

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.

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.

Pennsylvania Department of
Environmental Protection and

CASES NOT CONSOLIDATED

No. 41 M.D. 2022

No. 247 M.D. 2022

Heard: June 24 and 27, 2022

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 Intervenor 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) CO₂ 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 (electric generation suppliers with nameplate capacity of 25 megawatts or more) to purchase one allowance for each ton of carbon dioxide (CO₂) they emit. Each participating state in the RGGI establishes a declining CO₂ budget limiting the total CO₂ 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, House⁶) 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

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 re-passed 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 Law⁸ 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 CO₂ 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 Interconnection⁹ 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.