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-Appellant,	:	
v.	:	No. 41 MD 2022
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, *et al.*, Respondents-Appellees.	:	

NOTICE OF APPEAL

Pursuant to Pennsylvania Rules of Appellate Procedure 311(a)(4) and 1101(a)(1), notice is hereby given that Ramez Ziadeh, in his official capacity as Acting Secretary of the Pennsylvania Department of Environmental Protection and Acting Chairperson of the Environmental Quality Board, petitioner in the above-captioned action, hereby appeals to the Supreme Court of Pennsylvania from the Order entered in this matter on July 8, 2022, enjoining the implementation and enforcement of Pennsylvania's CO_2 Budget Trading Program (the "RGGI Regulation"), including any steps to codify the RGGI Regulation in the Pennsylvania Code. This Order has been entered on the Court's docket for the action at number 41 MD 2022. A copy of the Court's July 8, 2022 Order is attached as Exhibit A, and a copy of the docket entry is attached as Exhibit B.

In accordance with Pennsylvania Rules of Appellate Procedure 909 and 910, a Jurisdictional Statement is being filed concurrently with this Notice of Appeal.

Dated: July 11, 2022

Respectfully submitted,

/s/ *Matthew A. White*

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EXHIBIT A
to Notice of Appeal
(Order, dated July 8, 2022)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

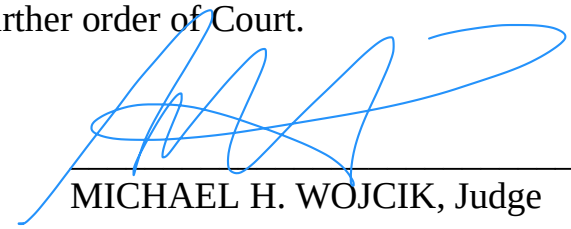
Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board,	:	
Petitioner	:	
v.	:	No. 41 M.D. 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J.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

O R D E R

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

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

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



MICHAEL H. WOJCIK, Judge

EXHIBIT B
to Notice of Appeal
(Docket Entry of July 8, 2022 Order)

Miscellaneous Docket Sheet **Commonwealth Court of Pennsylvania**

Docket Number: 41 MD 2022

July 11, 2022

CAPTION

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

CASE INFORMATION

Initiating Document:	Petition for Review		
Case Status:	Active		
Case Processing Status:	June 6, 2022	Awaiting Respondent Paperbooks	
Journal Number:			
Case Category:	Miscellaneous	Case Type(s):	Equity

CONSOLIDATED CASES

RELATED CASES

Docket No / Reason	Type
247 MD 2022 Similar Issue(s)	Related

COUNSEL INFORMATION

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Miscellaneous Docket Sheet **Commonwealth Court of Pennsylvania**

Docket Number: 41 MD 2022

July 11, 2022

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
July 6, 2022	Tentative Session Date Krimmel, Michael			
Document Name:	September 2022			
July 7, 2022	Transcript Filed Court Reporter			
July 8, 2022	Memorandum Opinion Filed Wojcik, Michael H.			07/08/2022
Document Name:	Re: Denial of Applications for Leave to Intervene			
Comment:	Order Filed 6/28/2022			
July 8, 2022	Memorandum Opinion Filed Wojcik, Michael H.			07/08/2022
Document Name:	Senate Intervenors' Preliminary Injunction Granted			
Comment:	AND NOW, this 8th day of July, 2022, upon consideration of the Application for Relief in the Nature of a Preliminary Injunction, filed on behalf of Intervenors President Pro Tempore of the Pennsylvania Senate Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the Senate Appropriations Committee Pat Browne, and after hearing on the issue, the Application is GRANTED. Respondents the Legislative Reference Bureau, Vincent D. DeLiberato and Amy Mendelsohn are ENJOINED from proceeding to codification of the CO2Budget Trading Program (Rulemaking) in the Pennsylvania Code and the Department of Environmental Protection is ENJOINED from implementing and enforcing the Rulemaking until further order of Court.			

SESSION INFORMATION

Journal Number:
Consideration Type: Tentative Session Date
Listed/Submitted Date: September 12, 2022

REARGUMENT / RECONSIDERATION / REMITTAL

Filed Date: April 15, 2022
Disposition: Order Denying Application for Reconsideration
Disposition Date: April 19, 2022

Record Remittal:

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-Appellant,	:	
v.	:	No. 41 MD 2022
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, *et al.*, Respondents-Appellees.	:	

JURISDICTIONAL STATEMENT IN SUPPORT OF NOTICE OF APPEAL

Pursuant to Pennsylvania Rules of Appellate Procedure 311(a)(4), 909, and 910, petitioner-appellant Ramez Ziadeh (the "Secretary"), in his official capacity as Acting Secretary of the Pennsylvania Department of Environmental Protection ("DEP") and Acting Chair of the Environmental Quality Board ("EQB"), hereby submits this Jurisdictional Statement in support of his Notice of Appeal from the Commonwealth Court's July 8, 2022 Order in the above-captioned action enjoining the implementation and enforcement of Pennsylvania's CO_2 Budget Trading Program (the "RGGI Regulation"), which includes any steps to codify the RGGI Regulation in the Pennsylvania Code.

I. ORDER AND OPINION BELOW

This is an appeal from the Order of Preliminary Injunction issued by the Commonwealth Court on July 8, 2022 (the "Order"). A copy of the Order is

attached as Exhibit A. The Commonwealth Court issued an unreported Memorandum Opinion (the "Opinion") in support of the Order. A copy of the Opinion is attached as Exhibit B.

II. BASIS FOR THE SUPREME COURT'S JURISDICTION

This appeal of a preliminary injunction issued by the Commonwealth Court is commenced as a matter of right. *See* Pa.R.A.P. 1101. The Supreme Court has exclusive jurisdiction over appealable orders of the Commonwealth Court where a matter is pending before the Commonwealth Court pursuant to its original jurisdiction. *See* 42 Pa.C.S. § 723(a); Pa.R.A.P. 1101(a)(1). The Secretary commenced this matter in Commonwealth Court pursuant to the court's original jurisdiction. *See* 42 Pa.C.S. § 761(a)(1) and (2).

The July 8, 2022 Order preliminarily enjoining implementation and enforcement of the RGGI Regulation, including any steps to codify the RGGI Regulation in the Pennsylvania Code, is an immediately appealable interlocutory order because it is "[a]n order that grants . . . an injunction[.]" Pa.R.A.P. 311(a)(4).

III. TEXT OF THE ORDER IN QUESTION

This appeal seeks review of the July 8, 2022 Order, which states in its entirety:

> AND NOW, this 8th day of July, 2022, upon consideration of the Application for Relief in the Nature of a Preliminary Injunction, filed

> on behalf of Intervenors President Pro Tempore of the Pennsylvania Senate Jake Corman, Senate Majority Leader Kim Ward, Chair of the Senate Environmental Resources and Energy Committee Gene Yaw, and Chair of the Senate Appropriations Committee Pat Browne, and after hearing on the issue, the Application is **GRANTED**.
>
> Respondents the Legislative Reference Bureau, Vincent D. DeLiberato and Amy Mendelsohn are **ENJOINED** from proceeding to codification of the CO_2 Budget Trading Program (Rulemaking) in the Pennsylvania Code and the Department of Environmental Protection is **ENJOINED** from implementing and enforcing the Rulemaking until further order of Court.

IV. CONCISE STATEMENT OF PROCEDURAL HISTORY

The Secretary's predecessor commenced this action pursuant to the Commonwealth Court's original jurisdiction on February 3, 2022, by filing a petition for review seeking to compel the Legislative Reference Bureau (the "LRB") to publish the RGGI Regulation in the *Pennsylvania Bulletin*.[1] Certain legislators from the Pennsylvania House of Representatives (the "House Intervenors") and Senate (the "Senate Intervenors") intervened. Senate Intervenors subsequently applied for a preliminary injunction to stay publication of the RGGI Regulation. Notwithstanding Senate Intervenors' application, LRB published the RGGI Regulation in the April 23, 2022 issue of the *Pennsylvania Bulletin*. The next day, and in subsequent filings, the Secretary argued that Senate Intervenors' application was moot, and that they no longer had standing.

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[1] Appellant respectfully directs the Court to pages 2-12 of the Opinion for a more fulsome statement of this case's procedural history.

On May 10 and 11, 2022, the Commonwealth Court held a hearing on Senate Intervenors' application.[2] Following the parties' briefing, Commonwealth Court issued the subject injunction on July 8, 2022.

V. QUESTIONS PRESENTED FOR REVIEW

1. Did Commonwealth Court err in declining to conclude Senate Intervenors lacked standing after publication of the RGGI Regulation?

2. Did the Supreme Court's decision in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), preclude Senate Intervenors from having standing to assert a challenge to the RGGI Regulation, as there was no evidence of any remaining legislative action to be taken?

3. Did Commonwealth Court err in granting Senate Intervenors relief not requested in any pleading or in their Application – namely, enjoining implementation and enforcement of the RGGI Regulation?

4. Did Commonwealth Court err in determining that a dispute over the interpretation of Section 7(d) of the Regulatory Review Act, which was moot as of

[2] During the hearing, Commonwealth Court also heard testimony and argument on an application for preliminary injunction filed in a separate action (docketed at 247 MD 2022) initiated by a group of Pennsylvania coal-fired power plants, coal-fired power plant employee unions, and various coal industry entities, seeking to preliminarily enjoin enforcement of the RGGI Regulation.

April 23, 2022, could suffice as a basis for injunctive relief on a constitutional challenge to the Regulation?

5. Did Commonwealth Court err in determining that Senate Intervenors raised a substantial legal question with respect to whether RGGI Rulemaking's CO_2 emission allowances are taxes, not fees?

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

7. Did Commonwealth Court err in failing to properly balance the harms alleged by Senate Intervenors with the harms the Secretary demonstrated would occur if the RGGI Regulation were enjoined?

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

9. Did Commonwealth Court err in determining that enjoining the RGGI Regulation would abate the harms alleged by Senate Intervenors?

10. Did Commonwealth Court err in determining that Senate Intervenors are "officers" exempt from the bond requirement of Pa. R. Civ. P. 1531?

Suggested Answers to Question Nos. 1-10: Yes.

Dated: July 11, 2022

Respectfully submitted,

/s/ *Matthew A. White*

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Thomas W. Hazlett (Pa. 88052)
Thomas J. Gallagher IV (Pa. 316269)
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Attorneys for Ramez Ziadeh, Acting Secretary of the Pennsylvania Department of Environmental Protection and Acting Chairperson of the Environmental Quality Board

EXHIBIT A
to Jurisdictional Statement
(Order, dated July 8, 2022)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

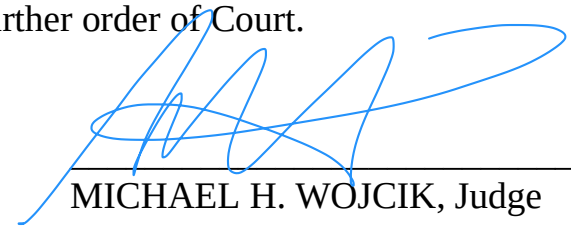
Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board,	:	
Petitioner	:	
v.	:	No. 41 M.D. 2022
Pennsylvania Legislative Reference Bureau, Vincent C. DeLiberato, Jr., Director of the Legislative Reference Bureau, and Amy J.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

O R D E R

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

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

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



MICHAEL H. WOJCIK, Judge

EXHIBIT B
to Jurisdictional Statement
(Memorandum Opinion, dated July 8, 2022)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: July 8, 2022

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

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

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

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

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

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

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

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

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

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

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

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

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

(Footnote continued on next page…)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidentiary Rulings

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

May 10, 2022, Transcript

Exhibits:

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

Testimony:

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

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

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

May 11, 2022, Transcript

Testimony

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

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

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

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

Standards for a Preliminary Injunction[20]

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

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

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

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

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

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

Immediate and Irreparable Harm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Restore the Parties to the Status Quo

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

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

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

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

Clear Right to Relief and Likely to Prevail on the Merits

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

a. Separation of Powers

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

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

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

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

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

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

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

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

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

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

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

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

b. Violation of the APCA

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

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

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

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

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

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

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

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

c. Interstate Compact or Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Imposition of a tax

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

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

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

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

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

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[27] 42 U.S.C.A. §§ 7661-7661f.

[28] 42 U.S.C.A.§ 7661a.

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

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

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

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

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

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

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

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

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

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

e. Public hearing requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

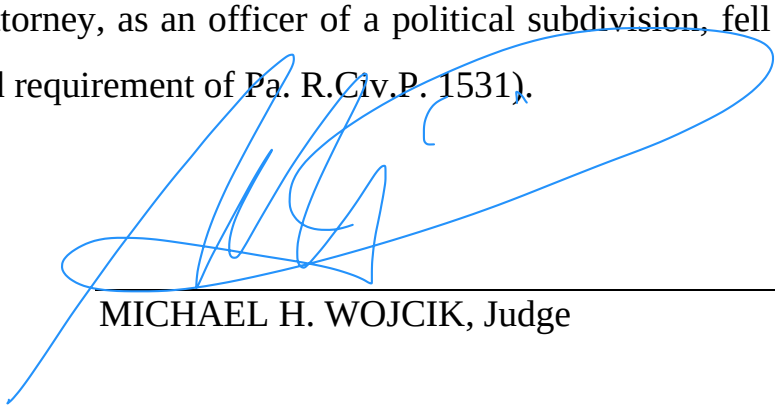
For these reasons, the written comment period and virtual public hearings conducted by the DEP do not appear to run afoul of the Commonwealth Documents Law or the APCA.

Conclusion

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

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

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



MICHAEL H. WOJCIK, Judge

CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127

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

Dated: July 11, 2022

/s/ *Matthew A. White*
Matthew A. White (Pa. ID No. 55812)

CERTIFICATE OF SERVICE

Pursuant to Pa.R.A.P. 906(a), I, Matthew A. White, hereby state that I have caused to be served a true and correct copy of the foregoing Notice of Appeal via the Court's PACFile.

Pursuant to Pa.R.A.P. 906(b), I, Matthew A. White, hereby state that I have caused to be served a true and correct copy of the foregoing Jurisdictional Statement required by Pa.R.A.P. 909 via the Court's PACFile.

Dated: July 11, 2022

/s/ *Matthew A. White*
Matthew A. White (Pa. ID No. 55812)