IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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: May 10-11, 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

Presently before the Court is the Application for Preliminary Injunction (Preliminary Injunction Application) filed on behalf of 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 (collectively, Petitioners). After hearings held on May 10 and 11, 2022, the Preliminary Injunction Application is **GRANTED**.

Parties

Petitioners Bowfin KeyCon Holdings, LLC, Chief Power Finance II, LLC, Chief Power Transfer Parent, LLC, and KeyCon Power Holdings, LLC, are Delaware limited liability companies that are partial owners of the Keystone Generating Station and Conemaugh Generation Station, each of which is a Pennsylvania-based fossil fuel-fired power plant that has a nameplate capacity of 25 megawatts (MW) or greater. Joint Stipulation of Facts (Stip.) ¶¶ 1-5. Petitioner GenOn Holdings, Inc. is a Delaware corporation that holds ownership interests in various Pennsylvania based fossil fuel-fired power plants that have nameplate capacities of 25 MW or greater.[1] Stip. ¶ 6.

Petitioner Pennsylvania Coal Alliance (PCA) is a Pennsylvania non-profit membership organization and the principal trade organization that represents underground and surface bituminous coal operators in Pennsylvania. Stip. ¶ 8. Petitioner United Mine Workers of America (UMWA) is a non-profit national labor organization that represents the nation's active and retired organized coal miners. Stip. ¶ 9. Petitioner International Brotherhood of Electrical Workers (IBEW) is a non-profit national labor organization that represents active and retired skilled electricians and related professionals who are engaged in a broad array of U.S.

[1] Bowfin KeyCon Holdings, LLC, Chief Power Finance II, LLC, KeyCon Power Holdings, LLC, Chief Power Transfer Parent, LLC, and GenOn Holdings, Inc., are collectively referred to as the Petitioner Plant Owners.

industries. Stip. ¶ 10. Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB) is a non-profit national labor organization whose members include workers who are actively engaged in, and workers who are retired from being engaged in, various skilled trades of welding and fabrication of boilers, ships, pipelines, and other industrial facilities and equipment in Pennsylvania as well as other states and Canada. Stip. ¶ 11.

Respondents include the Pennsylvania Department of Environmental Protection (DEP), an administrative agency that is part of the Executive Department of the Commonwealth, and the Pennsylvania Environmental Quality Board (EQB), a 20-member independent, administrative body of the Commonwealth that is statutorily charged with, among other things, promulgating environmental regulations. Stip. ¶¶ 12-13.

In addition, there are presently two groups of proposed intervenors in this matter.[2] The first group includes Constellation Energy Corporation, a Pennsylvania corporation that owns Pennsylvania-based fossil fuel-fired power plants with a nameplate capacity of 25 MW or greater, and Constellation Energy Generation, LLC, which owns and operates a fleet of fossil and non-fossil fuel-fired electric generation assets, including natural gas, petroleum, nuclear, hydroelectric, wind, and solar.[3] Stip. ¶¶ 14-15.

The second group includes Citizens for Pennsylvania's Future, a statewide environmental advocacy organization with over 1,100 members across the Commonwealth; Clean Air Council, a member-supported, non-profit environmental

[2] By order dated May 4, 2022, this Court granted leave to the proposed intervenors to participate in the Preliminary Injunction Application hearing subject to the Court's future disposition of their respective Applications for Leave to Intervene.

[3] These proposed intervenors are hereafter referred to collectively as Proposed Intervenor Constellation.

organization dedicated to protecting everyone's right to a healthy environment with approximately 8,000 members across the Commonwealth; Sierra Club and its Pennsylvania Chapter, a national membership organization with over 31,000 members in Pennsylvania; the Natural Resources Defense Council, a non-profit environmental membership organization that has more than 16,000 members in Pennsylvania, and the Environmental Defense Fund, a nonpartisan, non-profit organization with over 19,000 members in the Commonwealth.[4] Stip. ¶¶ 16-20.

Procedural History

On October 3, 2019, Governor Tom Wolf issued Executive Order 2019-07 directing DEP to "develop and present to the [EQB] a proposed rulemaking package to abate, control, or limit [CO_2] emissions from fossil-fuel-fired electric power generators, which rulemaking package shall be authorized by the Act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the Air Pollution Control Act ['APCA']"[5] and to "engage with PJM Interconnection[6] to promote the integration of this program in a manner that preserves orderly and competitive economic dispatch within PJM and minimizes emissions leakage."[7] Stip. ¶¶ 22-23. In response, DEP developed Rulemaking #7-559 (Rulemaking). Stip. ¶ 25.

The Rulemaking establishes a program to limit the emissions of CO_2 from fossil fuel-fired electric generating units (EGUs) located in the Commonwealth

[4] These proposed intervenors are hereafter referred to collectively as Proposed Non-profit Intervenors.

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

[6] PJM Interconnection is a regional transmission organization that coordinates the movement of wholesale electricity through 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. Stip. ¶ 24.

[7] *See* 4 Pa. Code §§ 7a.181–7a.183.

with a nameplate capacity equal to or greater than 25 MW. Stip. ¶ 26. The Rulemaking requires the EGUs to obtain allowances for each ton of CO_2 emitted and imposes permitting, monitoring, reporting, and record-keeping requirements on them. Stip. ¶ 27. It is the position of DEP Secretary Patrick J. McDonnell,[8] DEP, EQB, Proposed Intervenor Constellation, and Proposed Non-profit Intervenors "that CO_2 is a 'pollutant' that can be regulated under Pennsylvania's [APCA]." Stip. ¶ 28.

Under the Rulemaking, Pennsylvania will distribute CO_2 allowances available to each EGU through quarterly regional allowance auctions. The Rulemaking contains a declining CO_2 allowance trading budget, that would incrementally reduce the number of CO_2 allowances allocated by DEP to the air pollution reduction account for sale via an allowance auction. Stip. ¶ 29. The Rulemaking would enable DEP to participate in a multistate CO_2 allowance auction, such as the Regional Greenhouse Gas Initiative (RGGI or Initiative), provided that participation could provide benefits to the Commonwealth that meet or exceed the benefits conferred on Pennsylvania through its own Pennsylvania-run auction process. Stip. ¶ 30. Eleven other states currently participate in RGGI, namely Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia. Stip. ¶ 31.

To become a "Participating State" in RGGI, a state is required to (1) develop a regulation sufficiently consistent with the RGGI Model Rule and (2) sign a contract between the state agency and RGGI, Inc., to engage RGGI, Inc.'s services. Stip. ¶ 32. RGGI, Inc., is a 501(c)(3) non-profit corporation created to facilitate

[8] When this action was initiated, Patrick J. McDonnell was the Secretary of DEP and Chairperson of EQB. His service with the Commonwealth ended on July 1, 2022. Ramez Ziadeh is the current Acting Secretary of DEP and Acting Chairperson of EQB. However, for ease of discussion, we will continue to refer to Secretary McDonnell.

administrative and technical support services to Participating States in RGGI. Stip. ¶ 33. The Rulemaking contains certain, limited "exemptions" from the scope of its applicability, none of which are applicable in this proceeding. Stip. ¶ 34. In developing the Rulemaking, DEP performed certain modeling that was designed to forecast, among other things, the economic and environmental impacts that would result from the Rulemaking. The modeling assumed that Pennsylvania would begin to participate in RGGI auctions starting in the first quarter of 2022. The modeling was released in April 2020 and updated in 2021. Stip. ¶ 35. Any proceeds received by DEP from RGGI auctions and civil fines and penalties for excess emissions will be deposited into the Clean Air Fund. Stip. ¶ 36.

On July 10, 2020, Governor Tom Wolf signed an Order authorizing Commonwealth agencies to conduct administrative proceedings online by video or telephonic means. Stip. ¶ 37. On November 7, 2020, EQB published a proposed version of the Rulemaking (Proposed Rulemaking) in the Pennsylvania Bulletin, which opened a public comment period that closed on January 14, 2021. Stip. ¶ 38. On September 15, 2020, during a virtual meeting, EQB adopted Annex A of the Proposed Rulemaking.[9] Stip. ¶ 39. During the public comment period, DEP held ten meetings on the Rulemaking across five days: December 8, 9, 10, 11, and 14, 2020. Pursuant to the Governor's order of November 27, 2020, these meetings were held virtually due to the COVID-19 Pandemic. Stip. ¶ 40. The public hearings were advertised in the Pennsylvania Bulletin, through social media, on DEP's website, and via publication in twelve newspapers of general circulation across the Commonwealth. Stip. ¶ 41.

[9] Annex A of the Proposed Rulemaking included new regulations under Title 25, Chapter 145 of DEP's regulations related to the CO_2 Budget Trading Program.

In order to provide public comment during the virtual public hearings, participants were required to sign up prior to the start of the virtual public hearing. DEP heard testimony from 449 individuals during more than 32 hours of testimony across the ten virtual hearings. Stip. ¶ 42. DEP did not hold any in-person hearings to receive public comment on the Rulemaking due to the COVID-19 Pandemic. Stip. ¶ 43. During the public comment period, DEP received more than 14,000 written comments. Stip. ¶ 44.

EQB adopted the Rulemaking in final form on July 13, 2021. Stip. ¶ 45. The Rulemaking was approved for form and legality by the Governor's Office of General Counsel on July 26, 2021. Stip. ¶ 46. The Independent Regulatory Review Commission (IRRC) approved the Rulemaking on September 1, 2021, finding that the regulation was in the public interest. Stip. ¶ 47. On September 14, 2021, the Senate Environmental Resources and Energy (ERE) Committee reported out of committee to the full Senate chamber Senate Concurrent Regulatory Review Resolution (S.C.R.R.R.) 1, disapproving the Rulemaking pursuant to and in accordance with Section 7(d) of the Regulatory Review Act (RRA), Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. § 745.7(d). Stip. ¶ 48. Section 7(d) of the RRA establishes the procedure for the General Assembly to exercise its legislative power to disapprove final-form regulations. Stip. ¶ 49. The Senate held session days on September 21, 22, 27, 28, and 29 and October 18, 19, 25, 26, and 27, 2021. Stip. ¶ 50. The House held session days on September 15 (nonvoting), 20, 21, 22, 27, 28, and 29; October 4, 5, 6, 25, 26, and 27; November 8, 9, 10, 15, 16, and 17; and December 13, 14, and 15. Stip. ¶ 51.

On October 27, 2021, the full Senate voted to adopt S.C.R.R.R. 1. Stip. ¶ 52. On November 8, 2021, S.C.R.R.R. 1 was reported from the House ERE Committee to the full House chamber. Stip. ¶ 53. The Rulemaking was approved

for form and legality by the Office of the Pennsylvania Attorney General on November 24, 2021. Stip. ¶ 54. On December 15, 2021, the full House voted to adopt S.C.R.R.R. 1. Stip. ¶ 55. On January 10, 2022, S.C.R.R.R. 1 was presented to and vetoed by Governor Tom Wolf. Stip. ¶ 56. S.C.R.R.R. 1 was laid on the table for reconsideration in the Senate on January 18, 2022. Stip. ¶ 57. On April 4, 2022, the full Senate held a vote to override the Governor's veto, but the vote was unsuccessful. Stip. ¶ 58.

On April 18, 2022, the Legislative Reference Bureau submitted the Rulemaking to its contractor for publication in the April 23, 2022 issue of the Pennsylvania Bulletin. Stip. ¶ 59. On April 23, 2022, the Rulemaking was published in the Pennsylvania Bulletin. Stip. ¶ 60. The Rulemaking will be codified in the Pennsylvania Code at Title 25, Chapter 145, Subchapter E, which will be entitled "CO_2 Budget Trading Program." Stip. ¶ 61. Codification of the Rulemaking is anticipated in the July 2022 supplement to the Pennsylvania Code.[10] Stip. ¶ 62. The price of an allowance at the last two auctions was $13.00 for the December 2021 auction and $13.50 for the March 2022 auction. Stip. ¶ 63.

On April 25, 2022, Petitioners filed a Verified Petition for Review (Petition) seeking declaratory and injunctive relief against DEP and EQB with respect to the Rulemaking. Petitioners simultaneously filed their Preliminary Injunction Application, along with an accompanying brief, seeking to enjoin Respondents DEP and EQB from implementing, administering, or enforcing the

[10] In their Joint Stipulation of Facts, the parties further agreed to the authenticity and admissibility of the Rulemaking record, including, *inter alia*, the Rulemaking as it appears in the April 23, 2022 issue of the *Pennsylvania Bulletin*; DEP's Regulatory Analysis Form for CO_2 Budget Trading Program; Final-form Rulemaking, referred to as the Preamble; Annex A; Comment and Response Document, including Appendix; transcripts of public hearings held by DEP and EQB on Proposed Rulemaking; IRRC Approval Order; DEP's 2020 and 2021 Modelings; RGGI, Inc.'s 2015-2019 Investment Proceeds; and Governor Wolf's July 10, 2020 Order.

Rulemaking during the pendency of this action.[11] On May 3, 2022, Respondents filed an answer to Petitioners' Preliminary Injunction Application. On this same date, Proposed Intervenor Constellation and Proposed Non-profit Intervenors filed their respective Applications for Leave to Intervene, with attached responses in opposition to Petitioners' Preliminary Injunction Application.[12]

By order dated May 4, 2022, this Court scheduled a hearing to commence on May 10, 2022, related to Petitioners' Preliminary Injunction Application. As noted above, this Order granted leave to Proposed Intervenor Constellation and Proposed Non-profit Intervenors to participate in the hearing subject to the Court's future disposition of their respective Applications for Leave to Intervene.[13] A hearing commenced as scheduled on May 10, 2022, and was completed the next day, May 11, 2022.

During this hearing, the Court simultaneously considered a Preliminary Injunction Application filed on behalf of Senate President Pro Tempore Jake Corman, Senate Majority Leader Kim Ward, Senate ERE Committee Chair Gene Yaw, and Senate Appropriations Committee Chair Pat Browne (referred to collectively as the Senate Intervenors), and the responses thereto, in the related matter of *Ziadeh v. Pennsylvania Legislative Reference Bureau* (Pa. Cmwlth., No. 41 M.D. 2022). Secretary McDonnell initiated that matter by filing a Verified Petition for Review in the Nature of a Complaint for Permanent and Peremptory Mandamus and for Declaratory Relief on February 3, 2022, against the Pennsylvania Legislative Reference Bureau, its Director, Vincent C. DeLiberato, Jr., and Amy J.

[11] A copy of the Rulemaking, as set forth in the *Pennsylvania Bulletin*, is attached to the Petition at Tab A.

[12] Proposed Intervenor Constellation also attached to its Application for Leave to Intervene an Answer to Petitioners' Petition for Review.

[13] By order dated June 28, 2022, this Court denied said Applications for Leave to Intervene.

Mendelsohn, Director of the Pennsylvania Code and Bulletin, following their multiple refusals to publish the Rulemaking in late 2021. Senate Intervenors, whose intervention was unopposed, filed an Answer with New Matter and Counterclaims, the latter raising numerous claims of constitutional and statutory violations on the part of Secretary McDonnell, DEP, and EQB.

After a hearing and post-hearing brief by all parties, including Proposed Intervenor Constellation and Proposed Non-profit Intervenors, Petitioners' Preliminary Injunction Application is ripe for disposition.[14]

Evidentiary Rulings

We begin by first addressing Petitioners' Application for Relief in the Form of a Motion In Limine (Motion). In this Motion, Petitioners sought to preclude Respondents, Proposed Intervenor Constellation and Proposed Non-profit Intervenors from introducing any evidence that goes beyond the Rulemaking record and DEP's contemporaneous reasoning as set forth therein during the course of the Preliminary Injunction Application hearing.[15] Motion at 2. More specifically, Petitioners sought to preclude testimony from DEP officials with respect to the agency's decision-making in connection with, and in support of, the Rulemaking,

[14] The Court received three *amicus curiae* briefs in support of Respondents. 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-Mid Atlantic. The third brief was filed by Pennsylvania Scientists. The Court also received an *amicus curiae* brief in support of Petitioners, filed on behalf of the Pennsylvania Manufacturers' Association, Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry and the National Federation of Independent Business.

[15] Petitioners also raised numerous specific objections to the testimony of witnesses at this hearing that will be addressed separately below.

when determining whether they are likely to succeed on the merits. *Id.* Petitioners also sought to preclude testimony from third parties, both fact and expert witnesses, with respect to purported justifications for, including the alleged need for, the Rulemaking. Motion at 3. Next, Petitioners sought to preclude any documents, whether offered by Respondents or third parties, that are not part of the existing Rulemaking record for purposes of determining the validity of the Rulemaking. *Id.* Further, Petitioners sought to preclude any testimony with respect to public harm, or, in the alternative, to limit any such testimony to the period during which the Rulemaking may be enjoined should the Court ultimately grant Petitioners' Preliminary Injunction Application. Finally, Petitioners sought to preclude any testimony from Proposed Intervenor Constellation or Proposed Non-profit Intervenors regarding the harm they might suffer if the Rulemaking is preliminarily enjoined.

During the hearing, the Court heard argument from Petitioners and Respondents regarding the Motion and reserved ruling on the same. The Court also provided the parties an opportunity to address the Motion in post-hearing briefs, which have now been received.

A motion in limine is submitted "either pretrial or during trial whereby exclusion is sought of anticipated prejudicial evidence, keeping extraneous issues out of the underlying proceeding, precluding reference to prejudicial matters, or preventing encumbering the record with immaterial matter." *Commonwealth v. Pikur Enterprises, Inc.*, 596 A.2d 1253, 1259 (Pa. Cmwlth. 1991). A ruling on a motion in limine lies within the sound discretion of the trial court, in this case, this Court. *Commonwealth v. Rivera*, 983 A.2d 1211, 1228 (Pa. 2009).

Essentially, Petitioners seek, through their Motion, to preclude any testimony or documentary evidence that was not part of the Rulemaking record.

However, the Court does not view the scope of the Preliminary Injunction Application hearing through such a narrow lens, especially where the Court is sitting in our original jurisdiction and not as a court of appellate jurisdiction. As the trial court in the matter, 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.")[16]

The Court recognizes the cases relied upon by Petitioners. In *Cary v. Bureau of Professional and Occupational Affairs, State Board of Medicine*, 153 A.3d 1205, 1210 (Pa. Cmwlth. 2017), this Court held that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." However, *Cary* was a case in this Court's appellate jurisdiction. In *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947), our United States Supreme Court stated as follows:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

[16] *Compare* Pa. R.A.P. 1921 ("The original papers and exhibits filed in the lower court, paper copies of legal papers filed with the prothonotary by means of electronic filing, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases."); Pa. R.A.P. 3734 ("In matters which under the applicable law may be determined in whole or in part upon the record made before the Court, the record made before the Court as transcribed and filed, together with the pleadings and other documents filed incident to the matter (including any record certified pursuant to Chapter 19 (preparation and transmission of the record and related matters)), shall comprise the record in the Court and need not be reproduced for purposes of argument, except as prescribed in Pa. R.A.P. 2111(c) (pleadings).").

> If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .

Id. at 196.

However, the Court also recognizes the current procedural posture of this case. The Court is not making a final determination of the merits at this time, to which the above cases certainly apply. Rather, the matter presently before us, Petitioners' Preliminary Injunction Application, requires consideration of six distinct elements that will be discussed in further detail below. The evidence required to meet these elements will necessarily go beyond that included solely in the Rulemaking record. For example, the parties will present evidence relating to the potential harms that would result from the Rulemaking, not only on Petitioners but also on other interested parties and the public as a whole. Moreover, the Court is cognizant that any such harms must be directly resultant from the Rulemaking itself, whether it be implemented immediately or enjoined for a period of several months, depending on the time it takes to render a final disposition on the merits. For these reasons, the Court denies Petitioners' Motion.

Additionally, during the proceedings, the Court reserved ruling on numerous objections and other motions. We dispose of the objections and motions relevant to the present *Bowfin* matter, that is, objections or motions raised by counsel for Petitioners, Respondents, Proposed Intervenor Constellation and Proposed Non-profit Intervenors, by the page number on which the Court reserved its ruling. For objections and motions raised in the related *Ziadeh* matter, the Court's rulings are addressed in the companion opinion.

May 10, 2022 Transcript

Page 164 overruled (Secretary McDonnell can testify as to what happens if the Rulemaking is enjoined, not providing expert opinion)

Page 213 overruled (Secretary McDonnell not offering legal opinion and he can testify as to the use of auction proceeds)

Page 264 overruled (witness can testify as to personal knowledge of the bids submitted to PJM for daily generation and opine as to how the Rulemaking may affect those bids)

Page 267 overruled (witness can testify as to personal knowledge of the bidding process and how the Rulemaking allowances will factor into such bids)

Page 271 overruled (witness can testify as to the effects of compliance with the Rulemaking on his client)

Page 308 overruled (witness can testify as to client's revenue generated via capacity payments, not beyond scope of direct testimony)

May 11, 2022 Transcript

Page 19 overruled (witness can testify as to personal knowledge of the experiences with membership as president and assistant business manager of IBEW, Local 459)

Page 30 sustained (requires expert testimony)

Page 40 grant motion to strike (hearsay)

Page 51 grant motion to strike (non-responsive and requires expert testimony)

Page 56 overruled (witness can testify as to personal experience with the development of the Rulemaking as well as the benefits it seeks to achieve, and can offer testimony as to the effect on those intended benefits should the Rulemaking be enjoined)

Page 60 overruled (same)

Page 65 overruled (witness can testify as to personal experience with the development of the Rulemaking, including DEP's consideration of the 2021 Pennsylvania Climate Impact Assessment)

Page 70 grant motion to strike (requires expert testimony)

Page 83 overruled (witness can testify as to the different models utilized by DEP in the development of the Rulemaking)

Page 87 overruled anticipated net gains to the economy)

Page 92 overruled (witness can testify as to how the modeling factored into the Rulemaking, including the effect on electricity rates)

Page 97 overruled (witness can testify as to how the modeling factored into the Rulemaking, including the intended health benefits)

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 111 overruled (witness can testify as to personal knowledge of DEP's development of the Rulemaking, including the choice of utilizing a cap-and-trade program)

Page 146 overruled (expert witness with knowledge of the RGGI program and economic impact therefrom on power generators)

Page 162 overruled (expert witness can testify as to the compliance options available in the RGGI program)

Page 200 sustained (expert report does not address testimony from previous day)

Page 288 overruled (witness may testify as to climate change because issue goes to balancing of harms in preliminary injunction proceedings)

Page 310 grant motion to strike (witness comments as to document on counsel table)

Page 345 overruled (expert witness permitted to testify to health effects of pollutants; Court not limited to Rulemaking record in original jurisdiction; and the testimony goes to balancing of the harms)

Page 360 overruled (expert witness on air pollutants)

Page 372 overruled (expert witness testifying as to harms from air pollutants)

Page 377 deny motion to strike (expert witness can rely on peer-reviewed literature)

Page 382 sustained (speculation)

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

Standards for a Preliminary Injunction

"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 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 that 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 consider the evidence presented to determine whether Petitioners have "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 Petitioners have shown that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. *SEUI 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. 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 . . . ."). Further, this Court has held that an administrative agency's promulgation of a regulation that is "untethered to [its] statutory authority" causes *per se* irreparable harm. *Marcellus Shale Coalition v. Department of Environmental Protection* (Pa. Cmwlth., No. 573 M.D. 2016, filed Nov. 8, 2016).[17]

As will be discussed in greater detail below, Petitioners have raised a substantial legal question as to whether the proceeds resulting from the Rulemaking's required purchases of CO_2 allowances by the Commonwealth's covered sources, *i.e.*, fossil fuel-fired EGUs with a nameplate capacity equal to or greater than 25 MW, constitute a tax as opposed to a regulatory fee. Section 6.3(a) of the APCA, 35 P.S. § 4006.3(a), permits the imposition of fees to cover the costs of administering any air pollution control program authorized by the statute. However, the power to levy taxes is specifically reserved to the General Assembly. PA CONST. art. II, § 1. While the General Assembly may delegate the power to tax, the delegation must be clearly conferred via statute and any such delegation appears absent from the APCA.

[17] An unreported panel decision of this Court issued after January 15, 2008, may be cited for its persuasive value, but not as binding precedent. Section 414(a) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code §69.414(a).

Moreover, even if Petitioners were to ultimately succeed on their claims that the Rulemaking is invalid, the injuries that they would suffer are not recoverable because DEP and EQB enjoy sovereign immunity. *See* 1 Pa.C.S. § 2310 and 42 Pa.C.S. § 8522(a) and (b). As explained by our Pennsylvania Supreme Court, "since [DEP and EQB] enjoy sovereign immunity, if the challenged regulations are ultimately held invalid, that portion of the cost [of complying with the regulations] would not be recoverable by [the petitioner]. Thus, the [Commonwealth Court] reasonably found that [the petitioner] carried its burden to demonstrate irreparable harm." *Marcellus Shale Coalition v. Department of Environmental Protection*, 185 A.3d 985, 997 (Pa. 2018); *see also Boykins v. City of Reading*, 562 A.2d 1027, 1028-29 (Pa. Cmwlth. 1989) ("Because the instant matter does not fall within one of the exceptions to sovereign immunity, appellants will be unable to recover damages for loss of profits. The inability to be adequately compensated by an award of damages constitutes irreparable harm.").

For these reasons, we conclude that Petitioners have demonstrated irreparable harm and, thus, have met the first prerequisite to issuance of a preliminary injunction.

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)

Petitioners must 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. We address these preliminary injunction prerequisites together as the analyses thereof is overlapping.

On these points, Petitioners argue that the Rulemaking will inflict irreparable harm upon them in the form of an illegally imposed tax and compliance costs of approximately $200 million that will necessarily be passed along to consumers, that an injunction will not harm DEP, EQB, or the public interest, and that any claim that the Rulemaking would drive meaningful reductions in CO_2 emissions is undercut by DEP's own modeling and its admissions in the case of *Funk v. Commonwealth*, 144 A.3d 228 (Pa. Cmwlth. 2016).

We have noted above that Petitioners have presented a substantial legal question as to whether the auction proceeds from RGGI, Inc.'s sale of CO_2 allowances constitutes a tax as opposed to a regulatory fee and have established potential irreparable harm in relation thereto. There is no dispute that Petitioners will face increased costs as a result of the Rulemaking, with respect to both the cost of purchasing the CO_2 allowances and the costs associated with the required submission of a new permit application incorporating the CO_2 Budget Trading Program requirements.[18] *See* 52 Pa. B. 2471, 2521 (2022) (25 Pa. Code § 145.322). There is also no dispute that this increase in costs will ultimately be passed on to consumers. Allen Landis, an employee of DEP who worked extensively on the Rulemaking, testified that the Rulemaking will result in a 2.4% increase in the wholesale power price and a 1.2% increase in the retail electricity rate.[19] Notes of

[18] James Locher, the Manager of the Keystone-Conemaugh Project Office, which manages two Pennsylvania-based fossil fuel-fired power plants, testified that, based upon the most recent price of CO_2 allowances, the Rulemaking would result in an increase in costs of 50% for the Keystone-Conemaugh plants. Notes of Testimony, May 10, 2022, at 253.

[19] The Rulemaking record reflects that these increases were calculated utilizing an estimated cost of only $3.24 per allowance for 2022. 52 Pa. B. at 2500. However, Mr. Locher

(Footnote continued on next page…)

Testimony (N.T.), May 11, 2022, at 90; *see also* 52 Pa. B. at 2500 (recognizing that the covered sources "would . . . most likely incorporate this compliance cost into their offer price for electricity" and "[t]he price of electricity is then passed onto electric consumers").

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). N.T., 5/10/22, at 165-66. Indeed, in his position as Secretary of Environmental Protection and Chair of EQB, Secretary McDonnell is uniquely qualified to opine as the effect of an injunction as it relates to the Commonwealth's receipt of auction proceeds. Further, the Court accepts generally that any delay in implementing Rulemaking equates to a delay in the benefits intended therefrom.

However, the Rulemaking itself recognizes that there may be "emissions leakage in terms of additional fossil fuel emissions outside of this Commonwealth's borders." 52 Pa. B. at 2495. This leakage appears to be confirmed by the Rulemaking and DEP's own 2021 modeling. While this modeling reflects a reduction in Pennsylvania of 97 million short tons of CO_2 by 2030, Commonwealth Exhibits 19 and 20,[20] the Rulemaking estimates "a net emissions reduction of 28 million tons of CO_2 across the broader PJM region through 2030." 52 Pa. B. at 2495.

Moreover, in *Funk*, a case brought by a group of resident petitioners seeking to require the Commonwealth, including DEP and EQB, to develop a comprehensive plan to regulate Pennsylvania's emissions of CO_2 and other

noted that at the most recent auction in March 2022, the allowances sold for $13.50. N.T., May 10, 2022, at 252.

[20] The Commonwealth's exhibits refer to the exhibits submitted on behalf of DEP and EQB in this matter.

greenhouse gases, the Commonwealth parties successfully argued, in part, that climate change requires a national and global effort, that the ability of any single state to achieve and maintain satisfactory air quality is hampered by a steady stream of transported interstate and global emissions, and that forcing states to develop a patchwork of regulatory programs is neither a legally viable nor an effective regulatory solution. *See* Petitioners' Ex. 61-A at 12, 35, Appendix 4 at 42-43, 52.

In addition, Proposed Non-profit Intervenors, 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. We view this evidence as insufficient. No party presented evidence as to the number of CO_2 allowances that will be available for auction if the Commonwealth joins the Initiative (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.

Mr. Locher testified that for 2021, Keystone's two units emitted approximately 7.9 million tons of CO_2 and Conemaugh's two units emitted approximately 7.6 million tons of CO_2, or about 15.5 million tons for all four units. N.T. May 10, 2022, at 250-251. However, the record lacks evidence of the CO_2 emission levels of the remaining Pennsylvania covered sources or suggesting that the covered sources would be required to reduce emissions based on the available allowances.[21]

[21] While the testimony indicated that the Commonwealth's allowances could be bought by out-of-state electric generation suppliers and used to meet other states' emissions budgets, there was no evidence of the frequency of which that occurs and the effect this may have on the ability of Pennsylvania-covered sources to purchase their needed allowances.

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 or a statute. 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, as alleged here] 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 administrative impacts on covered sources while the challenges to the Rulemaking raise substantial legal issues.

Restore the Parties to the Status Quo

Petitioners 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,

[22] We recognize Proposed Non-profit Intervenors' 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 about a thousand years, with the remainder taking several thousand more years to dissipate. N.T. May 11, 2022, 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.

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.

In the present case, enjoining the implementation and enforcement of the Rulemaking would restore the status quo, *i.e.*, place the parties back in the positions they were in prior to publication of the Rulemaking.

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 v. School District of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (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*, 185 A.3d at 995 ("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 Petitioners have raised a substantial legal question as indicated below.

a. Tax or Regulatory Fee

Petitioners assert that the Rulemaking is unconstitutional because it usurps the authority of the General Assembly to levy taxes under the Pennsylvania Constitution and is not otherwise statutorily authorized.

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). Petitioners state that there has been no such delegation here under the APCA, the statutory authority relied upon by 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,[23] 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

[23] 42 U.S.C.A. §§ 7661-7661f.

section 502(b) of the Clean Air Act.[24]" 35 P.S. § 4006.3(a).[25] 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).[26]

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.

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)).[27]

We reject Secretary McDonnell's argument that the allowance auction proceeds do not constitute a tax because covered sources pay RGGI, Inc., for the allowances purchased and not the Commonwealth. First, it is undisputed that the auction proceeds are remitted to the participating states. *See* 52 Pa. B. at 2482 ("The

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[24] 42 U.S.C.A.§ 7661a.

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

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

[27] 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. . . .

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 DEP anticipates significant monetary benefits from participating in the auctions. In addition, and importantly, it is unclear under what authority 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 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 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 DEP, with the use of such proceeds exclusively limited to the elimination of air pollution. *See* 52 Pa. B. at 2545 (Rulemaking §§ 145.343 and 145.401).

Third, Secretary McDonnell acknowledged, during testimony as on cross by Senate Intervenors in the *Ziadeh* matter, 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 2022-2023 budget year exceed $443 million.[28] N.T., 5/10/2022, at 132-35. In fact, DEP's total budget for the 2021-22 fiscal year, *i.e.*, the total funds appropriated to 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 10, 2022).[29]

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

However, with respect to the remaining two issues, the Court is not satisfied that Petitioners have raised a substantial legal question.

b. Air Pollution Control Act

Next, Petitioners argue that the APCA does not authorize DEP or EQB to promulgate the Rulemaking.[30] The Court cannot conclude that Petitioners' 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.

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[28] Again, this was merely an estimate based on Pennsylvania's participation in RGGI, Inc.'s 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.

[29] In light of the most recent allowance pricing, Mr. Landis estimated that the Commonwealth could have expected revenues of $200 million from RGGI, Inc.'s June 2022 quarterly allowance auction alone, thereby surpassing the entirety of DEP's annual budget. *See* N.T., May 11, 2022, at 102.

[30] While DEP submitted the Rulemaking for publication by the LRB, the Rulemaking was promulgated by EQB. 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 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).[31]

Section 4 of the APCA sets forth 27 separate powers and duties of 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 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 and the rules or

[31] 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.

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 the General Assembly's intent to restrict 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 DEP).

Given EQB's specific authority to promulgate regulations for DEP under Section 1920-A(b) of the Administrative Code, and the broad authority granted to DEP under Sections 4(27) and 5(a)(1) of the APCA, promulgation of the Rulemaking appears to within the authority of DEP and/or EQB.

c. Public Hearing Requirement

Finally, Petitioners contend that the Rulemaking was void *ab initio* because the proper procedural requirements for developing regulations under the Commonwealth Documents Law[32] and the APCA were not followed. Again, the Court cannot conclude that Petitioners' 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.

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), *aff'd*, 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

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

> regulation, an agency must comply with the requirements set forth in the Commonwealth Documents Law . . . the Commonwealth Attorneys Act[33] . . ., 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 [EQB] or by [DEP], acting on behalf and at the direction or request of [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 board 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.

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

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). Petitioners contend that these sections of the APCA require in-person hearings.

There can be no dispute that 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, DEP held a public comment period, which opened November 7, 2020, and closed January 14, 2021, during which 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, 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 to 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. 5/6/22 Stip., ¶ 37.

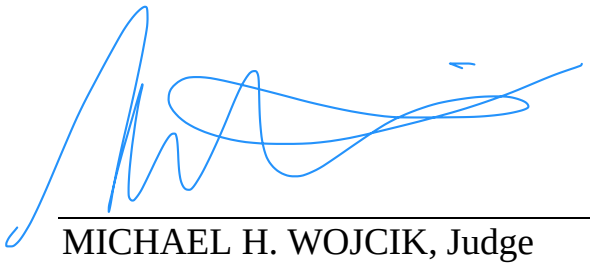
Moreover, the parties further stipulated that the public hearings were advertised in the Pennsylvania Bulletin, through social media, on DEP's website, and via publication in twelve newspapers of general circulation across the Commonwealth. 5/6/22 Stip., ¶ 41. The hearings were accessible by means of 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 DEP heard testimony from 449 individuals, which amounted to more than 32 hours of testimony, during the virtual public hearings. 5/6/22 Stip., ¶ 42. As a final note, Petitioners failed to produce evidence establishing the regions affected by the Rulemaking or that any person 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 DEP do not appear to run afoul of the Commonwealth Documents Law or the APCA.

Conclusion

Based upon the foregoing, the Court concludes that Petitioners have met their burden of proof for a preliminary injunction to issue. Accordingly, DEP and EQB are enjoined from implementing, administering, or enforcing the Rulemaking until further order of Court.



MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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
Pennsylvania Department of Environmental Protection and Pennsylvania Environmental Quality Board, Respondents	:	

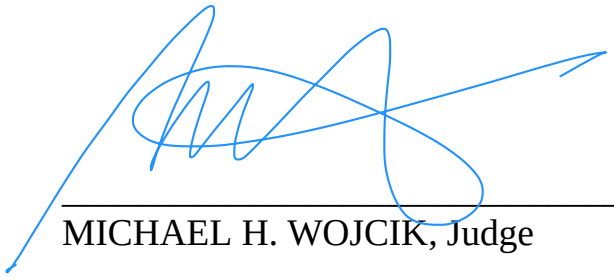
O R D E R

AND NOW, this 27th day of July, 2022, upon consideration of Petitioners' Application for Relief in the Nature of a Preliminary Injunction, the responses thereto, and after hearing on the issue, the Application is GRANTED.

Respondents are ENJOINED from implementing, administering, or enforcing the final rulemaking entitled CO_2 Budget Trading Program (#7-559) until further order of Court.

In accordance with Pa. R.Civ.P. 1531(b)(1), Petitioners shall file a bond in the amount of $100,000,000 with the Prothonotary of the Commonwealth Court, naming the Commonwealth as obligee within 14 days of the date of this Order.

Petitioners' Motion in Limine is DENIED.



MICHAEL H. WOJCIK, Judge