented expert testimony regarding the harms to their interests that the RGGI Regulation is designed to mitigate; the experts testified that an injunction of the RGGI Regulation for any period of time would result in grave harms to the public and public trust resources. Climate change expert Dr. Raymond Najjar explained that every "[e]mission of 5,000 tons of carbon dioxide . . . will lead to one death." R. 1467a. Public health expert Dr. Deborah Gentile testified that with "incorporation of the RGGI rules we are definitely going to see the reductions in [air] pollutants, and we're definitely going to see these improvements in health outcomes." R. 1535a; *see also* R. 1534a. Without the RGGI Regulation, Dr. Gentile explained, "we aren't going to see those health benefits," and "[w]e're putting people at risk of having these health risks, asthma attacks, hospitalizations, even death." R. 1535a. Nonprofit Intervenors' members also testified to the impacts that power plant pollution has on their daily lives and constitutional environmental rights, including breathing difficulties, headaches, nosebleeds, and reduced opportunities for recreation, not to mention the increasingly here-and-now harms of worsening

heat waves, storms, and flooding. *E.g.*, R. 1490-91a, 1493a, 1494a, 1498-1500a, 1502a, 1503-04a.

Nonprofit Intervenors also presented evidence to show that the air pollution and climate harms mitigated by the RGGI Regulation—and bound to persist without the Regulation—are not solely affecting current Pennsylvanians, but will persist long into the future. This uncontested testimonial evidence established that each molecule of CO_2 released into the atmosphere lingers for hundreds to thousands of years. R. 1459-60a. As a result, *any* reduction of CO_2 emissions will in turn serve to benefit the public for generations by incrementally reducing the magnitude of future harms caused by climate change. *See* R. 1474-75a.

Nonprofit Intervenors' witness testimony showed that as a result of fossil fuel combustion emissions that would be mitigated in part by the RGGI Regulation, Pennsylvania cities are ranked amongst the worst in the nation for air quality. R. 1532a. Children living closest to the sources of industrial air pollution in Pennsylvania, including fossil fuel-fired power plants, have asthma rates at double to triple the expected rate. R. 1521-22a, 1532a. As the testimony of Nonprofit Intervenor witness Echo Alford showed, for both adults and children living with these symptoms, this can mean they are unable to spend time outside, exercising or spending time with their family. R. 1499-1500a. Nonprofit Intervenors' expert testimony established the RGGI Regulation will address these harms to their

members' interests by "decreas[ing] the ambient air pollution" that Pennsylvanians are exposed to, which would translate to "decreased asthma attacks, decreased asthma deaths, decreased hospitalizations, [and] increased lifespans." R. 1534a.

In all, the testimony presented by Nonprofit Intervenors was key to advocating for their members' interests protected by the RGGI Regulation. The Commonwealth Court discussed the important evidence presented by Nonprofit Intervenors in its preliminary injunction opinion. R. 2558a (noting that Nonprofit Intervenors "offered witnesses who testified as to the effects of CO_2 emissions on climate change and human health"); R. 2559a (discussing in a footnote the testimony of Nonprofit Intervenor witness Dr. Najjar). Absent Nonprofit Intervenors' participation as parties in the preliminary injunction proceedings, this evidence about the effect of an injunction on Nonprofit Intervenors' members' constitutional rights to clean air and a stable climate would not have been before the court, and Nonprofit Intervenors' and their members' interest in protecting those rights would not have been represented. This is a critical and demonstrable way in which DEP has not adequately represented Nonprofit Intervenors' interests in these proceedings to date.

Third, in addition to presenting distinct factual testimony in the preliminary injunction hearing, Nonprofit Intervenors made legal arguments in the preliminary injunction briefing that DEP did not advance. Consistent with their commitment to protecting their members' interests in clean air and a stable climate, Nonprofit

Intervenors advanced arguments about the RGGI Regulation and the ERA, while DEP did not. *Compare* R. 1819-20a, 1830-31a (Nonprofit Intervenors' brief raising ERA arguments), *and* R. 1999-2000a (same), *with* R. 1660-1729a (Department's brief raising no ERA arguments). As discussed *supra*, Section A.2.c., the Legislative Intervenors have thus argued that ERA arguments were waived by the parties and may not be advanced by Nonprofit Intervenors in amicus briefing. Of course, limiting Nonprofit Intervenors' participation to that of amici and then determining that their legally enforceable interests were waived by the parties would violate Nonprofit Intervenors' due process rights and highlights the error of denying their intervention.

Therefore, the Commonwealth Court abused its discretion in considering Nonprofit Intervenors' interests adequately represented. *See Larock*, 740 A.2d at 314.

C. The Commonwealth Court Erred in Requiring Nonprofit Intervenors' Member Witnesses to Testify on the Legal Issue of "Adequate Representation" and in Discounting Nonprofit Intervenors' Employee Witness Testimony on that Issue.

The Commonwealth Court's primary reason for denying intervention was its determination that Nonprofit Intervenors' witnesses did not testify that the Department is not adequately protecting their interests. R. 2539-40a. This determination was based on two legal errors that warrant correction by this Court.

First, the Commonwealth Court's ruling improperly requires member witnesses to give opinion testimony to the legal conclusion of "adequate representation" under Pa. R.C.P. 2329(2). Under the Rules, opinion evidence may be admitted when it is "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [regarding expert witness testimony]." Pa. R.E. 701. Opinion testimony "is not objectionable just because it embraces an ultimate issue." Pa. R.E. 704. The rules do not support *requiring* lay witness opinion testimony to embrace an ultimate issue or to provide legal conclusions that are more properly argued by counsel.

Yet that is what the Commonwealth Court did. Nonprofit Intervenors' member witnesses testified regarding the impacts of poor air quality and climate change on their health and the health of their family members, and on their ability to participate in recreational activities. R. 2182-87a, 2330-36a, 2400-03a. These witnesses explained that they are members of Nonprofit Intervenor organizations because they believe Nonprofit Intervenors represent them in advocating for their interests in protecting their health, the health of their family members, and their quality of life. R. 2176-78a, 2184a, 2337-38a, 2395-96a. The witnesses also testified to their concerns about, past conflicts with, and lack of faith in, the Department and other government officials. R. 2178-79a, 2338-39a, 2396-99a.

On cross-examination, however, the member witnesses were asked, over objections, to identify specific Departmental litigation decisions that proved inadequate representation. R. 2344a ("[A]re you aware of anything that has happened in this litigation that indicates to you that the government will not adequately protect your interests . . . in this case?"); *see also* R. 2198-99a. The Commonwealth Court subsequently faulted the member witnesses for lacking an intimate knowledge of the Department's litigation tactics, claiming that "[n]one of the Non-profits['] member witnesses could articulate any reason why the DEP is not adequately protecting their interests." R. 2539a. This goes beyond what is required of a lay witness and what is required of parties seeking intervention. Nonprofit Intervenors' members were lay witnesses testifying to matters of personal experience and cannot be expected to act as legal experts or demonstrate knowledge of the Department's litigation strategy. The Commonwealth Court erred in requiring an opinion on the legal issue of "adequate representation" from Nonprofit Intervenors' lay member witnesses that went beyond their possible knowledge.

Second, the Commonwealth Court's analysis conflated issues connected to associational standing with the inquiry into "adequate representation," which led it to inappropriately discount the testimony of Nonprofit Intervenors' employee witnesses. Nonprofit Intervenors have standing here on behalf of their members; as the Commonwealth Court explained in so finding, "associations have standing as

representatives of their members if, even in the absence of injury to themselves, the associations allege that at least one of their members is suffering immediate or threatened injury because of the challenged action." R. 2536a (citing, *e.g.*, *Robinson Twp.*, 83 A.3d at 922-23). The Commonwealth Court correctly found that Nonprofit Intervenors had standing because they established a legally enforceable interest by virtue of injury to their members. R. 2538a. But in considering whether that interest was adequately represented, the Commonwealth Court *returned* to the framework of the associational standing inquiry and required each of Nonprofit Intervenors' member witnesses to individually testify to how the Department is not adequately representing their individual interests in this litigation. R. 2539-40a. Those members joined these organizations to represent them in advocating for their interests. The Commonwealth Court's approach here prevents Nonprofit Intervenors from doing the exact thing it concluded they could do—represent their members' interests.

Had the Commonwealth Court looked at the entirety of Nonprofit Intervenors' testimony regarding adequate representation, it would have considered testimony from the Nonprofit Intervenors' employee witnesses on behalf of the organizations representing them. This testimony details the Department's inadequate representation of the Nonprofit Intervenors' members' legally enforceable interests.

All the employee witnesses are familiar with the Department's actions in the past and in this litigation and testified to their concerns with the Department's

actions. R. 2120-22a, 2157-64a, 2278a, 2280a, 2284-86a, 2356-62a. Based on their knowledge of the Department's actions, the employee witnesses described specifically how the Department is not adequately representing Nonprofit Intervenors' members' interests and may not do so in the future. For example, Sierra Club employee witness Tom Schuster explained how the Department's litigation decisions in the May 2022 preliminary injunction hearing have caused concern that it is not prioritizing defense of the RGGI Regulation. R. 2377a. At that hearing, the Department did not present any fact witnesses to address the RGGI Regulation's public health and environmental benefits, or the harm that would ensue from enjoining the Regulation; by contrast, the Nonprofit Intervenors did present such witnesses. R. 2377a; *see also* R. 2300a. As another example, PennFuture employee witness Rob Altenburg testified about the Department's delay in bringing a mandamus petition to compel publication of the RGGI Regulation, a litigation decision that may have deprived the Commonwealth of months of participation in RGGI and with which the Nonprofit Intervenors do not agree. R. 2288-89a. Clean Air Council and PennFuture employee witnesses also testified regarding disagreement with how Pennsylvania agencies disburse funds from the Clean Air Fund, which could be implicated in a settlement of this action. R. 2120-22a, 2280a, 2284-86a.

The Commonwealth Court referenced some of the employee witness testimony in considering whether Nonprofit Intervenors established a legally protected interest based on injury to the organizations themselves, but disregarded this testimony in evaluating whether those legally enforceable interests were being adequately represented. *See* R. 2536-40a. This failure to consider all relevant evidence is an abuse of discretion. *See, e.g*., *Ziegler v. City of Reading*, 216 A.3d 1192, 1202-05 (Pa. Cmwlth. 2019) (trial court erred when it made findings about certain evidence but failed to consider that evidence in its analysis); *Philly Int'l Bar, Inc. v. Pa. Liquor Control Bd*., 973 A.2d 1, 4 (Pa. Cmwlth. 2008) ("We hold that the trial court abused its discretion when it ignored the substantial uncontradicted evidence . . . .").

For all the aforementioned reasons, the Commonwealth Court erred when it denied Nonprofit Intervenors' application to intervene in this litigation, and the decision should be reversed.

II. The Commonwealth Court Erred in Granting the Preliminary Injunction.

A. The Commonwealth Court Erred in Finding That Legislative Intervenors Had a Clear Right to Relief.

The Commonwealth Court erred in its analysis of whether Legislative Intervenors demonstrated a clear right to relief on their claim that the proceeds DEP anticipates receiving through the sale of RGGI allowances at auction can be viewed

as a tax, rather than as a fee. First, the Commonwealth Court did not correctly apply this Court's long-standing precedent in its analysis of the clear right to relief requirement for obtaining a preliminary injunction. Second, the court's analysis of whether the RGGI Regulation creates a fee or a tax failed to consider important evidence in the record, including the significant costs associated with power plant carbon pollution, the expense of administering air pollution reduction programs, and the requirement that proceeds be deposited in a segregated account rather than treated as general revenue.

1. The Commonwealth Court Applied the Wrong Legal Standard.

To obtain a preliminary injunction, the movant bears the burden of proof, and must demonstrate each of the six essential prerequisites outlined in *SEIU Healthcare Pa. v. Commonwealth*. 104 A.3d 495, 502 (Pa. 2014); *see also Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004). It is not enough for a movant to establish only one of these prerequisites: "(*e*)*very one* of these prerequisites must be established." *Lee Publ'ns, Inc. v. Dickinson. Sch. of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (emphasis in original) (quoting *Cnty. of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988)).

A party may not merely raise a substantial legal question and obtain a preliminary injunction on that conclusion alone. *See Fischer v. Dep't. of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1981). In *Fischer*, this Court determined that a

party may establish a clear right to relief by raising a substantial legal question that must be resolved to determine the rights of the parties if "the threat of immediate and irreparable harm to the petitioning party is evident," and "the injunction does no more than restore the status quo and the greater injury would result by refusing the requested injunction than granting it." *Id*.

In other words, raising a "substantial legal question" establishes a clear right to relief only where the applicant has already satisfied the other preliminary injunction requirements. *See MSC II*, 185 A.3d at 995 n.9 (Pa. 2018) (recognizing that the formulation of the "substantial legal question" standard in *Fischer* applies only where the other requirements are met, and in applying the *Fischer* formulation finding that other requirements were met based on the findings of the Commonwealth Court); *see also Valley Forge Hist. Soc'y v. Washington Mem'l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981). Parties must establish each of the other preliminary injunction requirements before invoking the *Fischer* standard to carry their burden of demonstrating a clear right to relief just by raising a substantial legal question.

Here, the Commonwealth Court put the cart before the horse by applying the substantial legal question standard first and using that determination alone as the evidence for irreparable harm. R. 2556-57a. Because the Commonwealth Court failed to find that Legislative Intervenors had independently established the other

preliminary injunction requirements, the Court erred in applying the substantial legal question standard to its determination of whether Legislative Intervenors established a clear right to relief.

2. Legislative Intervenors Cannot Establish a Clear Right to Relief Because the RGGI Auction Proceeds Are a Fee, Not a Tax.

The Commonwealth Court's error and application of the incorrect legal standard was compounded by the flawed conclusion upon which it relied: that Legislative Intervenors are likely to succeed on the merits with respect to their claim that the auction proceeds under the RGGI Regulation are a "tax," not a fee. However, these proceeds meet all the classic indicia of a fee, rather than a tax, and as fees generated from conversion of trust resources, are constrained by the ERA as to their use.

a. The RGGI Regulation Creates a Permissible Fee, Not a Tax.

Pennsylvania courts have long distinguished funds collected by an administrative agency as either a permissible "license fee" or an impermissible "tax." The common distinction between taxes and license fees is that "taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of

government." *City of Phila. v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973).

In *National Biscuit Co. v. City of Philadelphia*, the Pennsylvania Supreme Court described the features leading to defining something as a "license fee" and not a "tax." 98 A.2d 182, 188 (Pa. 1953). Those features are:

> (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

Id. The RGGI Regulation meets all four of these criteria.

First, the RGGI Regulation identifies—and only applies to—certain electric power plants located in Pennsylvania that are subject to supervision and regulation by DEP and EQB. The fee here applies to each unit of CO_2 the plants' operators elect to emit into the airshed of the Commonwealth if they choose to continue to emit CO_2 through their continued operation. Second, DEP and EQB do in fact supervise and regulate CO_2 emissions from the regulated power plants. DEP and EQB are authorized by the Pennsylvania Air Pollution Control Act ("APCA") to regulate CO_2 pollution. 35 P.S. §§ 4004-4005. The RGGI Regulation—duly promulgated by DEP and EQB under the APCA—is part of DEP and EQB's overall regulatory scheme under the APCA to control air pollution, including CO_2 pollution. The fee imposed

is for "regulatory purposes," related to the APCA, and supports DEP's role and responsibilities in carrying out these regulations. *Pittsburgh Milk Co. v. City of Pittsburgh*, 62 A.2d 49, 52 (Pa. 1948). Third, power plants are an industry regulated by the Commonwealth, and the Commonwealth, through DEP, may require various conditions and regulations to be met in order to issue operating permits. *See, e.g.*, 25 Pa. Code §§ 127.401127.642. Fourth, the RGGI Regulation's fee directly relates to, and will be used exclusively for, the supervision, regulation, and implementation of the air pollution control program adopted by EQB and administered by DEP.

The Commonwealth Court's analysis improperly took a narrow view of administrative costs by focusing on the part of the proceeds used only for the oversight of the CO_2 Budget Trading Program itself, which are more appropriately understood as ministerial costs, rather than the cost of administering the regulatory program in whole. *See* R. 2573-74a. The Commonwealth Court's analysis is inconsistent with *National Biscuit Co.*, other Pennsylvania court precedent, and the purpose of the regulatory scheme authorized by the APCA. *See, e.g.*, *White v. Commonwealth Med. Pro. Liab. Catastrophe Loss Fund*, 571 A.2d 9, 12 (Pa. Cmwlth. 1990) (the costs of implementing the totality of a regulatory scheme, including in that case payment of claims to patients, are the costs of "administering" the regulatory program or scheme). The RGGI Regulation's fee provides specific funding to support DEP's supervision and regulatory expense to carry out a

comprehensive program needed to achieve the APCA's legislative purpose of air pollution control.

The RGGI Regulation proceeds also do not meet the indicia of a tax. A charge is transformed into an impermissible tax when it is enacted for the purpose of raising revenue. *See Greenacres Apartments, Inc. v. Bristol Twp.*, 482 A.2d 1356, 1358-59 (Pa. Cmwlth. 1984); *see also Nat'l Biscuit Co.*, 98 A.2d at 187 (explaining that a tax is "levied by virtue of the government's taxing power solely for the purpose of raising revenue") (internal citations omitted). Here, limitations in both the Regulation itself and Pennsylvania statute ensure the proceeds from the implementation of the Regulation are limited to defraying the expense of regulation and are not used for general revenue. *See, e.g.*, 52 Pa. Bull. at 2492-93 (describing limits on and plan for use of RGGI proceeds); 35 P.S. § 4009.2(a) (limiting fines, civil penalties and fees collected by DEP and paid into the Clean Air Fund to "use in the elimination of air pollution"); *cf. Talley v. Commonwealth*, 553 A.2d 518, 520 (Pa. Cmwlth. 1989) (noting borough official testimony that "the Borough council believed there was a need to enact the ordinance in question because the Borough had lost considerable revenues and it was apparent revenues had to be increased").

A charge may also be an impermissible tax when it is "characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision." *Greenacres Apartments*, 482 A.2d at 1359. However,

as discussed above, a charge must be evaluated in the context of the broader regulatory scheme and its purpose. Here, the regulatory program created by the Regulation involves not only the allocation of allowances, but also the implementation of programs and projects needed to reduce CO_2 emissions under the APCA. Thus, the total value of anticipated RGGI Regulation proceeds is in fact appropriately sized to supervise and address the problem of unmitigated greenhouse gas pollution, and the Regulation does not meet this indicator of a tax.

b. The ERA Prohibits Treating the RGGI Proceeds as General Revenue, Which Precludes Them From Functioning as a Tax.

In addition to the analysis of the *National Biscuit Co.* factors above, the Environmental Rights Amendment precludes the RGGI auction proceeds from being construed as a tax. The RGGI auction proceeds are not general revenue and cannot, under the ERA, be treated as general revenue, making one of the hallmark characteristics of taxes inapplicable.

The RGGI auction proceeds exist because under the Regulation, covered electricity generating units need to purchase credits to cover each ton of carbon dioxide they emit; the proceeds from these purchases are then deposited, pursuant to the APCA, into DEP's separate Clean Air Fund, which must be used by DEP for the "elimination of air pollution." 25 Pa. Code § 143.1(a). The Regulation, and its associated fees, are required because of the impacts to the Commonwealth's public trust resources that come with the operation of these covered electricity generating

units. The fee is derived from the consumption or diminution of a trust asset—*i.e.*, the airshed of the Commonwealth. *PEDF II*, 161 A.3d at 934. As this Court has made clear, proceeds obtained from the sale of trust resources must "remain in the trust and must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27." *Id.* at 936. The fee collected from the sale of CO_2 emission allowances at auction are exactly this: proceeds that must be devoted to the conservation of the "public natural resources." This nexus with the public trust precludes the General Assembly from appropriating the fee proceeds to become part of the General Fund of the Commonwealth, and limits DEP's ability to expend the fee monies to protecting the trust asset from which they derive.

The Commonwealth Court opined that because "DEP anticipates significant monetary benefits from participating in the auctions," the RGGI Regulation might impose a tax. R. 2573a. However, the mere fact that auction proceeds under the RGGI Regulation may be "significant" is not itself evidence that the RGGI Regulation imposes a tax. Instead, those proceeds are significant precisely due to the commensurate diminution of public trust assets.

This Court has explained that large sums of money are collected from leases for oil and gas drilling because large portions of the public trust are consumed by those activities. *See PEDF II*, 161 A.3d at 938. Here, the same is true for greenhouse

gas pollution and climate change, which are already costing the Commonwealth hundreds of millions—if not billions—of dollars annually, without any mechanism to recompense the trust beneficiaries.[3] As such, the auction proceeds under the RGGI Regulation are designed to cover the costs of implementing the air pollution control program under the APCA and are properly returned to the trustee of the impacted resources for further conservation and maintenance.

The Commonwealth Court also looked to the small fraction of the auction proceeds under the RGGI Regulation that would be used to defray the ministerial costs associated with running the programmatic elements of the auction as a basis for finding the proceeds could constitute a tax. R. 2573-74a. The Commonwealth Court's reasoning ignores this Court's holdings in the *PEDF* cases that *all* of the money obtained from permitting activities that diminish the trust (*i.e.*, not merely the programmatic cost to auction oil and gas rights) must be used to conserve and maintain public natural resources. *See PEDF II*, 161 A.3d at 939; *PEDF IV*, 255 A.3d at 314. Consistent with the ERA, the RGGI Regulation specifically requires

[3] *See, e.g.*, PA. AUDITOR GENERAL, *Special Report on Climate Crisis: The Rising Cost of Inaction*, 1 (2019) https://www.paauditor.gov/Media/Default/Reports/RPT_Climate_crisis_111219_FINAL.pdf ("In 2018 alone, climate-related costs to Pennsylvania totaled at least $261 million; that number includes the record-breaking floods and landslides that caused over $125.7 million in infrastructure damage."); *see also* PA. DEP'T OF ENV'T PROT., *Pa. Climate Impact Assessment 2021,* 25-26 https://www.dep.pa.gov/Citizens/climate/Pages/impacts.aspx, (discussing the increase in billion-dollar extreme weather events in the Commonwealth).

allowance proceeds to be deposited into a separate, segregated account, the Clean Air Fund, in accordance with APCA requirements to be used in support of reducing air pollution. As this Court has made abundantly clear in the *PEDF* cases, monies generated from public trust resources cannot be appropriated for general fund purposes. *See PEDF VI*, 279 A.3d at 1213 n.25 (noting the Commonwealth, as trustee, must keep accurate accounting and keep ERA trust property separate under general trust principles); *see also White*, 571 A.2d at 12. As a result, RGGI proceeds can never be treated as general revenue dollars.

In sum, the RGGI Regulation's proceeds are commensurate with the costs of the regulatory program and are not a general revenue producing measure. The RGGI Regulation meets every indicia of a fee and not a tax. Indeed, the RGGI Regulation's auction proceeds are precluded by the ERA from being utilized for General Fund purposes and are required to be used for the protection of the corpus from which they were derived: conserving and maintaining the airshed of the Commonwealth through the elimination of air pollution.

Because the RGGI Regulation creates a permissible fee, the Commonwealth Court erred in finding that the Legislative Intervenors had met their burden in demonstrating they have a clear right to relief and are likely to prevail on the merits.

B. The Commonwealth Court Erred in Finding Irreparable Harm *Per Se* Where the RGGI Regulation Did Not Violate Any Clear Statutory Mandate and There Was No Evidence of Significant Material Harm.

The Commonwealth Court's sole basis for concluding that Legislative Intervenors had demonstrated irreparable harm *per se* was that Legislative Intervenors had "raised a substantial question as to whether the Rulemaking constitutes a tax as opposed to a regulatory fee." R. 2557a. This conclusion improperly conflates the standard for determining irreparable harm *per se* with the standard for the likelihood of success on the merits. A finding that Legislative Intervenors raised a substantial legal question of a statutory or constitutional violation is not a sufficient basis for a finding of irreparable harm *per se*.

1. Supreme Court Precedent Sets a High Standard for Establishing Irreparable Harm *Per Se*.

This Court's precedent sets a high bar to establish irreparable harm *per se* in the context of a preliminary injunction application. The party claiming *per se* irreparable harm must establish a *prima facie* case that the conduct in question violates a clear statutory or constitutional duty or mandate, and the court must find such a violation based on the record evidence. Some evidence of significant material harm is also important to a court's analysis. In cases where irreparable harm *per se* has been established, the violation of a clear mandate has often been shown by undisputed facts and the finding of irreparable harm *per se* is often supported by evidence of material harm.

In *Pennsylvania Public Utilities Commission v. Israel*, the Supreme Court held that "[w]hen the Legislature *declares* certain conduct to be unlawful it is tantamount to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." 52 A.2d 317, 321 (Pa. 1947) (emphasis added). The Court found that because the Public Utility Commission ("PUC") had made a *prima facie* showing that the defendants were operating taxicabs in violation of law and that the facts of the case were "not seriously disputed," the PUC suffered irreparable harm as a result of the conduct. *Id.* Importantly, the Court also found that the evidence showed that the defendants' conduct was resulting in an increase in the unlawful operation of taxicabs, and that "[s]preading unlawful conduct is irreparable injury of the most serious nature." *Id.*

In *Commonwealth v. Coward*, the Supreme Court held that where a statute *proscribes* certain activity, if the court *makes a finding that illegal activity occurred in fact*, the court may find irreparable harm by virtue of that violation. 414 A.2d 91, 98-99 (Pa. 1980). In *Coward*, the factual record demonstrated that appellant was operating a landfill in violation of two orders issued by the Pennsylvania Department of Environmental Resources. The Court found "[t]he operation of the landfill produced and allowed pollutants to be discharged onto the land and into the waters of the Commonwealth in *clear violation of the law*." *Id.* at 99 (emphasis added). The Court therefore found irreparable harm *per se* based on the *finding* that the defendant

was operating the landfills in violation of two Department orders of unlawful conduct as established by the record evidence. *Id.* The Court also considered evidence in the record that the landfill was continuously polluting the adjoining land and waters in determining that greater harm will not result from the closure of the landfill. *Id.*

In *SEIU Healthcare Pa.*, the Supreme Court affirmed this precedent, finding that because it found that the challenged action was in "direct contravention of the plain language" of the statute at issue, the party seeking the injunction had demonstrated immediate and irreparable harm. *SEIU Healthcare Pa.*, 104 A.3d at 508-509. The plain language of the statute at issue in *SEIU* required "the Commonwealth to continue to offer the same level of public health services and operate the same number of Centers that existed on July 1, 1995." *Id.* at 500. The Court found that an Executive Branch proposal to reduce the number of health centers below the statutory mandate was "*undisputed*" and amounted to a "*direct contravention of the plain language*" of the statute such that "SEIU has demonstrated immediate and irreparable harm." *Id.* at 508-09 (emphasis added). In that finding, the Court considered the purported harm demonstrated by the record, which was the reduction in the number of health centers, the number of nurse consulting positions, and the level of public health services. *Id.*

Israel and its progeny set a high bar to establish irreparable harm *per se*. The court must find that the facts in evidence leave no doubt that a clear statutory or constitutional duty or mandate has been violated. In *Israel*, *Coward* and *SEIU Healthcare Pa.*, the facts establishing the statutory violations were undisputed and a clearly established part of the record at the preliminary injunction stage. The mandate or duty at issue was similarly clearly established in statute. There were no disputed issues of statutory interpretation as to what the statutory mandate required of the respective parties. There was also evidence in the record demonstrating material harm.

2. The Commonwealth Court Erroneously Found Irreparable Harm *Per Se* Without Finding a Violation of a Clear Statutory Mandate and Without Finding Evidence of Significant Harm.

This Court, then, has established clear limiting principles for the application of the doctrine of irreparable harm *per se*. Consequently, for the Commonwealth Court to find *per se* irreparable harm, the court would have to first find both that Legislative Intervenors established that the RGGI Regulation is *in fact* in violation of a clearly established, undisputed statutory or constitutional mandate, and the record needed to demonstrate evidence of material harm. Here, the Legislative Intervenors did not meet this burden and the Commonwealth Court did not make this finding. Instead, the Commonwealth Court ignored the clear limiting principles

established by the Pennsylvania Supreme Court and failed to apply the correct standard for determining irreparable harm *per se.*

More importantly, the Commonwealth Court did not make—and indeed the record did not support—that required finding. Instead, the Commonwealth Court found that the Legislative Intervenors had raised a "substantial legal question" about the legality of the RGGI Rulemaking. As discussed previously, while the substantial legal question standard is appropriate for determining the right to relief on the merits when all other preliminary injunctions requirements are satisfied, raising a substantial legal question is not sufficient to establish irreparable harm *per se* under the standard created by Pennsylvania Supreme Court precedent.

Additionally, the Legislative Intervenors failed to demonstrate any significant material harm. At the hearing, the Legislative Intervenors conceded that they did not put forward any evidence of irreparable harm to the Legislative Intervenors themselves. R. 1012-15a. Without evidence on the record demonstrating material harm, the record cannot support a finding of irreparable harm *per se*. Because the Commonwealth Court failed to find that the RGGI Regulation was *in fact in violation* of a clearly established, undisputed statutory or constitutional mandate and there was no evidence of significant material harm, the Commonwealth Court erred in finding that Legislative Intervenors had demonstrated irreparable harm *per se*.

C. The Commonwealth Court Erred in Failing to Balance the Harms and to Assess the Harms to the Public Interest of Enjoining the RGGI Regulation.

The Commonwealth Court erred in finding that Legislative Intervenors had met the requirements for obtaining a preliminary injunction because Nonprofit Intervenors presented evidence of the significant harm to public health and the environment that will result from the injunction of the RGGI Regulation, while Legislative Intervenors failed to provide evidence of harm to themselves or the public. In doing so, the Commonwealth Court improperly permitted Legislative Intervenors to avoid their burden of putting on evidence of *any* harm and of satisfying several prerequisites to obtaining a preliminary injunction.

1. The Commonwealth Court Erred in Failing to Balance Harms.

As an initial matter, the Commonwealth Court erred in concluding that it did not need to balance the harms because of the alleged constitutional violation. R. 2557a. The Commonwealth Court compounded that error by finding that, even if it were to balance the harms, the implementation of the RGGI Regulation would cause greater harm "if the Rulemaking is determined to violate the Constitution" because "[a] violation of the law cannot benefit the public interest." R. 2559a (citing *Israel*, 52 A.2d at 321).

The Commonwealth Court's analysis is wrong at every level and improperly relieves the Legislative Intervenors of their burden of demonstrating *any* harm to

themselves or the public interest. First, the Commonwealth Court's conclusion that no balancing of harms was needed as a result of the Legislative Intervenors' "alleged constitutional[] violation" again betrays a fundamental misunderstanding of the doctrine of irreparable harm *per se*. R. 2557a. As discussed in more detail above in II.B.2, simply alleging a constitutional violation, or even raising a substantial legal question, does not meet the high bar for establishing irreparable harm *per se* set by Pennsylvania Supreme Court precedent. The Commonwealth Court relied on its misunderstanding of irreparable harm *per se* in concluding that, if it were to conduct a balancing of the harms, the greater harm would result from implementing the RGGI Rulemaking based on the alleged constitutional violation. R. 2559a. In support of this conclusion, the Commonwealth Court cited *Israel*. However, *Israel* is inapposite here. In *Israel*, irreparable harm *per se* was established by undisputed facts and by record evidence of harm. *Israel*, 52 A.2d at 321-22. There is no such record here. This error highlights the circular logic of the Commonwealth Court's analysis: irreparable harm *per se* exempts the court from balancing harms, but if the court *were* to perform a balancing, the irreparable harm *per se* outweighs *any* evidence of harm to parties or the public interest.

The Commonwealth Court's improper reliance on its application of an incorrect standard for determining irreparable harm *per se* essentially collapses four of the long-standing requirements for issuance of a preliminary injunction into one.

Under the Commonwealth Court's analysis, a moving party may show a clear right to relief only by raising a substantial question as to whether there is a statutory or constitutional violation. Having done so, it can avoid having to present any evidence of harm to itself, and any harm to the public is irrelevant. That cannot be the case. Raising a substantial legal question regarding a constitutional violation is not a sufficient basis for a finding of irreparable harm *per se* and should not exempt the moving party from their burden to demonstrate all the preliminary injunction prerequisites. Accordingly, the Commonwealth Court erred in failing to balance the harms or consider the adverse impact on the public interest, and in failing to require the Legislative Intervenors to demonstrate harm to themselves or the public.

2. Nonprofit Intervenors Established Evidence of Harm and the Commonwealth Court Erred in Failing to Consider Those Harms.

Evidence established by both lay and expert testimony at the Preliminary Injunction Hearing showed that an injunction would result in extensive harms to the public interest: these include environmental injury to the natural resources of the Commonwealth and injury to individual and public health.[4] The Commonwealth Court's opinion did not dispute the evidence of harm to the public presented by Nonprofit Intervenors and there was no countervailing evidence. Instead, the Commonwealth Court simply ignored it. After concluding that no balancing of the

[4] Evidence of these harms is discussed in detail in Section I.B.

harms was needed, the Commonwealth Court then incorrectly found that, if it were to balance the harms, the evidence of harm was insufficient because no party presented evidence that the RGGI Regulation would result in the immediate reduction of CO_2 emissions from Pennsylvania's covered sources. R. 2558-59a.

In fact, parties on both sides *unanimously agreed* that the Regulation would reduce greenhouse gas emissions in short order. *E.g.*, R. 1043-45a (Bowfin witness testifying to anticipated immediate reduction of coal-fired power plant operations); R. 1327-29a (Constellation Energy witness testifying to Pennsylvania electric sector emissions dropping immediately on the order of millions of tons of greenhouse gases annually); R. 1256-60a (Department witness Landis testifying that the benefits of the RGGI Regulation would accrue immediately upon it taking effect). All the testimony points to an immediate reduction in CO_2 emissions from Pennsylvania's covered sources. Senate Intervenors themselves acknowledged in their opening argument that there will be "emissions reductions achieved in Pennsylvania." R. 812a. The Commonwealth Court's finding of no evidence of immediate emissions reductions was clear error.

If the Commonwealth Court had properly assessed the evidence presented and balanced the harms, it is clear that the enormous harms to Nonprofit Intervenors and to the public that result from the injunction of the RGGI Regulation far outweigh any speculative harms alleged by Legislative Intervenors, and the RGGI Regulation

is clearly to the benefit of the public interest. The extensive harms demonstrated by evidence at the hearing were essentially unrebutted by Legislative Intervenors. The uncontroverted expert evidence established that enjoining the RGGI regulation will deprive the public of the health and environmental benefits of reduced CO_2 and $PM_{2.5}$ emissions and that any delay will result in grave harms to the public. *See e.g.*, R. 1467a (Dr. Najjar explaining that for every "[e]mission of 5,000 tons of carbon dioxide, that will lead to one death"); R. 1524a, 1534a ("The RGGI rule would actually decrease the ambient air pollution that we're exposed to," and "short-term exposure" for just a few "days . . . actually decreases life span, causes premature death").

On the other side of the scale, Legislative Intervenors failed to demonstrate harm. To obtain a preliminary injunction, a movant must demonstrate the harm will result from the alleged misconduct, and that the harm is more than speculative. *See W. Pittsburgh P'ship v. McNeilly*, 840 A.2d 498, 505 (Pa. Cmwlth. 2004) (finding that movants did not demonstrate immediate and irreparable harm where movants failed to provide evidence of actual harm). To meet the burden here, a plaintiff must present "concrete evidence" demonstrating "actual proof of irreparable harm." *Kessler v. Broder*, 851 A.2d 944, 951 (Pa. Super. 2004) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003)). Here, Legislative Intervenors presented no expert testimony to support their purported harms. At the

hearing, the Legislative Intervenors conceded that they did not put forward any evidence of harm to the Legislative Intervenors themselves. R. 1012-15a. Instead, the Legislative Intervenors rely entirely on the concept of irreparable harm *per se*, R. 1014-15a, the inapplicability of which is discussed above.[5] Legislative Intervenors have failed to meet their burden on all fronts.

In light of the evidence of immense harms adversely impacting Nonprofit Intervenors and the public interest, and the complete absence of evidence of harm presented by Legislative Intervenors, there is no apparent reasonable ground to support the Commonwealth Court's issuance of the preliminary injunction.

[5] To the extent Legislative Intervenors rely on the evidence put forth by Bowfin at the hearing, this reliance is impermissible, and in any event Bowfin failed to provide evidence that the RGGI Regulation would directly decrease plant operations or that they would incur any compliance costs during the period of the preliminary injunction.

CONCLUSION

Therefore, for the reasons stated above, the Commonwealth Court's decision to deny Nonprofit Intervenors' application for intervention should be reversed, and the grant of the preliminary injunction should also be reversed and the injunction lifted. Nonprofit Intervenors should be permitted to participate as a full party on remand and for the remainder of these proceedings.

Respectfully submitted,

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DATE: November 4, 2022

OPINIONS BELOW

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patrick J. McDonnell, Secretary of the Department of Environmental Protection and Chairperson of the Environmental Quality Board,	:	
Petitioner	:	
v.	:	No. 41 M.D. 2022
	:	Heard: June 24 and 27, 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J. Mendelsohn, Director of the Pennsylvania Code and Bulletin,	:	
Respondents	:	

O R D E R

AND NOW, this 28th day of June, 2022, upon consideration of the Applications for Leave to Intervene filed by Constellation Energy Corporation and Constellation Energy Generation, LLC (collectively, Constellation) and the Citizens for Pennsylvania's Future, the Clean Air Council, and the Sierra Club, and after hearing on the issue, the Applications are **DENIED**. An opinion in support of this Order will follow.

Constellation's Application for Special Relief in the Form of Expedited Consideration of the Application for Leave to Intervene is **DISMISSED** as moot.

MICHAEL H. WOJCIK, Judge

Order Exit
06/28/2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board,	:	**CASES NOT CONSOLIDATED**
Petitioner	:	
v.	:	No. 41 M.D. 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J. Mendelsohn, Director of the Pennsylvania Code and Bulletin,	:	
Respondents	:	

Bowfin KeyCon Holdings, LLC; Chief Power Finance II, LLC; Chief Power Transfer Parent, LLC; KeyCon Power Holdings, LLC; GenOn Holdings, Inc.; Pennsylvania Coal Alliance; United Mine Workers of America; International Brotherhood of Electrical Workers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers,	:	
Petitioners	:	
v.	:	No. 247 M.D. 2022
	:	Heard: June 24 and 27, 2022
Pennsylvania Department of Environmental Protection and	:	

Pennsylvania Environmental Quality Board, :
:
:
Respondents :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: July 8, 2022

This opinion is in support of the Court's June 28, 2022, Orders denying intervention in these unconsolidated cases. In *McDonnell v. Legislative Reference Bureau*, 41 M.D. 2022,[1] Constellation Energy Corporation and Constellation Energy Generation, LLC (collectively, Constellation) and Citizens for Pennsylvania's Future (PennFuture), the Clean Air Council, and the Sierra Club (collectively, Non-profits) seek to intervene in the mandamus and declaratory judgment action filed by Patrick J. McDonnell, Secretary of Environmental Protection and Chairperson of the Environmental Quality Board (EQB). Constellation and Non-profits seek intervention to defend against Counterclaims raised by Intervenors President Pro Tempore Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the

[1] When this action was initiated, Patrick J. McDonnell was the Secretary of Environmental Protection and Chairperson of the Environmental Quality Board. His service with the Commonwealth ended on July 1, 2022. Pursuant to Pa. R.A.P. 502(b), Acting Secretary Ramez Ziadeh has been substituted as petitioner. For ease of discussion, we will continue to refer to Secretary McDonnell.

Senate Appropriations Committee Pat Browne (collectively, the Senate)[2] to Secretary McDonnell's Petition for Review.

In the *Bowfin* matter,[3] 247 M.D. 2022, Constellation and Non-profits, which added the Natural Resources Defense Council and the Environmental Defense Fund to their Application, seek intervention to defend against the Bowfin Petitioners' challenge of the Department of Environmental Protection's (DEP) CO_2 Budget Trading Program (Rulemaking).

McDonnell

On February 3, 2022, Secretary McDonnell filed an original jurisdiction petition for review (PFR) naming the Legislative Reference Bureau (LRB), its Director Vincent C. DeLiberato and Director of the Pennsylvania Code and Pennsylvania Bulletin Amy Mendelsohn (collectively, LRB Respondents) as respondents. The PFR alleges that on November 29, 2021, the DEP, on behalf of the EQB, submitted the Rulemaking to the LRB for publication in the Pennsylvania Bulletin. The LRB Respondents, however, refused to publish the Rulemaking because the time for the House of Representatives to act on the September 14, 2021, Senate Concurrent Regulatory Review Resolution 1 (SCRRRI) disapproving the Rulemaking had not yet expired. The LRB Respondents denied Secretary McDonnell's second attempt at submittal on the basis that the House of

[2] Our designation of Senators Corman, Ward, Yaw and Browne as "Senate" does not imply that they are acting on behalf of the Pennsylvania Senate as a whole. The designation is used for ease of reference only.

[3] The *Bowfin* Petitioners are Bowfin KeyCon Holdings, LLC, Chief Power Finance II, Chief Power Transfer Parent, LLC, KeyCon Power Holdings, LLC and GenOn Holdings, LLC (collectively, Plant Owners), the Pennsylvania Coal Alliance, (PAC), the United Mine Workers of America (UMWA), the International Brotherhood of Electrical Workers (IBEW) and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB).

Representatives adopted a December 15, 2021, resolution disapproving the Rulemaking.

Secretary McDonnell's PFR seeks mandamus relief in the form of an order compelling the LRB Respondents to publish the Rulemaking in the Pennsylvania Bulletin. In his claim for declaratory relief, Secretary McDonnell requests the Court to declare that the LRB Respondents' refusal to publish the Rulemaking is contrary to law, the Rulemaking must be published in the Pennsylvania Bulletin and the Pennsylvania Code, and the Rulemaking was deemed approved by the General Assembly on October 14, 2021. Secretary McDonnell asserts that the LRB Respondents' interpretation of the Regulatory Review Act (RRA)[4] was in error because the House of Representatives and the Senate must concurrently, rather than consecutively, consider resolutions.

Simultaneously with his PFR, Secretary McDonnell filed a Verified Application for Expedited Special and Summary Relief (Summary Relief Application) setting forth allegations supporting his claim of a clear right to relief and entitlement to judgment as a matter of law. The Summary Relief Application explained that the Rulemaking provides for the Commonwealth's participation in the Regional Greenhouse Gas Initiative (RGGI), which requires covered sources (election generation suppliers with nameplate capacity of 25 megawatts or more) to purchase one allowance for each ton of carbon dioxide (CO_2) they emit. Each participating state in the RGGI establishes a declining CO_2 budget limiting the total CO_2 that covered sources are permitted to emit. The allowances are then auctioned off quarterly by RGGI, Inc., and participating states receive the auction proceeds to

[4] Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.14.

combat air pollution. The Commonwealth's proceeds will be used in accordance with the Air Pollution Control Act (APCA).[5]

The LRB Respondents filed Preliminary Objections to Secretary McDonnell's PFR and an Answer to his Summary Relief Application.

On February 24, 2022, Speaker of the House of Representatives Bryan D. Cutler, Majority Leader of the House Kerry A. Benninghoff, and Chairman of the House Environmental Resources and Energy Committee Daryl D. Metcalfe (collectively, House[6]) filed an Application for Leave to Intervene and attached thereto Preliminary Objections to Secretary McDonnell's Petition and Answer to the Summary Relief Application.

Briefing on Secretary McDonnell's Summary Relief Application and the LRB Respondents' and the House's Preliminary Objections is complete.

On February 25, 2022, Senators Corman, Ward, Yaw and Browne sought leave to intervene. The Senate attached to its Application for Leave to Intervene an Answer with New Matter and raised the following Counterclaims: (1) the Rulemaking violates article II, section 1 and article III, section 9 of the Pennsylvania Constitution;[7] (2) the Rulemaking is an *ultra vires* action in violation of the APCA; (3) the Rulemaking is an interstate compact or agreement that only the General Assembly may enter; (4) the Rulemaking constitutes a tax that only the

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[5] Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4015.

[6] Our designation of Representatives Cutler, Benninghoff, and Metcalfe as "House" does not imply that they are acting on behalf of the Pennsylvania House of Representatives as a whole. The designation is used for ease of reference only.

[7] Article II, section 1 of the Pennsylvania Constitution provides that the legislative powers of the Commonwealth are vested in a General Assembly, which consists of a Senate and a House of Representatives. PA. CONST. art. II, § 1. Article III, section 9 relevantly provides that every resolution shall be presented to the Governor for approval. If the Governor disapproves a resolution, it shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in the case of a bill. PA. CONST. art. III, § 9.

General Assembly may impose; and (5), the DEP failed to comply with the Commonwealth Documents Law[8] and the APCA because it failed to hold "in-person" public hearings.

After the Court granted the House's and the Senate's Applications for Leave to Intervene, which were unopposed by Secretary McDonnell and the LRB Respondents, the Senate filed a March 25, 2022, Application for Relief in the Nature of a Preliminary Injunction (Senate Preliminary Injunction Application), asking the Court to enjoin publication, promulgation and codification of the Rulemaking pending a determination on the merits.

On April 5, 2022, the Court issued an order staying the processing of the Rulemaking for publication based on its review of various applications to amend filings and the answers thereto. Secretary McDonnell appealed the April 5, 2022, Order to the Pennsylvania Supreme Court but ultimately withdraw his appeal after the Court issued an April 18, 2022, Order. The April 18 Order concluded that the April 5, 2022, Order dissolved as a matter of law under Pennsylvania Rule of Civil Procedure 1531(d), Pa. R.Civ.P. 1531(d) (an injunction given without notice shall be deemed dissolved unless a hearing on a continuance is held within five days after granting the injunction or within such time as the parties agree or the court, upon good cause, may direct).

Accordingly, the LRB Respondents proceeded to publication of the Rulemaking in the April 23, 2022, issue of the Pennsylvania Bulletin. *See* 52 Pa. B. 2471 (2022).

Days prior to publication of the Rulemaking, Constellation filed an April 20, 2022, Application for Leave to Intervene. Constellation attached to its

[8] Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102, 1201-1208, 1602; 45 Pa. C.S. §§ 501-907.

Application for Leave to Intervene an Answer in opposition to the Senate's Preliminary Injunction Application, an Application for Special Relief seeking expedited consideration of its Application for Leave to Intervene, a proposed witness and exhibit list, and the expert report of John Hutchinson. It did not, however, attach a responsive pleading to the Senate's New Matter and Counterclaims.

Non-profits filed their Application for Leave to Intervene on April 25, 2022. They attached to their Application a brief in opposition to the Senate's Preliminary Injunction Application and an omnibus Reply to the Senate's New Matter, Answer to the Senate's Counterclaims and Answer to the Senate's Preliminary Injunction Application.

Bowfin

Also on April 25, 2022, the *Bowfin* Petitioners filed their PFR naming the DEP and the EQB as respondents. The *Bowfin* PFR alleges that the Rulemaking: (1) is an unconstitutional tax; (2) is not authorized by the APCA; (3) violated the APCA's requirement of "in-person" hearings; and (4) is unreasonable because it fails to consider impacts of the Rulemaking outside of Pennsylvania and because it was based on inaccurate assumptions. The *Bowfin* PFR raises assertions relative to the requests for injunctive relief that: the Rulemaking violates Pennsylvania law, which amounts to irreparable harm *per se*; the Rulemaking causes Plant Owners and others to incur significant compliance costs that will be reflected in their prices of electricity and cause a loss of revenue; and Plant Owners are already incurring compliance costs as they mobilize to comply with the Rulemaking's monitoring, reporting, and recording requirements and to participate in the allowance auctions. The PFR further alleges that the Rulemaking has an adverse economic impact on Plant Owners, including the possibility of closure of their facilities, as well as on

employees or retirees of the electric generation plants, and members of the IBEW, the IBB, and the PCA.

The *Bowfin* Petitioners simultaneously filed an Application for Preliminary Injunction (Bowfin Preliminary Injunction Application), seeking an order enjoining the DEP and the EQB from implementing, administering, and enforcing the Rulemaking. The Preliminary Injunction Application seeks relief on the basis that the Rulemaking is a tax, the APCA does not authorize the Rulemaking, and the Rulemaking was procedurally defective. The DEP and the EQB filed a May 3, 2022, Answer in opposition to the *Bowfin* Petitioners' Preliminary Injunction Application.

On May 3, 2022, Constellation and Non-profits filed their respective Applications for Leave to Intervene. Constellation attached to its Application for Leave to Intervene an Answer to the *Bowfin* PFR, an Answer to the *Bowfin* Preliminary Injunction Application, and an Application for Special Relief seeking expedited consideration of its Application for Leave to Intervene. Non-profits attached to their Application for Leave to Intervene an Answer to the *Bowfin* Petitioners' Preliminary Injunction Application but did not attach a responsive pleading to the PFR; rather, they filed a proposed Answer on May 25, 2022.

Court Proceedings

Recognizing the overlapping nature of the *McDonnell* and *Bowfin* matters, the Court held a May 5, 2022, Status Conference with the parties. At that time, the Court advised that Constellation and Non-profits would be permitted to participate in the hearings on both preliminary injunction applications pending disposition of their Applications for Leave to Intervene. The Court held a

preliminary injunction hearing on May 10 and 11, 2022, and disposition thereof remains pending.

On June 24 and 27, 2022, the Court held a hearing on Constellation's and Non-profits' Applications for Leave to Intervene. In the *McDonnell* matter, Secretary McDonnell does not oppose their intervention, but the House and the Senate do. Likewise, the *Bowfin* Petitioners oppose Constellation's and Non-profits' intervention, but the DEP and the EQB do not.

At this point, it is important to note that although we summarize the Applications for Leave to Intervene, the Court has considered the entirety of the Applications, the case law cited therein, the opposition to the Applications, and the arguments and testimony presented at the June 24 and 27, 2022, hearing in our determination of whether to grant intervention in these cases.

Standards for Intervention

Intervention in a matter appearing in this Court's original jurisdiction is governed by Pennsylvania Rule of Appellate Procedure 1531(b), which directs that an application for leave to intervene must contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought. Pa. R.A.P. 1531(b). In addition, Rule of Appellate Procedure 106 advises that "[u]nless otherwise prescribed by [the Appellate Rules,] the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to [the] practice and procedure in the courts of common pleas, so far as they may be applied." Pa. R.A.P. 106; *see also* Pa. R.A.P. 1517 ("Unless otherwise prescribed by these rules, the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied.");

Commonwealth ex rel. Fisher v. Jash International, Inc., 847 A.2d 125, 130 (Pa. Cmwlth. 2004).

To that end, Pennsylvania Rule of Civil Procedure 2327, Pa. R.Civ.P. 2327, provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Constellation and Non-profits claim to have legally enforceable interests in both proceedings sufficient to satisfy the standards for intervention. The phrase "legally enforceable interest" has been interpreted to require that "the applicant for intervention . . . own an interest in or a lien upon property in question or . . . own a cause of action which will be affected by the action." *Marion Power Shovel Co., Division of Dresser Industries v. Fort Pitt Steel Casting Co., Division of Conval-Penn,* 426 A.2d 696, 700 (Pa. Super. 1981). The determination of whether a proposed intervenor has a "legally enforceable interest" calls for "a careful exercise of discretion and consideration of all the circumstances involved" because the exact

boundaries of the "legally enforceable interest" limitation in Rule 2327(4) are not clear. *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted). Nevertheless, an applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings. *See generally Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998).

In addition, Pennsylvania Rule of Civil Procedure 2328, Pa. R.Civ.P. 2328, states:

> (a) Application for leave to intervene shall be made by a petition in the form of and verified in the manner of a plaintiff's initial pleading in a civil action, setting forth the ground on which intervention is sought and a statement of the relief or the defense which the petitioner desires to demand or assert. The petitioner shall attach to the petition a copy of any pleading which the petitioner will file in the action if permitted to intervene or shall state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed in the action.
>
> (b) A copy of the petition shall be served upon each party to the action.

Finally, Pennsylvania Rule of Civil Procedure 2329, Pa. R.Civ.P. 2329, provides:

> Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is already adequately represented; or

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

The effect of Rule 2329 is that if the petitioner is an entity within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present. *Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999). Refusal to permit intervention is discretionary. *Id.*

In *Application of Biester*, 409 A.2d 848 (Pa. 1979), our Supreme Court established the standards for intervention. In *Biester*, a taxpayer sought to intervene in an action seeking to impanel a statewide investigative grand jury. The Court, after initially allowing the taxpayer to intervene, vacated its order granting intervention. The Court determined that to intervene, the taxpayer must meet the "substantial, direct, and immediate" test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). That standard remains the law in this Commonwealth. *Markham v. Wolf,* 136 A.3d 134, 139 (Pa. 2016) ("in order to intervene, individuals must have standing, Pa. R.[Civ.]P. [] 2327(3), (4), and to establish standing, one must have an interest that is substantial, direct[,] and immediate"). To have a substantial interest, the proposed intervenor's concern in the outcome of the action must surpass "the common interest of all citizens in procuring obedience to the law." *Id.* at 140. An interest is direct if the matter will cause harm to the party's interest, and the concern is immediate "if that causal connection is not remote or speculative." *Id.* "The purpose of the standing requirement is to guard against improper litigants by requiring some proof in the interest in the outcome that surpasses the common interests of all citizens." *Capital*

BlueCross v. Pennsylvania Insurance Department, 937 A.2d 552, 588 (Pa. Cmwlth. 2007).

Constellation

Constellation's Applications for Leave to Intervene in the *McDonnell* and *Bowfin* matters are substantially similar. Constellation states that it is the country's and the Commonwealth's largest producer of emission-free electricity, with a clean energy portfolio that includes nuclear, hydroelectric, wind, and solar generation. Constellation also owns oil and natural gas-fueled generation units in Pennsylvania that are subject to the Rulemaking All told, Constellation supports 2,443 jobs in Pennsylvania and produces approximately $285 million in labor income. It serves over 150,000 small and large consumers in Pennsylvania, which amounts to 20 million megawatt hours of annual electric consumption.

Constellation claims it has a legally enforceable interest in these matters because once the Rulemaking is effective, covered sources must internalize some portion of their costs of emitting CO_2 into their bid offerings to supply electricity. Internalizing these costs requires covered sources to increase the price for which they sell electricity, which in turn, places the covered sources higher in the dispatch order to meet the demand for electricity. When the covered sources are placed higher in the dispatch order, there is increased dispatch of "cleaner" generation. In addition, once Pennsylvania becomes part of the RGGI, the number of allowances available for auction nearly doubles, thus affecting the price of allowances. There is also a secondary market for allowances outside the auction that will affect Constellation.

Constellation further asserts that its oil and natural gas-fuel fired operations have been preparing for the Rulemaking for several years;

implementation of the Rulemaking is critical to maintain the regulatory certainty needed to plan capital and operating expenditures for its covered sources.

Constellation admits that its participation in these proceeding is aimed at protecting its investments and interests. It claims that its interests are not protected by the DEP, which is charged with proper administration of the APCA. It states that it intends to ensure that the Rulemaking and its legal foundations are fully and vigorously defended.

In its *Bowfin* Application for Leave to Intervene, Constellation claims a direct interest because: (1) if the Rulemaking is overturned it would materially impact its business interests and reasonable commercial expectations; (2) affirming the Rulemaking will allow regulation of Constellation's industry in a cost-effective manner; and (3) it will be directly and significantly impacted by a Court ruling that calls into question the integrity of the Integrated Planning Model, which the DEP used to model the Rulemaking and which is used by the United States Environmental Protection Agency for countless rulemakings for the electric power section.

Initially, we observe that in the *McDonnell* matter, Constellation failed to attach to its Application for Leave to Intervene a responsive pleading to the Senate's Counterclaims. Moreover, we found *no* allegations in the Application itself wherein Constellation alleges it has a legally enforceable interest in the constitutionality of the Rulemaking or any allegations establishing the way it will defend its constitutionality. Had Constellation made such allegations, we would nevertheless conclude that Constellation's interest does not surpass the common interest of all citizens in the promulgation of constitutional laws.

In addition, Constellation failed to adduce evidence in support of a challenge to the Senate's Counterclaims at the June 24, 2022, intervention hearing.

Constellation offered the testimony of Lael Campbell, Constellation's Vice-President for State Government Affairs. Mr. Campbell testified as to Constellation's core mission of promoting clean energy sources. When questioned as to Constellation's interest in the Senate's constitutionally based Counterclaims, Mr. Campbell could not articulate any interest other than defending the reasonableness of the Rulemaking. Similarly, Constellation and Mr. Campbell did not offer any defenses Constellation will raise to the *Bowfin* claims that the Rulemaking violates the APCA's grant of authority, is an unconstitutional tax, and violates the APCA's "in-person" hearing requirements.

Nevertheless, Mr. Campbell stated that Constellation supports the Rulemaking because, among other things, it levels the playing field in the energy generation market by making covered sources accountable for their air pollution. He opined that if the Rulemaking does not go into effect, fossil-fuel generators are subsidized and that the benefits of cleaner energy will not be realized. Mr. Campbell believes that the Rulemaking could be even more stringent by requiring fossil-fuel generators to internalize more of their costs than what the Rulemaking requires.

Mr. Campbell acknowledged that Constellation's clean energy sources directly compete with sources covered by the RGGI and believes that clean energy should be dispatched more. He claimed there is a property interest in Constellation's facilities but did not explain how those facilities would be impacted by the Rulemaking; he is unaware of any anticipated closures of Constellation's facilities and did not say how the Rulemaking may negatively impact Constellation's workforce.

We conclude that the interest Constellation alleges is merely financial in nature and not a legally enforceable interest. It concedes in its filings that its

participation is aimed at ensuring the Rulemaking goes into effect because its non-emitting sources compete directly with covered sources for dispatch of electricity and Mr. Campbell's testimony offered nothing more. An application for intervention asserting financial harm must offer proof of such harm. *Cf. Capital BlueCross*, 937 A.2d at 558 (addressing competitor standing before agency and stating that persons asserting a direct interest in an agency action based on financial harm for purposes of appeal must assert such a claim at the agency level and offer proof of harm).

In addition, we cannot conclude that increased dispatch and participation in allowance auctions are legally protected interests. Constellation has no legally enforceable interest to be dispatched at all. Its order of dispatch is based solely on its bid to PJM Interconnection[9] and whether its production is necessary to meet the anticipated demand. Furthermore, we found no authority stating that participation in an auction is a legally protected interest. Even so, Constellation's success in the allowance auctions is dependent on the price for which it offers for allowances and whether its offer is accepted; it has no protected interest in ensuring that there are additional allowances available for purchase.

Even if we concluded that Constellation has demonstrated a legally enforceable interest, and we do not, its interest is more than adequately protected. The DEP, which has a far more direct and immediate interest in the outcome of these matters, is defending the constitutionality and reasonableness of the Rulemaking in *McDonnell* and *Bowfin.*

[9] PJM Interconnection is the regional transmission organization that coordinates the distribution of electricity in the eastern interconnection grid of the United States, including all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

We deny Constellation's Applications for Leave to Intervene because it has no legal or equitable interest that will be affected by the Rulemaking, its interest is based purely on financial gain, which the courts have found insufficient to allow for intervention without direct evidence of harm, *cf. Marion Shovel Co.,* 426 A.2d 696, and the DEP and EQB adequately represent its interest.

Non-profits

Non-profits are various environmental advocacy organizations with members throughout the Commonwealth and the United States. The organizations' goals include the protection of the environment by promotion of clean energy resources and transition away from fossil-fuel based energy sources, a healthier environment, and the protection of natural resources. Non-profits engage with government agencies on issues related to pollution, work to educate the public and ensure enforcement with environmental laws, promote responsible use of the earth's ecosystems and resources, strive to reduce emissions to mitigate the impacts of climate change, and seek innovative, equitable cost-effective solutions to environmental problems.

Non-profits' Application for Leave to Intervene has similar infirmities as Constellation's Application. First, in the *McDonnell* matter, Non-profits fail to identify a legally enforceable interest in the constitutionality of the Rulemaking or the way in which they will defend its constitutionality. At the intervention hearing, Non-profits offered an employee from each organization who testified to the organization's mission, its participation in the Rulemaking process, and its purported interests in these proceedings. To the *McDonnell* matter, none of the witnesses explained the organizations' interests in defending the constitutionality of the Rulemaking. Rather, Non-profits' Application for Leave to Intervene and employee

witness testimony focused on why the Rulemaking is appropriate and not whether the Rulemaking violated the Pennsylvania Constitution, the APCA, or the Commonwealth Documents Law, as alleged by the Senate in its Counterclaims.

In the *Bowfin* matter, Non-profits failed to attach a responsive pleading to the PFR with their Application for Leave to Intervene. They filed an Answer to the *Bowfin* PFR on May 25, 2022, about 22 days after they filed their Application. Although a curable defect, they did not seek leave of court to amend their Application for Leave to Intervene nor did they attempt to cure the defect by way of praecipe.

Regardless, Non-profits claim that (1) they have a strong interest in how the allowance auction proceeds are disbursed; (2) PennFuture and the Clean Air Council submitted to the DEP a proposed rulemaking petition that, while distinct in scope and application from the present Rulemaking, presents substantially similar questions regarding the DEP's authority to regulate greenhouse gas emissions and the decisions here may affect the DEP's action on their proposed rulemaking petition; and (3) their missions include the protection of the rights established in article I, section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment.[10]

We agree with Non-profits that their evidence demonstrated a legally enforceable interest in the proceedings in part. Non-profits must show threatened

[10] Article I, section 27 of the Pennsylvania Constitution, PA. CONST. art. I, § 27, provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

injury sufficient to confer standing to intervene. In Pennsylvania, associations have standing as representatives of their members if, even in the absence of injury to themselves, the associations allege that at least one of their members is suffering immediate or threatened injury because of the challenged action. *Robinson Township Washington County v. Commonwealth*, 83 A.3d 901, 922-23 (Pa. 2013); *Pennsylvania Medical Society v. Department of Public Welfare*, 39 A.3d 267, 278-79 (Pa. 2012); *South Whitehall Township Police Service v. South Whitehall Township*, 555 A.2d 793, 796-97 (Pa. 1989).

We find that Non-profits failed to prove a legally enforceable interest or injury to the Non-profits themselves. The witnesses indicated that at times their organizations have been at odds with the DEP and that they advocated for restrictions placed on other pollution sources in the Rulemaking that the DEP did not include, such as in the transportation sector. Their position that the Rulemaking does not go far enough does not impact on whether this Rulemaking is constitutional or reasonable. The employee witnesses all testified that they support the Rulemaking.

As to Non-profits' testimony that they have a strong interest in how the allowance auction proceeds are disbursed, if the proceeds are ultimately determined to be fees and not a tax, Section 9.2(a) of the APCA, 35 P.S. § 4009.2(a),[11] mandates that such fees be deposited into the Clean Air Fund maintained by the DEP. Further, the use of any auction proceeds is exclusively limited to the elimination of air pollution. *See* 52 Pa. B. at 2487, 2545 (Rulemaking §§ 145.343 and 145.401).[12] And, we have found no statutory authority granting Non-profits a say in how Clean Air Fund monies are utilized.

[11] Added by the Act of October 26, 1972, P.L. 989.

[12] The Court may take judicial notice of the Pennsylvania Bulletin. 45 Pa. C.S. § 506.

In the current proceedings, Mr. Cheung and Mr. Altenburg both recognized that the DEP has not made public any statements how the auction proceeds may be invested in air pollution reduction. Additionally, Mr. Altenburg and Mr. Schuster acknowledged that DEP is not required to adopt a formal rulemaking relating to the investment of the allowance auction proceeds but that DEP has indicated an intention to release a draft plan for the proceeds and seek input from the public. In that regard, both the member and employee witnesses admitted that they may continue to advocate before the DEP how the auction proceeds are used.

As to the proposed rulemaking petition submitted to DEP on behalf of PennFuture and the Clean Air Council, these parties acknowledge that the proposal is distinct in scope and application from the present Rulemaking. Further, the fact that such proposal may present substantially similar questions regarding the DEP's authority to regulate greenhouse gas emissions does not equate to a right to intervene in the present proceedings. Again, the DEP and the EQB are vigorously defending their ability to regulate such emissions via the current Rulemaking.

The same is true with respect to Non-profits' claim that their missions include the protection of the rights established under the Environmental Rights Amendment. While the Environmental Rights Amendment sets forth the public's right to natural resources, it imposes upon the Commonwealth the duty to conserve and maintain these resources. The Rulemaking represents the Commonwealth's most recent attempt to comply with its constitutional duty and the DEP and the EQB adequately represent the interests of the public herein.

Turning to the member testimony, Non-profits' member witnesses testified why they joined the respective organizations, their activities associated

therewith, and their general concerns regarding climate change and air pollution.[13] Some member witnesses participated in the Rulemaking process and seek to have an input on how the auction proceeds are used.

Four of Nonprofits' witnesses testified as to health issues they or their family members experience. These witnesses are members of the PennFuture, the Environmental Defense Fund, the Clean Air Council and the Sierra Club. The health issues ranged from sensitivity to extreme heat (trouble breathing and exacerbation of an autoimmune disease), asthma, allergies, an inability to participate in outdoor activities on hot days or when the air quality is poor, and frequent headaches and nosebleeds.

We conclude that the above-named Non-profits have provided sufficient credible evidence to establish that they have a legally enforceable interest by virtue of injury to their members. We must also determine, however, whether their interests are adequately represented and conclude that they are.

The Commonwealth "is committed to the conservation and maintenance of clean air by article I, [section] 27 . . . ." *Department of Environmental Resources v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979). Section 2(a) of the APCA states:

> It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary

[13] Julia Nakhleh, a member of the Natural Resources Defense Council, explained her concerns regarding the increased intensity of natural events, in addition to increased occurrences of wildfires and droughts. Her concerns included global warming's effect on the food supply and coral reefs, and the effect of greenhouse gases and particulate matter in the atmosphere. Ms. Nakhleh indicated generally that she does not agree with how the Rulemaking is implemented. She did not testify as to any injury. Thus, we cannot conclude that the Natural Resources Defense Council presented evidence of an injury to one of its members.

> for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; (iv) development, attraction and expansion of industry, commerce and agriculture; and (v) implementation of the provisions of the Clean Air Act[14] in the Commonwealth.

35 P.S. § 4002(a). The General Assembly, by virtue of Section 2 of the APCA, "has declared as policy the protection of air resources to the degree necessary for the protection of the health, safety and well[]being of the citizens; the prevention of injury to plant and animal life and property; the protection of public comfort and convenience and Commonwealth recreational resources; and the development, attraction and expansion of industry, commerce and agriculture." *Locust Point Quarries*, 396 A.2d at 1209.

The responsibility for undertaking such actions is specifically designated to the DEP and the EQB. *See* Sections 4 and 5 of the APCA, 35 P.S. §§ 4004, 4005 (Section 4 sets forth the powers and duties of the DEP; Section 5 sets forth the powers and duties of the EQB). Indeed, the Rulemaking states that "[t]his final-form rulemaking is authorized under section 5(a)(1) of the [APCA] (35 P.S. § 4005(a)(1)), which grants the [EQB] the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth." 52 Pa. B. 2471 (2022). Thus, the protection of our air resources is of the highest priority. *Locust Point Quarries*.

None of the Non-profits member witnesses could articulate any reason why the DEP is not adequately protecting their interests. They raised speculative

[14] 42 U.S.C. §§ 7401-7431.

claims about possible settlement affecting use of the auction proceeds or changes to the Rulemaking, and stated that they have had poor experiences with government officials.

As noted above, however, members have no legally enforceable interests in how the DEP utilizes the auction proceeds so long as they are used consistent with the APCA.[15] Any changes in the Rulemaking in attempt to settle the underlying dispute would have to undergo the rulemaking process once again, where Non-profits' members may advocate before the DEP and the EQB. Finally, disappointment with government officials' (neither of which was a DEP or EQB official) receptiveness of the advocate's position is not indicative of the DEP's commitment to defend its Rulemaking.

Thus, although we determined that Non-profits have a legally enforceable interest in part by virtue of injuries to the members, we nevertheless conclude that the DEP adequately represents their interests in these matters. Accordingly, Non-profits' Applications for Leave to Intervene are denied.

MICHAEL H. WOJCIK, Judge

[15] Mr. Cheung, who works for the Clean Air Council, testified regarding an action taken against the Allegheny County Health Department by an environmental group wherein it was alleged that the Health Department was using Clean Air Fund money to furnish an office building and not for combating air pollution. Thus, such organizations appear to act when they believe that statutory mandates are not being fulfilled.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board,	:	
Petitioner	:	
v.	:	No. 41 M.D. 2022
	:	Heard: May 10-11, 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J. Mendelsohn, Director of the Pennsylvania Code and Bulletin,	:	
Respondents	:	

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: July 8, 2022

The Verified Petition for Review in the Nature of a Complaint for Permanent and Peremptory Mandamus and for Declaratory Relief (Petition) filed by Petitioner Patrick J. McDonnell, Secretary of Environmental Protection and Chairperson of the Environmental Quality Board,[1] has morphed into an action pitting

[1] When this action was initiated, Patrick J. McDonnell was the Secretary of Environmental Protection and Chairperson of the Environmental Quality Board. His service with the Commonwealth ended on July 1, 2022. Pursuant to Pa. R.A.P. 502(b), Acting Secretary Ziadeh
(Footnote continued on next page…)

the actions of one branch of state government against what others characterize as the exclusive constitutional powers of another. The Court considers at this time the Application for Relief in the Nature of a Preliminary Injunction (Preliminary Injunction Application) filed by President Pro Tempore of the Pennsylvania State Senate Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the Senate Appropriations Committee Pat Browne (collectively, the Senate[2]). After a hearing held on May 10 and 11, 2022, the Preliminary Injunction Application is **GRANTED**.

On February 3, 2022, Secretary McDonnell filed his Petition against the Pennsylvania Legislative Reference Bureau (LRB), its Director Vincent C. DeLiberato, and Director of the Pennsylvania Bulletin and Pennsylvania Code Amy J. Mendelsohn (collectively, LRB Respondents). Pet. for Rev., ¶¶ 12-13; *see also* April 20, 2022, Joint Stipulation of Material Facts by All Parties (4/20/22 Stip.) ¶¶ 2, 3, 4. The Pennsylvania Code and the Pennsylvania Bulletin are located within the offices of the LRB. Pet. for Rev., ¶ 13. The Petition alleges that on November 29, 2021, the Department of Environmental Protection (DEP), acting on behalf of the Environmental Quality Board (EQB), submitted to the LRB for publication in the Pennsylvania Bulletin the "Trading Program Regulation" (Rulemaking). Pet. for Rev., ¶ 35. Ms. Mendelsohn, although acknowledging submission of the Rulemaking, refused to publish it because the period during which the House of Representatives had to disapprove of the Rulemaking had not yet expired. *Id.* ¶ 36.

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has been substituted as petitioner. For ease of discussion, we will continue to refer to Secretary McDonnell.

[2] Our designation of Senators Corman, Ward, Yaw and Browne as "Senate" does not imply that they are acting on behalf of the Pennsylvania Senate as a whole. The designation is used for ease of reference only.

On December 10, 2021, Secretary McDonnell again submitted the Rulemaking for publication. *Id.* ¶ 37. Ms. Mendelsohn and Mr. DeLiberato responded that the Rulemaking could not be published because the House of Representatives adopted a December 15, 2021, resolution disapproving the Rulemaking. *Id.* ¶ 38.

The Petition avers that the Offices of General Counsel and of the Attorney General approved the Rulemaking as to form and legality pursuant to the Commonwealth Attorneys Act[3] and the Commonwealth Documents Law,[4] on July 26, 2021, and November 24, 2021, respectively. *Id.* ¶¶ 31, 34. Further, the Independent Regulatory Review Commission (IRRC) approved the Rulemaking on September 1, 2021, pursuant to the Regulatory Review Act (RRA).[5] *Id.* ¶ 32. The Petition acknowledges that once the approvals were obtained, the General Assembly had time in which it could disapprove the Rulemaking. *Id.* ¶¶ 74, 75. Pursuant to Section 7(d) of the RRA,[6] after review by the IRRC, the standing committee of either

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[3] Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101—732-506.

[4] Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102, 1201-1208, 45 Pa. C.S. §§ 501-907.

[5] Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1- 745.14.

[6] Section 7(d) of the RRA, 71 P.S. § 745.7(d) provides:

> Upon receipt of the commission's order pursuant to subsection (c.1) or at the expiration of the commission's review period if the commission does not act on the regulation or does not deliver its order pursuant to subsection (c.1), one or both of the committees may, within 14 calendar days, report to the House of Representatives or Senate a concurrent resolution and notify the agency. During the 14-calendar-day period, the agency may not promulgate the final-form or final-omitted regulation. If, by the expiration of the 14-calendar-day period, neither committee reports a concurrent resolution, the committees shall be deemed to have approved the final-form or final-omitted regulation, and the agency may promulgate that regulation. If either committee reports a concurrent resolution before the expiration of the 14-day period, the Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, from the date on which the concurrent resolution has been reported, to adopt the concurrent resolution. If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House of Representatives,

(Footnote continued on next page…)

or both the House of Representatives and the Senate, within 14 days, may report to the House of Representatives or the Senate a concurrent resolution disapproving the regulation at issue. *See generally id.* ¶ 76. In this case, the Senate Environmental Resources and Energy Committee reported Senate Concurrent Regulatory Review Resolution 1 (SCRRR1) disapproving the Rulemaking on September 14, 2021. *Id.* ¶ 77. According to the Petition, once SCRRR1 was reported from the Senate committee, the House of Representatives and the Senate had 10 legislative days or 30 calendar days, whichever is longer, to adopt SCRRR1. *Id.* ¶ 75. For its part, the Senate approved SCRRR1 on October 27, 2021, within the 10-legislative-day limitation. *Id.* ¶¶ 81-83. The House of Representatives, however, did not adopt SCRRR1 until December 15, 2021. *Id.* ¶ 89. Secretary McDonnell claims that the Rulemaking was approved by operation of law on October 14, 2021, because the

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> the concurrent resolution shall be presented to the Governor in accordance with section 9 of Article III of the Constitution of Pennsylvania. If the Governor does not return the concurrent resolution to the General Assembly within ten calendar days after it is presented, the Governor shall be deemed to have approved the concurrent resolution. If the Governor vetoes the concurrent resolution, the General Assembly may override that veto by a two-thirds vote in each house. The Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, to override the veto. If the General Assembly does not adopt the concurrent resolution or override the veto in the time prescribed in this subsection, it shall be deemed to have approved the final-form or final-omitted regulation. Notice as to any final disposition of a concurrent resolution considered in accordance with this section shall be published in the Pennsylvania Bulletin. The bar on promulgation of the final-form or final-omitted regulation shall continue until that regulation has been approved or deemed approved in accordance with this subsection. If the General Assembly adopts the concurrent resolution and the Governor approves or is deemed to have approved the concurrent resolution or if the General Assembly overrides the Governor's veto of the concurrent resolution, the agency shall be barred from promulgating the final-form or final-omitted regulation. If the General Assembly does not adopt the concurrent resolution or if the Governor vetoes the concurrent resolution and the General Assembly does not override the Governor's veto, the agency may promulgate the final-form or final-omitted regulation. The General Assembly may, at its discretion, adopt a concurrent resolution disapproving the final-form or final-omitted regulation to indicate the intent of the General Assembly but permit the agency to promulgate that regulation.

House of Representatives failed to act on SCRRR1 within 10 legislative or 30 calendar days of September 14, 2021.[7] *Id.* ¶ 88. In other words, the House of Representatives and the Senate must *concurrently* consider a standing committee's resolution, regardless of which chamber reports the resolution. The House of Representatives' failure to act within the statutory period resulted in the approval of the Rulemaking under Section 7(d) of the RRA by operation of law and, therefore, the LRB Respondents improperly refused its publication. *Id.*

The Petition seeks mandamus relief, that is, an order directing publication of the Rulemaking in the Pennsylvania Bulletin. In the claim for declaratory relief, Secretary McDonnell requests an order declaring that the LRB Respondents' refusal to publish the Rulemaking is contrary to law, the Rulemaking must be published in the Pennsylvania Bulletin and the Pennsylvania Code, and the Rulemaking was deemed approved by the General Assembly. Pet. for Rev., at 24. Secretary McDonnell claims that the LRB Respondents' interpretation of Section 7(d) of the RRA, that the House of Representatives and the Senate review committee resolutions consecutively rather than concurrently, is incorrect.

Simultaneously with the filing of the Petition, Secretary McDonnell filed a Verified Application for Expedited Special and Summary Relief (Summary Relief Application) setting forth allegations supporting his claim of a clear right to relief and entitlement to judgment as a matter of law. The Summary Relief Application explains that expedited review by the Court was required because the Rulemaking provides for Pennsylvania's participation in the Regional Greenhouse Gas Initiative (RGGI). The RGGI requires electric generation plants (covered sources) located in participating states to purchase one allowance for each ton of

[7] The House of Representatives' tenth legislative day from September 14, 2021, was October 6, 2021. Thus, the House had the longer 30-day period to adopt SCRRR1.

carbon dioxide (CO_2) they emit. Each state participating in the RGGI establishes a declining CO_2 budget that effectively limits the total CO_2 that the covered sources are permitted to emit. The allowances are auctioned off quarterly by RGGI, Inc., and participating states receive the proceeds from the auction. The Rulemaking provides that Pennsylvania's proceeds will be used in accordance with the Air Pollution Control Act (APCA)[8] and the DEP's regulations. In 2021, the participating states received $926 million from the allowance auctions. According to the Summary Relief Application, the LRB Respondents' refusal to publish the Rulemaking has delayed Pennsylvania's entry in the RGGI and resulted in a loss of approximately $162 million in auction proceeds and associated air pollution reduction.

The LRB Respondents filed an Answer opposing Secretary McDonnell's Summary Relief Application. Summarizing, they observe that the parties have a fundamental disagreement in the interpretation of Section 7(d) of the RRA and the timing/procedure for General Assembly review of resolutions. The interpretation of Section 7(d) is an issue of first impression for this Court, and the Court's considered disposition of the issue is not amenable to expedited review. Secretary McDonnell does not have a clear right to relief regarding his interpretation of Section 7(d) of the RRA, so neither summary relief nor mandamus relief is appropriate.

The LRB Respondents filed Preliminary Objections to the Petition asserting a demurrer. According to the Preliminary Objections, Secretary McDonnell does not understand the legislative review process for resolutions because a committee may only report a resolution to its own chamber. If the

[8] Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4015.

committee's chamber votes to approve the resolution, it is submitted to the other chamber for consideration. Thus, consideration of resolutions is consecutive rather than concurrent.[9]

On February 24, 2022, Speaker of the House of Representatives Bryan D. Cutler, Majority Leader of the House Kerry A. Benninghoff, and Chairman of the House Environmental Resources and Energy Committee Daryl D. Metcalfe (collectively, House) filed an Application for Leave to Intervene. Consistent with the Pennsylvania Rules of Civil Procedure, the House attached to its Application for Leave to Intervene its Preliminary Objections to the Petition and an Answer to Secretary McDonnell's Summary Relief Application. In its Preliminary Objections, the House objects to the Petition on the bases that (1) a controversy did not exist because Governor Tom Wolf vetoed SCRRR1 and the Senate had yet to override the veto;[10] (2) an adequate remedy in the form of a declaratory judgment exists and, therefore, Secretary McDonnell has failed to state a claim for mandamus; (3) Secretary McDonnell fails to state a claim for declaratory relief because the plain language of Section 7(d) of the RRA grants each chamber the longer of 10 legislative days or 30 calendar days to adopt a concurrent resolution either in the first instance upon reporting from that chamber's committee or upon referral from the other chamber; and (4) Secretary McDonnell's claims are barred by laches or waiver. The

[9] The LRB Respondents also objected on the basis that the Petition failed to name an indispensable party, the General Assembly. The LRB Respondents withdrew this Preliminary Objection after the Court granted the petitions for leave to intervene filed on behalf of Senators Corman, Ward, Yaw, and Browne and Speaker of the House of Representatives Bryan D. Cutler, Majority Leader of the House Kerry A. Benninghoff, and Chair of the House Environmental Resources and Energy Committee Daryl D. Metcalfe (collectively, House). Our designation of Representatives Cutler, Benninghoff, and Metcalfe as "House" does not imply that they are acting on behalf of the Pennsylvania House of Representatives as a whole. The designation is used for ease of reference only.

[10] The full Senate failed to override the Governor's veto on April 4, 2022.

House asserts that Secretary McDonnell waited over three months before filing his Petition in this Court despite alleging that the Rulemaking was approved by operation of law on October 14, 2021. The House's Answer to Secretary McDonnell's Summary Relief Application refers the Court to its supporting brief.

On February 25, 2021, Senators Corman, Ward, Yaw, and Browne sought leave to intervene. Like the House, the Senate attached a responsive pleading to the Petition: its Answer with New Matter and Counterclaims. The Counterclaims have taken this case in a new direction. The Senate's first Counterclaim is that Secretary McDonnell violated article II, section 1[11] and article III, section 9[12] of the Pennsylvania Constitution when he submitted the Rulemaking to the LRB for publication before the House of Representatives had time to consider SCRRR1. According to the Senate, Secretary McDonnell's action was an attempt to sidestep article III, section 9 and usurp the General Assembly's authority in violation of article II, section 1. The second Senate Counterclaim alleges that the Rulemaking is an *ultra vires* action in violation of the APCA. The APCA, although authorizing the DEP to promulgate regulations, sets forth bright-line limits on the DEP's powers. By sending the Rulemaking for publication, the DEP took significant legal action despite clear statutory prohibitions to the contrary.

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[11] PA. CONST. art. II, § 1 provides: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

[12] PA. CONST. art. III, § 9 provides:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the questions of adjournment or termination or extension of a disaster emergency declaration as declared by an executive order or proclamation, or portion of a disaster emergency declaration as declared by an executive order or proclamation, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

The Senate's third Counterclaim asserts that the Rulemaking is an interstate compact or agreement, which is within the General Assembly's exclusive constitutional authority to enter. In addition to this power being constitutionally reserved to the General Assembly, Section 4(24) of the APCA specially states that the DEP may formulate interstate air pollution control compacts or agreements *for submission to the General Assembly*. 35 P.S. § 4004(24).[13] In its fourth Counterclaim, the Senate alleges that the Rulemaking is a tax and that the imposition of taxes is within the exclusive authority of the General Assembly. The Senate recognizes that the APCA allows for the collection of fines, penalties, and fees, including fees to cover the direct and indirect costs of administering the APCA. Here, however, the Rulemaking amounts to a tax. The courts have held that a fee may constitute a tax where the revenue generated exceeds the costs reasonably necessary to operate the program. The Senate references the 2021-22 budget for the DEP of $169 million and notes yearly participation in the RGGI could generate over $650 million. Finally, the Senate's fifth Counterclaim is that the DEP failed to comply with the Commonwealth Documents Law and the APCA because it failed to hold "in-person" hearings. The DEP held 10 virtual hearings and the virtual hearings do not satisfy the statutory requirement of "in-person" hearings.

The Court directed the parties to file an answer to the House and the Senate Applications for Leave to Intervene. Secretary McDonnell and LRB

[13] Section 4(24) of the APCA states:

> The [DEP] shall have power and its duty shall be to-
>
> ….
>
> (24) Cooperate with the appropriate agencies of the United States or of other states or any interstate agencies with respect to the control, prevention, abatement and reduction of air pollution, and where appropriate formulate interstate air pollution control compacts or agreements for the submission thereof to the General Assembly.

Respondents consented to the Applications and, therefore, the Court granted the Applications and accepted for filing the responsive pleadings attached thereto. On March 25, 2022, the Senate filed its Preliminary Injunction Application, seeking to enjoin Secretary McDonnell and the LRB Respondents from taking any further action to promulgate, publish, or otherwise codify the Rulemaking.

The Court issued a March 29, 2022, briefing schedule to move Secretary McDonnell's Summary Relief Application and the LRB Respondents' and the House's Preliminary Objections before the Court for disposition.

The Court issued an April 5, 2022, Order staying the processing of the Rulemaking for publication pending further order of court based on its review of applications to amend filings and answers thereto. Secretary McDonnell appealed the April 5, 2022, Order to the Pennsylvania Supreme Court but later withdrew his appeal upon issuance of the Court's April 18, 2022, Order. The April 18, 2022, Order concluded that the April 5, 2022, Order dissolved as a matter of law.[14]

On April 23, 2022, the Rulemaking was published in the Pennsylvania Bulletin as the CO_2 Budget Trading Program.

Prior to April 23, 2022, Constellation Energy Corporation and Constellation Energy Generation LLC (collectively, Constellation) filed an April 20, 2022, Application for Leave to Intervene in support of Secretary McDonnell, the DEP and the EQB, which he does not oppose.[15] The House and the Senate oppose

[14] Pennsylvania Rule of Civil Procedure 1531 provides that an injunction given without notice shall be deemed dissolved unless a hearing on continuance of the injunction is held within five days after granting the injunction or within such time as the parties may agree or the court upon good cause directs. Pa. R.Civ.P. 1531(d).

[15] Constellation failed to attach a responsive pleading to the Senate's Counterclaims to the Application for Leave to Intervene but did include an Answer to the Senate's Preliminary Injunction Application and an Application for Special Relief in the Form of Expedited Consideration of its Application for Leave to Intervene with an attached witness and exhibit list and expert report.

Constellation's intervention. On April 27, 2022, Citizens for Pennsylvania's Future, the Clean Air Counsel, and the Sierra Club (collectively, Non-profits) filed an Application for Leave to Intervene aligned with Secretary McDonnell.[16] Like their responses to Constellation's Application for Leave to Intervene, Secretary McDonnell does not oppose Non-profits' Application, but the House and the Senate do.

On April 25, 2022, after publication of CO_2 Budget Trading Program, i.e., the Rulemaking, in the Pennsylvania Bulletin, several electric energy generation companies, a non-profit, and several unions filed an original jurisdiction action challenging the Rulemaking on the basis that it is an unconstitutional imposition of a tax, the APCA does not authorize the Rulemaking, the DEP failed to hold public hearings on the Rulemaking, and the Rulemaking is otherwise unreasonable.[17] *See Bowfin KeyCon Holdings, LLC v. Pennsylvania Department of Environmental Protection* (Pa. Cmwlth., No. 247 M.D. 2022). Concurrently therewith, the *Bowfin* Petitioners filed an Application for Preliminary Injunction, seeking an order enjoining the implementation, administration, or enforcement of the Rulemaking.

On May 4, 2022, the Court issued orders in this case and in the *Bowfin* matter scheduling a preliminary injunction hearing for May 10, 2022. The Court held a status conference at which counsel for Secretary McDonnell, the LRB Respondents, the Senate, the House, and proposed intervenors Constellation and Non-profits were present. The Court confirmed that Constellation and Non-profits may participate in the preliminary injunction hearing subject to the Court's later

[16] Non-profits included with the Application for Leave to Intervene a brief in opposition to the Senate's Preliminary Injunction Application, and an omnibus Reply to New Matter, Answer to Counterclaims, and Answer to the Senate's Preliminary Injunction Application.

[17] The petition for review claims that the Rulemaking is unreasonable because it is based on false assumptions and failed to consider the impacts of the Rulemaking outside of the Commonwealth.

decision on their Applications for Leave to Intervene, which were denied on June 28, 2022.

After a hearing and post-hearing briefing by all parties, including proposed intervenors Constellation and Non-profits, the Senate's Preliminary Injunction Application is ripe for disposition.[18]

Evidentiary Rulings

During the proceedings, the Court reserved ruling on numerous objections and motions. We dispose of the objections and motions relevant to the *McDonnell* matter, that is, objections or motions raised by counsel for Secretary McDonnell, the House, the Senate, Constellation, and Non-profits, by the page number on which the Court reserved its ruling. For objections and motions raised in the *Bowfin* matter, the Court's rulings are addressed in the companion opinion.

May 10, 2022, Transcript

Exhibits:

Page 93	Objection to admission of Senate Ex. 27, 27a, 27b sustained (memoranda of understanding- Cmwlth. not a party to the memoranda and not part of Rulemaking Record)

Testimony:

[18] The Court also received three *amicus curiae* briefs on behalf of Secretary McDonnell. The first was filed by Widener University Commonwealth Law School, Environmental Law and Sustainability Center, and Robert B. McKinstry, Jr. The second brief was filed by Keystone Energy Efficiency Alliance, Bright Eye Solar, Celentano Energy Services, CHP-Funder.com, eco(n)law, LLC, Green Building Alliance, Krug Architects, Philadelphia Solar Energy Association, Rebuilding Together Pittsburgh, RER Energy Services, Sumintra, and Vote Solar. The third brief was filed by Pennsylvania Scientists.

The Court received a June 17, 2022, *amicus brief* in support of the Senate, filed by the Pennsylvania Manufacturers' Association, the Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry, and the National Federation of Independent Business.

Page 99; 104	sustained (witness may not testify to his understanding of a document not admitted into the record)
Page 220-21	denied (demurrer to Senate's case-in-chief)[19]

May 11, 2022, Transcript

Testimony

Page 85	overruled (witness was part of process to develop Rulemaking; can testify how modeling factored into Rulemaking)
Page 88	overruled (same)
Page 94-95	denied (same; Rulemaking addresses impact on electric consumers)
Page 106	overruled (in the interest of conserving judicial resources, Court permitted Constellation's counsel to examine Secretary McDonnell's witness during Secretary's case-in-chief)
Page 133	sustained (witness not permitted to testify regarding other states' contracts with RGGI, Inc. that were not admitted into the record)
Page 139	sustained (beyond scope of direct testimony as to benefits lost if Commonwealth holds own CO_2 allowances auction)
Page 286	sustained (expert report will not be admitted as evidence but filed with Court)
Page 288	overruled (witness may testify as to climate change because issue goes to balancing of harms in preliminary injunction proceedings)

[19] We believe a demurrer is the appropriate characterization of Secretary McDonnell's motion. *See generally Therapy Source, Inc. v. Lidstone* (Pa. Super., No. 2431 EDA 2018, filed June 28, 2019). Pursuant to Pa. R.A.P. 126(b), we may cite this unpublished decision as persuasive authority.

Page 325	sustained (proffered as fact witness to show real harms of carbon pollution, witness may only testify to CO_2 emissions and not other pollutants expelled from covered sources)
Page 345	overruled (expert witness permitted to testify to health effects of pollutants other than CO_2; Court not limited to Rulemaking Record in original jurisdiction and testimony goes to balancing of the harms)

Any objection on which the Court reserved ruling not addressed above is deemed overruled.

Standards for a Preliminary Injunction[20]

"The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made[;] it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined." *Appeal of Little Britain Township*, 651 A.2d 606, 610 (Pa. Cmwlth. 1994). "A preliminary injunction [does not] serve as a judgment on the merits since by definition it is a temporary remedy granted until that time when the [parties'] dispute can be completely resolved." *Id.* A party seeking a

[20] Secretary McDonnell raised the issue of the Senate's standing to pursue its Counterclaims and Preliminary Injunction Application after the April 23, 2022, publication of the Rulemaking. Although Secretary McDonnell filed his Reply to the Senate's New Matter and Answer to the Senate's Counterclaims on March 30, 2022, and his Answer to the House's Preliminary Objections on April 4, 2022, before publication of the Rulemaking, he has not sought leave of court to amend his responsive pleadings to challenge the standing of the House or the Senate post-publication. *See* Pa. R.Civ.P. 1028(a)(5) ("Preliminary objections may be filed to *any pleading* and are limited to the following grounds: …. (5) lack of capacity to sue ….") (emphasis added); Pa. R.Civ.P. 1017 (identifying pleadings as a complaint and answer thereto, a reply to new matter, counterclaim, or cross-claim; a counter-reply if the reply to a counterclaim or cross-claim contains new matter, and preliminary objections). Thus, we will not consider Secretary McDonnell's argument on standing.

preliminary injunction bears a heavy burden of proof. The applicant for a preliminary injunction must show that

> (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages;
>
> (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings;
>
> (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
>
> (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits;
>
> (5) the injunction is reasonably suited to abate the offending activity; and,
>
> (6) the preliminary injunction will not adversely affect the public interests.

SEIU Healthcare Pennsylvania v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014); *see also Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc*., 828 A.2d 995, 1001 (Pa. 2003) (same). "Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is granted only when *each* [factor] has been fully and completely established." *Pennsylvania AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original). With these principles in mind, we will consider the evidence presented to determine whether the Senate

has "fully and completely established" each of the elements necessary for issuance of a preliminary injunction. *Id.* at 694.

Immediate and Irreparable Harm

We first examine whether the Senate has shown that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. *SEIU Healthcare*, 104 A.3d at 508. "[W]here the offending conduct to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established." *Id.* "Statutory violations constitute irreparable harm *per se* . . . ." *Wolk v. School District of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth.), *appeal denied*, 240 A.3d 108 (Pa. 2020); *see also Council 13, American Federation of State, County, and Municipal Employees, AFL-CIO by Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) ("In Pennsylvania, the violation of an express statutory provision per se constitutes irreparable harm . . . .").

Our research failed to disclose any case law stating that a violation of the Pennsylvania *Constitution* is irreparable harm *per se*. Regardless, it is black letter law that one branch of the government may not intrude on the powers of other branches. *See Renner v. Court of Common Pleas of Lehigh County*, 234 A.3d 411, 419 (Pa. 2020) ("The rationale underlying this separation of powers is that it prevents one branch of the government from exercising, infringing upon, or usurping the powers of the other two branches" and "[t]hus, to 'avert the danger inherent in the concentration of power in any single branch or body,' no branch may exercise the functions delegated to another branch.") (citations omitted). It seems obvious, therefore, that exercising the powers and duties of another branch of the government is irreparable harm to the offended branch.

To that end, and as discussed in greater detail below, the Senate has raised a substantial legal question as to whether the Rulemaking constitutes a tax as opposed to a regulatory fee.

For these reasons, we conclude that the Senate has demonstrated irreparable harm and, thus, has met the first prerequisite to issuance of a preliminary injunction. *Cf. Commonwealth v. Snyder*, 977 A.2d 28, 41 (Pa. Cmwlth. 2009) (affirming issuance of preliminary injunction where Commonwealth alleged a credible violation of the statute at issue).

Greater Harm Will Result from Refusing to Grant the Injunction
An Injunction is in the Public Interest
An Injunction is Reasonably Suited to Abate the Offending Conduct
(Balancing of the Harms)

Initially, because the Senate has shown irreparable harm *per se*, we do not need to balance the harms where there is a statutory, or in this case, an alleged constitutional, violation. *Wolk*, 228 A.3d at 611. Even if we perform a balancing of the harms, the Senate has to show that greater harm will result from refusing the injunction rather than from granting it and that the issuance of an injunction will not substantially harm other interested parties, that an injunction is in the public interest, and that an injunction is reasonably suited to abate the offending conduct. *SEIU Healthcare*, 104 A.3d at 502.

On these points, the Senate argues an injunction is necessary because the Rulemaking constitutes a violation of the Constitution, that is, the Rulemaking usurps the General Assembly's exclusive constitutional authority to impose taxes, to enter interstate compacts or agreements, and to enter course-setting legislation regarding air pollution controls. While we determine that the Senate fails to raise a substantial legal question as to whether the APCA restricts the DEP's authority as

the Senate suggests and whether the Rulemaking constitutes an interstate compact or agreement, we agree that the Senate has raised substantial legal questions as to whether Secretary McDonnell's interpretation of Section 7(d) of the RRA infringes upon legislative authority and whether the Rulemaking constitutes an impermissible tax.

We are mindful of Secretary McDonnell's testimony wherein he opined that postponement of implementation of the Rulemaking will delay the Commonwealth's receipt of auction proceeds and their deposit into the Clean Air Fund (to be used to fund programs aimed at reducing air pollution). Secretary McDonnell confirmed, however, that the DEP is currently able to cover existing disbursements. *See* Notes of Testimony (N.T.), 5/10/22, at 134; Senate Ex. 33 (Governor Tom Wolf Executive Budget, 2022-2023, p. 980 (identifying 2020-21 actual and estimated receipts and disbursements and estimated 2022-2023 receipts, including estimated CO_2 auction proceeds, and disbursements)). In his position as Secretary of Environmental Protection and Chair of the EQB, Secretary McDonnell is uniquely qualified to opine as to the effect of an injunction as it relates to the Commonwealth's receipt of auction proceeds.

In addition, Non-profits, which were permitted to participate in the preliminary injunction proceedings, offered witnesses who testified as to the effects of CO_2 emissions on climate change and human health.[21] We view this evidence as

[21] In the *Bowfin* matter, the petitioners filed a motion in limine seeking to preclude any evidence (1) related to the agency's decision regarding the Rulemaking that is not within the Rulemaking Record when determining whether the *Bowfin* Petitioners are likely to succeed on the merits; (2) from fact and expert witnesses as to the purported justifications and benefits of the Rulemaking beyond that found in the Rulemaking itself; and (3) that is not part of the Rulemaking Record for purposes of determining the validity of the Rulemaking. The Court denied the motion in limine on the basis that the Court, sitting in its original jurisdiction and not its appellate jurisdiction, is not limited to reviewing the Rulemaking Record. As the trial court in the matter,
(Footnote continued on next page…)

insufficient. No party presented evidence as to the number of CO_2 allowances that will be available for auction if the Commonwealth joins the RGGI (for all participating states) and how that translates to lower emissions at this time. There was no evidence of how many sources are subject to emissions limitations and how those limitations would affect Pennsylvania covered sources. Similarly, no party offered evidence of anticipated allowance auction pricing if Pennsylvania conducts its own auction and how that may affect Pennsylvania covered sources.

Even accepting for preliminary injunction purposes that implementation of the Rulemaking would result in an immediate reduction in CO_2 emissions from Pennsylvania's covered sources,[22] we conclude that implementation and enforcement of an invalid rulemaking would cause greater harm if the Rulemaking is determined to violate the Constitution. A violation of the law cannot benefit the public interest. *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317, 321 (Pa. 1947) ("The argument that a violation of the law [or Constitution] can be a benefit to the public is without merit.").

We further conclude that an injunction is reasonably suited to abate the effects of the Rulemaking should it be deemed invalid. It would not be prudent to enforce the Rulemaking, with its attendant duties on the DEP and financial and

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we may admit any evidence that is relevant, Pa. R.E. 402, and afford that evidence the weight deemed appropriate. *1198 Butler Street Associates v. Board of Assessment Appeals, County of Northampton*, 946 A.2d 1131, 1138 n.7 ("The trial court, as fact-finder, has discretion over evidentiary weight and credibility determinations.")

[22] We recognize Non-profits' witness Dr. Raymond Najjar's testimony that any reduction is CO_2 emissions is beneficial. Dr. Najjar also explained that CO_2 remains in the atmosphere a long time, that about half of the CO_2 emitted lasts several hundred years, and that about 15% of the original CO_2 emitted remains for about a thousand years, with the remainder taking several thousand more years to dissipate. N.T. 5/11/22, at 298-299. This testimony does not, however, show that the Rulemaking will result in an immediate reduction in CO_2 emissions by Pennsylvania's covered sources.

administrative impacts on covered sources[23] while the challenges to the Rulemaking raise substantial legal issues.

Restore the Parties to the Status Quo

The Senate must also show that a preliminary injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct. *SEIU Healthcare*, 104 A.3d at 502. The status quo for a preliminary injunction is "the last peaceable and lawful uncontested status preceding the underlying controversy." *Hatfield Township v. Lexon Insurance Co.*, 15 A.3d 547, 555 (Pa. Cmwlth. 2011) (quoting *In re Milton Hershey School Trust*, 807 A.2d 324, 333 (Pa. Cmwlth. 2002)). The purpose of the preliminary injunction is to keep the parties in the positions that they were when the case began to preserve the court's ability to decide the matter. *Little Britain Township*, 651 A.2d at 610. When litigation commences shortly before or after the alleged wrongful conduct, the status quo is more easily ascertainable. The matter here commenced, and the Senate filed its Preliminary Injunction Application, prior to publication of the Rulemaking. The status quo changed upon publication of the Rulemaking on April 23, 2022.

We conclude that the Senate's requested relief is broad enough to encompass implementation and enforcement of the Rulemaking post-publication. In its prayer for relief, the Senate requests the Court to "preliminary enjoin all government officials employed by [the DEP], the LRB, and the [Pennsylvania Code], including [Secretary McDonnell] and [the LRB Respondents,] from taking any further action to promulgate, publish, or otherwise codify the [Regulation]."

[23] For example, covered sources are required to submit a complete permit application incorporating the CO_2 Budget Trading Program requirements within the later of six months of April 23, 2022, or twelve months before the date on which the covered source or a new unit at the source starts operating. Senate Ex. 36 (52 Pa. B. at 2521 (25 Pa. Code § 145.322)). In other words, covered sources must go through the permitting process once again. This is in addition to the requirement of purchasing allowances to cover their CO_2 emissions.

Senate Appl. for Prelim. Inj. at 16. The status quo prior to publication of the Rulemaking is restored if implementation and enforcement of the Rulemaking is enjoined.

Clear Right to Relief and Likely to Prevail on the Merits

"For a right [to relief] to be clear, it must be 'more than merely viable or plausible;' however, this requirement is not the equivalent of stating that no factual disputes exist between the parties." *Wolk*, 228 A.3d at 611 (quoting *Ambrogi v. Reber*, 932 A.2d 969, 980 (Pa. Super. 2007)). To show a clear right to relief, the party seeking the preliminary injunction does not need to prove the merits of the underlying claims; rather it must "only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU Healthcare*, 104 A.3d at 506. *Accord Marcellus Shale Coalition v. Department of Environmental Protection*, 185 A.3d 985, 995 (Pa. 2018) ("In the context of a motion for a preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-relief prong.") (citing *SEIU Healthcare*). The Court is satisfied that the Senate has raised substantial legal questions as indicated below.

a. Separation of Powers

In its first Counterclaim to Secretary McDonnell's Petition, the Senate sets forth that article III, section 9 of the Pennsylvania Constitution, *see supra* note 12, establishes the procedures whereby the General Assembly may exercise legislative power by way of concurrent resolutions. Concurrent resolutions are an exercise of legislative authority, with limited exceptions not relevant here, and must be presented to the Governor. Article III, section 9 further grants the General Assembly an opportunity to override a gubernatorial veto pursuant to the same rules

and limitations prescribed in the case of a bill. Section 7(d) of the RRA recognizes the concurrent resolution process for disapproving an executive agency rulemaking and that the procedures in article III, section 9 must be followed.

The Senate avers that once the IRRC grants final approval of a regulation, either the House or the Senate, or both, may within 14 calendar days, report to the House or the Senate a concurrent resolution. 71 P.S. § 745.7(d). During this 14-day period, the agency is prohibited from promulgating the regulation, and this prohibition continues until the regulation has been approved or deemed approved. *Id.* The IRRC approved the Rulemaking here on September 1, 2021, and the Senate Environmental Resources and Energy Committee reported SCRRR1 out of committee and to the full Senate on September 14, 2021, well within the 14-day period found in Section 7(d).

According to the Senate, a standing committee of one chamber can only report resolutions to its own chamber, not to both. Thus, it would not have been possible for the Senate Environmental Resources and Energy Committee to report SCRRR1 to the full House for consideration.

The full Senate adopted SCRRR1 on October 27, 2021. The full House adopted SCRRR1 on December 15, 2021. Thus, when Secretary McDonnell sent the Rulemaking to the LRB for publication on November 29, 2021, SCRRR1 was adopted by the full Senate but not by the full House. At the time that it filed its Counterclaims, the General Assembly had 10 legislative days or 30 calendar days to override the Governor's veto of SCRRR1. Accordingly, the Senate averred that Secretary McDonnell violated the RRA when he attempted to promulgate the Rulemaking before it was either approved or deemed approved pursuant to Section 7(d) of the RRA. Secretary McDonnell's actions, according to the Senate's

Counterclaim, disregarded SCRRR1, a legislative action duly adopted by the Senate and the House, and usurped the General Assembly's opportunity to override the Governor's veto.

In its Preliminary Injunction Application, the Senate states broadly that Secretary McDonnell's interpretation of Section 7(d) of the RRA is incorrect, and his act of sending the Rulemaking to the LRB for publication while a concurrent resolution disapproving the Rulemaking remained pending was unlawful and violated articles II and III of the Pennsylvania Constitution.

The Senate's claims that Secretary McDonnell's actions of submitting the Rulemaking for publication prior to the General Assembly's opportunity to override the Governor's veto of SCRRR1 are technically moot because the full Senate failed to override the veto on April 4, 2022. In a prior status conference, however, *all* parties maintained that the issue surrounding interpretation of Section 7(d) of the RRA is an exception to the mootness doctrine because it is capable of repetition but evading review. The issue of mootness is therefore more properly addressed in a determination on the merits rather than in a request for a preliminary injunction where all parties previously represented to the Court that this issue is an exception to the mootness doctrine.

Moreover, the Senate's position relates directly to Secretary McDonnell's request for declaratory and summary relief that the House and the Senate must concurrently consider resolutions and that the Rulemaking was deemed approved on October 14, 2021. If it is as Secretary McDonnell maintains and the Rulemaking was deemed approved in October 2021, the Governor's veto of SCRRR1 on January 10, 2022, was a nullity. There would have been no need for the Governor to veto SCRRR1 if the Rulemaking was deemed approved on October

14, 2021, and no need for the Senate's attempt to override the veto. These actions by the Governor and the General Assembly lend support for the conclusion that there is valid question as to the interpretation of Section 7(d) of the RRA.

Finally, and certainly not controlling, we notice that the language of SCRRR1, reported months before this controversy arose, is consistent with the Senate's current position, that is, Section 7(d) of the RRA provides for consecutive consideration by each chamber of the General Assembly. SCRRR1 states: "Whereas, the House of Representatives shall have 30 calendar days or 10 legislative days, whichever is longer, *from the date on which the concurrent resolution has been adopted by the Senate to adopt the concurrent resolution* . . . ." Senate Ex. 2, at 4 (capitalization omitted and emphasis added).

For these reasons, we conclude that the Senate has raised a substantial legal question involving the separation of powers.

b. Violation of the APCA

Next, the Senate argues that Secretary McDonnell's act of sending the Rulemaking to the LRB was an unconstitutional infringement on the General Assembly's legislative authority because it goes beyond the authority granted to the DEP under the APCA.[24] The Court cannot conclude that the Senate's argument in this regard presents a substantial legal question, let alone establishes a clear right to relief or a likelihood of prevailing on the merits.

[24] While the DEP submitted the Rulemaking for publication by the LRB, the Rulemaking was promulgated by the EQB. The EQB was established in 1970 by the addition of the Act of December 3, 1970, P.L. 834, to Section 1920-A of The Administrative Code of 1929 (Administrative Code), Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-20. The EQB was designated with "the responsibility for developing a master environmental plan for the Commonwealth," with the power/duty "to formulate, adopt and promulgate such rules and regulations as may be determined by the [EQB] for the proper performance of the work of the [DEP]." Sections 1920-A(a) and (b) of the Administrative Code, 71 P.S. §§ 510-20(a), (b).

Section 3 of the APCA defines "AIR CONTAMINANT" to include a "gas." 35 P.S. § 4003. There is no dispute herein that CO_2 constitutes a "gas." Section 3 defines "AIR CONTAMINATION SOURCE" as "[a]ny place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant." *Id.* Further, Section 3 defines "AIR POLLUTION" as "[t]he presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of . . . gases . . . ." *Id.*

Section 5(a)(1) of the APCA specifically empowers the EQB to "[a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution . . . throughout the Commonwealth . . . which shall be applicable to all air contamination sources," including the establishment of "maximum allowable emission rates of air contaminants from such sources . . . ." 35 P.S. § 4005(a)(1) (emphasis added).[25]

Section 4 of the APCA sets forth 27 separate powers and duties of the DEP. This includes the power to enter any property to inspect "any air contamination source . . . for the purpose of ascertaining the compliance or non-compliance with this act" or "any rule or regulation promulgated" thereunder. Section 4(2) of the APCA, 35 P.S. § 4004(2). Section 4(27) also empowers the DEP to "[d]o any and all other acts and things not inconsistent with any provision of this act, which it may deem necessary or proper for the effective enforcement of this act

[25] Broadly interpreted, Section 5(a)(1)'s grant of authority to "establish maximum allowable emission rates of air contaminants from such sources" could encompass the Rulemaking since it establishes the maximum number of allowances available in Pennsylvania, which, in turn, determines the maximum tonnage of CO_2 emissions permitted to be expelled from covered sources in a given year.

and the rules or regulations promulgated under this act." 35 P.S. § 4004(27). *See generally Rushton Mining Co. v. Commonwealth*, 328 A.2d 185 (Pa. Cmwlth. 1974) (amendments to APCA did not evidence General Assembly's intent to restrict the DEP's rulemaking power to highly regulatory procedures in the control and prevention of air pollution; rather, Section 5(d)(2) of the APCA granted "broad and discretionary" authority to the DEP).

Given the EQB's specific authority to promulgate regulations for the DEP under Section 1920-A(b) of the Administrative Code, and the broad authority granted to the DEP under Section 4(27) of the APCA, Secretary McDonnell's act of sending the Rulemaking to the LRB does not appear to be an unconstitutional infringement on the General Assembly's legislative authority.

c. Interstate Compact or Agreement

The Senate avers that the Rulemaking violates the Pennsylvania Constitution because only the General Assembly may enter interstate compacts and agreements and, specifically, Section 4(24) of the APCA states the DEP may "[c]ooperate with the appropriate agencies of the United States or of other states *or any interstate agencies* with respect to the control, prevention, abatement and reduction of air pollution, and *where appropriate formulate interstate air pollution control compacts or agreements for the submission thereof to the General Assembly*." 35 P.S. § 4004(24) (emphasis added). The Senate suggests the Rulemaking is an interstate compact or agreement for which the APCA demands that the DEP submit to the General Assembly for approval. We disagree.

Interstate compacts are agreements enacted into state law and function as contracts between states and as statutes within those states. *See generally Aveline v. Pennsylvania Board of Probation & Parole*, 729 A.2d 1254, 1257 (Pa. Cmwlth.

1999). "Compacts have the characteristics of contracts because the enactment of the compact terms as part of an enabling statute by one state is viewed as an offer. The offer may be accepted through the enactment of statutes, including the same compact terms by another state." *Id*. at 1257 n.10. Interstate compacts, however, require congressional approval. Article I, Section 10, Clause 3 of the United States (U.S.) Constitution, U.S. CONST., art. I, § 10, c.3, states in relevant part and with emphasis added:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State*, or foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit delay.

When read literally, the Compact Clause would require that states obtain congressional approval before entering any agreement between themselves, regardless of form, duration, or interest of the United States. It appears, however, that the U.S. Supreme Court has limited Article I, Section 10's application to agreements that encroach on federal sovereignty. *See Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) (Massachusetts and Connecticut statutes permitting out-of-state bank holding company with principal place of business in any other New England state to acquire in-state bank provided that other state accords reciprocal privileges did not violate Compact Clause because the Bank Holding Act of 1956, 12 U.S.C. §§ 1841-1852, contemplated such enactments); *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 470 (1978) (multistate agreement relating to multistate taxpayers did not violate Compact Clause because agreements did not tend to increase political power of states that would encroach upon or interfere with

supremacy of the United States); *New Hampshire v. Maine*, 426 U.S. 363 (1976) (states' consent decree relating to meaning of terms in 1740 decree setting state boundaries was not compact because establishment of boundary line would not lead to increase in states' political power or influence and thus encroach on exercise of federal authority); *Commonwealth of Virginia v. State of Tennessee*, 148 U.S. 503 (1893) (selection of parties to settle boundary dispute was not a compact or agreement unless boundary led to increase or decrease of political power or influence of states affected). Thus, the lack of Congressional approval of the RGGI does not pose an obstacle to the determination of whether the Rulemaking requires the General Assembly's approval to enter an interstate compact or agreement.

In an analogous case, however, the United States District Court for the Eastern District of California (District Court) addressed whether a cap-and-trade program was an interstate compact. In *United States v. California*, 444 F. Supp. 3d 1181 (E.D. Cal. 2020), *appeal dismissed*, (9th Cir., No. 20-16789, filed April 22, 2021), the California legislature passed the Global Warming Solutions Act[26] in 2006 and vested the California Air Resources Board (CARB) with the power to adopt rules and regulations to achieve the Global Warming Solutions Act's goals of reducing greenhouse gas emissions. CARB determined in 2008 that the best way to reduce emissions was to enact a cap-and-trade program that links to other programs to create a regional market system.

Thereafter, in 2007, the premiers of several Canadian provinces and the governors of several western states formed the Western Climate Initiative (WCI), which was intended to be a "collaboration of independent jurisdictions working together to identify, evaluate, and implement policies to tackle climate change at a

[26] Cal. Health & Safety Code §§ 38500-38599.11 (2006).

regional level." 444 F. Supp. 3d at 1187. The WCI formed WCI, Inc., a non-profit entity to support the implementation of state and provincial greenhouse gas emissions trading programs. The WCI, Inc. board was comprised of voting and non-voting members from each participating jurisdiction.

Thereafter, CARB proposed a cap-and-trade program that relied upon the WCI's design recommendations; it formally adopted the cap-and-trade program in October 2011 and began using WCI Inc.'s technical and administrative services. When CARB passed regulations to establish the cap-and-trade program, it adopted a framework for linkage, that is, to accept the allowances from other states and provinces. The law required CARB to notify the governor of its intent to link to another state or province. If approved by the governor, covered entities could use allowances purchased through linked jurisdictions to satisfy their obligations in California, and vice versa.

Relevantly, California linked its cap-and-trade program with Quebec, Canada, and they entered into a 2017 Agreement of Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (Agreement). In 2019, the United States brought an action against the State of California alleging, among other things, that the Agreement violated the Treaty and Compact Clauses of Article 1, Section 10 of the U.S. Constitution.

The United States moved for summary judgment. In concluding that the Agreement did not violate the Compact Clause, the District Court considered whether the Agreement had the classic indicia of a compact: "(1) provisions that required reciprocal actions for the agreement's effectiveness; (2) a regional limitation; (3) a joint organization or body for regulatory purposes; and (4) a prohibition on the agreement's unilateral modification or termination." *Id.* at 1194.

Reviewing the compact criteria here, the DEP currently does not have a service agreement with RGGI, Inc., or any other written agreement with the participating states. We only have evidence of the RGGI, Inc. By-Laws, which would indicate that the Rulemaking is not a compact. There is no reciprocal agreement needed for the Rulemaking's effectiveness. Indeed, Secretary McDonnell testified that the Commonwealth did not have to join the RGGI to auction its allowances and that no other participating state can control what the Commonwealth does. N.T. 5/10/22, at 154; *see also* Senate Ex. 36 (52 Pa. B. at 2471, 2545 (2022) (Rulemaking § 145.401(b) ("Should the [DEP] find that the conditions in subsection (a) (relating to participation in the RGGI, Inc. auction) are no longer met, the [DEP] may determine to conduct a Pennsylvania-run auction ….")). The Rulemaking could operate on its own.

Moreover, it appears that each state establishes its own annual CO_2 emissions budget, *see* Senate Ex. 36, 52 Pa. B. at 2476 ("Each participating state establishes its own annual CO_2 emissions budget which sets the total amount of CO_2 emitted from fossil fuel-fired [electric generation units] in a year."), and no witness offered what the regional budget would be considering the Commonwealth's participation.

Although RGGI, Inc. will provide technical and administrative services, nothing in its January 2019 By-Laws describe any regulatory authority over the Rulemaking. Senate Ex. 22 (Amended and Restated By-Laws of RGGI, Inc. as of January 3, 2019), at 9, Art. XII ("The Corporation shall have no regulatory or enforcement authority with respect to any existing or future program of any Participating State, and all such sovereign authority is reserved to each Participating State.").

As to unilateral modification, the testimony established that the DEP may amend the Rulemaking so long as it is consistent with the RGGI's model rule. N.T., 5/10/22, at 159. Finally, the testimony established that the RGGI, Inc. service agreement will dictate the terms/procedures for termination of a state's participation in the RGGI. *Id.* at 115.

While the fact that any modification of the Rulemaking may require approval of the other participating states, this single factor does not appear to outweigh the remaining criteria suggesting that the Rulemaking is not an interstate compact or agreement. Thus, we cannot conclude for preliminary injunction purposes that the Senate has raised a substantial legal question as to whether the Rulemaking constitutes an interstate compact or agreement in violation of the Pennsylvania Constitution and Section 4(24) of the APCA.

d. Imposition of a tax

The Senate asserts that the Rulemaking is unconstitutional because it usurps its authority, as members of the General Assembly, to levy taxes under the Pennsylvania Constitution. The power to levy taxes is specifically reserved to the General Assembly. PA. CONST. art. II, § 1; *Thompson v. City of Altoona Code Appeals Board*, 934 A.2d 130, 133 (Pa. 2007) ("It is well[]settled that '[t]he power of taxation . . . lies solely in the General Assembly of the Commonwealth acting under the aegis of the Constitution.'") (quoting *Mastrangelo v. Buckley*, 250 A.2d 447, 452-53 (Pa. 1969)). While the General Assembly may delegate the power to tax, such as to a municipality or political subdivision, any such delegation must be "*plainly* and *unmistakably* conferred . . . and the grant of such right must be strictly construed and not extended by implication." *Mastrangelo*, 250 A.2d at 453 (emphasis in original); *see also* PA. CONST. art. III, §31 (placing restrictions on

General Assembly's right to delegate its taxing authority). The Senate states that there has been no such delegation here under the APCA, the statutory authority relied upon by the DEP in enacting the current Rulemaking.

The APCA specifically permits the imposition of fees to cover the costs of administering any air pollution control program authorized by the statute. Specifically, Section 6.3(a) of the APCA "authorizes the establishment of fees sufficient to cover the indirect and direct costs of administering the air pollution control plan approval process, operating permit program required by Title V of the Clean Air Act,[27] other requirements of the Clean Air Act and . . . to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act.[28]" 35 P.S. § 4006.3(a).[29] Additionally, Section 9.2(a) of the APCA allows for the collection and deposit of "fines, civil penalties and fees into . . . the Clean Air Fund." 35 P.S. § 4009.2(a).[30]

This Court has previously considered the question of what constitutes a proper regulatory fee as opposed to a tax. We have stated:

> A licensing fee, of course, is a charge which is imposed pursuant to a sovereign's police power for the privilege of performing certain acts, and which is intended to defray the expense of regulation. It is to be distinguished from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.

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[27] 42 U.S.C.A. §§ 7661-7661f.

[28] 42 U.S.C.A.§ 7661a.

[29] Added by the Act of July 9, 1992, P.L. 460.

[30] Added by the Act of October 26, 1972, P.L. 989.

Simpson v. City of New Castle, 740 A.2d 287, 292 (Pa. Cmwlth. 1999) (emphasis added) (quoting *Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984)).[31]

We cannot, at this time, agree with Secretary McDonnell's argument that the allowance auction proceeds do not constitute a tax. First, it is undisputed that the auction proceeds are remitted to the participating states. Senate Ex. 22 (52 Pa. B. at 2482 ("The CO_2 allowances purchased in the multistate auctions generate proceeds that are provided back to the participating states, including the Commonwealth, for investment in initiatives that will further reduce CO_2 emissions.")). Secretary McDonnell's position is unpersuasive where it is undisputed that the auction proceeds are to be deposited into the Clean Air Fund, are generated as a direct result of the Rulemaking, and the DEP anticipates significant monetary benefits from participating in the auctions. In addition, and importantly, it is unclear under what authority the DEP may obtain the auction proceeds for Pennsylvania allowances purchased by non-Pennsylvania covered sources not subject to the DEP's regulatory authority and which are not tethered to CO_2 emissions in Pennsylvania.

Second, the Rulemaking record, namely the DEP's 2020 modeling, estimated that only 6% of the proceeds from the CO_2 allowances auctions would be for "programmatic costs related to administration and oversight of the CO_2 Budget

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[31] This definition has remained consistent over time. In *Pennsylvania Liquor Control Board v. Publicker Commercial Alcohol Co.*, 32 A.2d 914, 917 (Pa. 1943), our Pennsylvania Supreme Court declared as follows:

> A license fee is a charge [that] is imposed by the sovereign, in the exercise of its police power, upon a person within its jurisdiction for the privilege of performing certain acts and which has for its purpose the defraying of the expense of the regulation of such acts for the benefit of the general public; it is not the equivalent of or in lieu of an excise or a property tax, which is levied by virtue of the government's taxing power solely for the purpose of raising revenue. . . .

Trading Program (5% for [DEP] and 1% for RGGI, Inc.)." 52 Pa. B. at 2508. The remaining proceeds from the CO_2 allowances auctions will be deposited into an air pollution reduction account within the Clean Air Fund maintained by the DEP, with the use of such proceeds exclusively limited to the elimination of air pollution. *See* 52 Pa. B. at 2545, 2545 (Rulemaking §§ 145.343 and 145.401).

Third, Secretary McDonnell acknowledged that from 2016 to 2021, the Clean Air Fund annually maintained between $20 million and $25 million in funds, the total expenditures exceeded the receipt of funds by $1 million for the years 2016 to 2020, but with the inclusion of anticipated CO_2 auction allowance proceeds, the estimated receipts for the 2022-23 budget year exceed $443 million.[32] N.T., 5/10/2022, at 132-35. In fact, the DEP's total budget for the 2021-22 fiscal year, *i.e.*, the total funds appropriated to the DEP from the General Fund, was slightly in excess of $169 million. *See Pennsylvania Treasury, General Fund Current Fiscal Year Enacted Budget: Appropriated Departments, https://www.patreasury.gov/transparency/budget.php* (last visited June 23, 2022).

Based on the above, the Court concludes that the Senate has raised a substantial legal question with respect to this issue.

e. Public hearing requirement

Finally, the Senate contends that the Rulemaking was void *ab initio* because the proper procedural requirements for developing regulations under the Commonwealth Documents Law and the APCA were not followed. Again, the Court cannot conclude that the Senate's argument in this regard presents a

[32] Again, this was merely an estimate based on Pennsylvania's participation in RGGI, Inc., CO_2 allowances auctions, which has been delayed by the current litigation and the fact that the Rulemaking was not published until April 23, 2022.

substantial legal question, let alone establishes a clear right to relief or a likelihood of prevailing on the merits.

This Court has recently addressed the process for the promulgation of regulations by Commonwealth agencies in *Corman v. Acting Secretary of the Pennsylvania Department of Health*, 267 A.3d 561 (Pa. Cmwlth.) (en banc), *affirmed*, 266 A.3d 452 (Pa. 2021). We explained as follows:

> An agency derives its power to promulgate regulations from its enabling act. An agency's regulations are valid and binding only if they are: (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable. . . . [W]hen promulgating a regulation, an agency must comply with the requirements set forth in the Commonwealth Documents Law . . . the Commonwealth Attorneys Act . . ., and the [RRA]. Regulations promulgated in accordance with these requirements have the force and effect of law. A regulation not promulgated in accordance with the statutory requirements will be declared a nullity.

Id. at 571-72 (quoting *Germantown Cab Co. v. Philadelphia Parking Authority*, 993 A.2d 933, 937-38 (Pa. Cmwlth. 2010)).

The "purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To that end, an agency must invite, accept, review and consider written comments from the public regarding the proposed regulation; it may hold public hearings if appropriate. [Section 202 of the Commonwealth Documents Law,] 45 P.S. § 1202. After an agency obtains the Attorney General's approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the [LRB] for publication in the *Pennsylvania Bulletin*. Section[s] 205, 207 of the Commonwealth Documents Law, 45 P.S. §§ 1205, 1207." *Id.* at 572.

With respect to the APCA, Section 7(a) provides, in pertinent part, as follows:

> Public hearings shall be held by the [EQB] or by the [DEP], acting on behalf and at the direction or request of the [EQB], in any region of the Commonwealth affected before any rules or regulations with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion. When it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for more than one region of the Commonwealth, the [EQB] may hold one hearing for any two contiguous regions to be affected by such rules and regulations. Such hearing may be held in either of the two contiguous regions.

35 P.S. § 4007(a). Additionally, Section 7(e) of the APCA requires that the "[f]ull opportunity to be heard with respect to the subject of the hearing shall be given to all persons in attendance. . . ." 35 P.S. § 4007(e). The Senate contends that these sections of the APCA require in-person hearings.

There can be no dispute that the EQB complied with the requirement of Section 202 of the Commonwealth Documents Law in this case. Indeed, the parties stipulated to the fact that while the Rulemaking was under development, the DEP held a public comment period, which opened November 7, 2020, and closed January 14, 2021, during which the DEP received more than 14,000 written comments. 4/20/22 Stip., ¶¶ 18, 23.

The parties also stipulated to the fact that during the public comment period, the DEP held 10 virtual meetings on the Rulemaking, but it did not hold any in-person hearings. 4/20/22 Stip., ¶¶ 19, 22. However, Section 7(a) of the APCA merely requires public hearings; there is no requirement that the hearings be in-person. While Section 7(e) of the APCA could be read to imply that the hearings should be in-person by virtue of its reference to all persons "in attendance," 35 P.S. § 4007(e), the Court is also cognizant that the public hearings were held in the midst of the COVID-19 pandemic. In that regard, by Joint Stipulation of Facts dated May 7, 2022, the parties stipulated as to the existence of Governor Wolf's July 10, 2020,

Executive Order authorizing Commonwealth agencies to conduct administrative proceedings online by video or telephonic means during the pandemic.[33]

Moreover, the parties further stipulated that the public hearings were advertised in the Pennsylvania Bulletin, through social media, on the DEP's website, and via publication in twelve newspapers of general circulation across the Commonwealth. 4/20/22 Stip., ¶ 20. The hearings were accessible by means of any phone connection, including landline and cellular service, or internet connection, and were held at varying times, including evening hours outside of typical work hours, resulting in "record participation" by the public. 52 Pa. B. at 2493. Indeed, the parties stipulated that the DEP heard testimony from 449 individuals, which amounted to more than 32 hours of testimony, during the virtual public hearings. 4/20/22 Stip., ¶ 21; *see also* Cmwlth. Exs. 38(a)-(j). As a final note, the Senate failed to produce evidence establishing that any person in the affected regions was unable to participate in the virtual public comment proceedings due to accessibility issues.

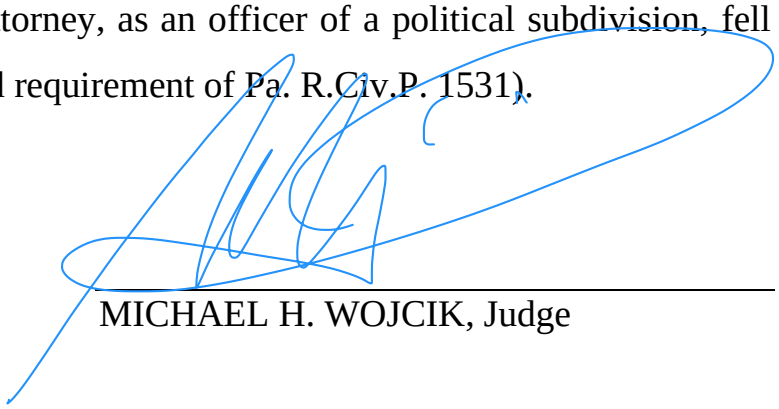
For these reasons, the written comment period and virtual public hearings conducted by the DEP do not appear to run afoul of the Commonwealth Documents Law or the APCA.

Conclusion

Based upon the foregoing, the Court concludes that the Senate has met its burden of proof for a preliminary injunction to issue. Accordingly, Mr. DeLiberato and Ms. Mendelsohn are enjoined from proceeding to codification of the CO_2 Budget Trading Program in the Pennsylvania Code and the DEP is enjoined from implementing and enforcing the Rulemaking until further order of Court.

[33] This fact was included in a Joint Stipulation of Facts dated May 6, 2022, in the related *Bowfin* matter. However, the parties in the present matter, in a May 7, 2022, Joint Stipulation of Facts, acknowledged and incorporated by reference the *Bowfin* stipulation of facts.

Because President Pro Tempore of the Senate Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the Senate Appropriations Committee Pat Browne are members of the Commonwealth government, we conclude that they need not file a bond. *Cf. Lewis v. City of Harrisburg*, 631 A.2d 807 (Pa. Cmwlth. 1993) (holding that a district attorney, as an officer of a political subdivision, fell within the exception to the bond requirement of Pa. R.Civ.P. 1531).



MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

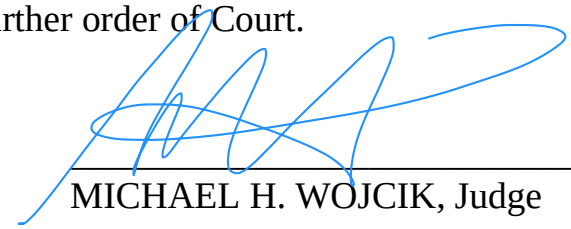
Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board,	:	
Petitioner	:	
v.	:	No. 41 M.D. 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J. Mendelsohn, Director of the Pennsylvania Code and Bulletin,	:	
Respondents	:	

O R D E R

AND NOW, this 27th day of July, 2022, upon consideration of the Application for Relief in the Nature of a Preliminary Injunction, filed on behalf of Intervenors President Pro Tempore of the Pennsylvania Senate Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the Senate Appropriations Committee Pat Browne, and after hearing on the issue, the Application is **GRANTED**.

Respondents the Legislative Reference Bureau, Vincent D. DeLiberato and Amy Mendelsohn are **ENJOINED** from proceeding to codification of the CO_2 Budget Trading Program (Rulemaking) in the Pennsylvania Code and the

Department of Environmental Protection is **ENJOINED** from implementing and enforcing the Rulemaking until further order of Court.



MICHAEL H. WOJCIK, Judge

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I, Jessica O'Neill, hereby certify that the word count for the foregoing Brief, excluding supplementary matters, *see* Pa. R.A.P. 2135(a)(1), is 13,954 words based on the Microsoft Word system used to prepare the brief, and thus complies with the word limit set forth in Pa. R.A.P. 2135(a)(1).

Dated: November 4, 2022 */s/ Jessica R. O'Neill*
Jessica R. O'Neill (Pa. I.D. No. 205934)

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 4, 2022 */s/ Jessica R. O'Neill*
Jessica R. O'Neill (Pa. I.D. No. 205934)

PROOF OF SERVICE

I certify that (i) on this day I caused a copy of the foregoing document to be served via the Court's PAC File System upon all persons registered to receive service in this matter, and (ii) two hard copies of the foregoing document will be served via first class U.S. Mail, postage prepaid upon counsel of record for all parties in this matter.

Dated: November 4, 2022

/s/ Jessica R. O'Neill
Jessica R. O'Neill (Pa. I.D. No. 205934)