

AND NOW, this ___ day of _____, 2022, upon consideration of the Application for Special Relief in the Nature of a Preliminary Injunction filed by Senate Intervenor Respondents,¹ the Application is hereby **GRANTED**.

IT IS HEREBY ORDERED that Petitioner, Respondents, and all employees of the Legislative Reference Bureau, the Pennsylvania Code, and the Pennsylvania Bulletin and all persons working in concert with each of the above, are enjoined and barred, pending further order of this Court from taking any further steps to promulgate, publish, and/or otherwise codify Environmental Quality Board Rulemaking #7-559, also known as the Regional Greenhouse Gas Initiative ("RGGI") Rulemaking.

IT IS FURTHER ORDERED that Petitioner shall, within forty-eight hours of issuance of this Order, withdraw the RGGI Rulemaking submission from Respondents.

BY THE COURT:

J.

¹ Senate Intervenor Respondents in this matter are Senate President Pro Tempore Jake Corman, Senate Majority Leader Kim Ward, Senate Environmental Resources and Energy Committee Chair Gene Yaw, and Senate Appropriations Committee Chair Pat Browne.

SENATE INTERVENOR RESPONDENTS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

Senate Intervenor Respondents,¹ by and through their counsel, McNees Wallace & Nurick LLC, hereby offer this Application for Special Relief in the Nature of a Preliminary Injunction pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), and request that the Court preliminarily enjoin all government officials employed by the Pennsylvania Department of Environmental Protection ("PADEP"), the Environmental Quality Board ("EQB"), the Legislative Reference Bureau, and or the Pennsylvania Code and Bulletin ("PCB"), including Petitioner and Respondents, from promulgating and/or publishing EQB Rulemaking #7-559, also referred to as the Regional Greenhouse Gas Initiative ("RGGI") Rulemaking.

Senate Intervenor Respondents further request that the Court order Petitioner to, within forty-eight hours of issuance of its Order, withdraw the RGGI Rulemaking submission from Respondents.

The House Intervenor Respondents concur in these requests.

In support thereof, Senate Intervenor Respondents state as follows:

¹ Senate Intervenor Respondents in this matter are Senate President Pro Tempore Jake Corman, Senate Majority Leader Kim Ward, Senate Environmental Resources and Energy Committee Chair Gene Yaw, and Senate Appropriations Committee Chair Pat Browne.

PARTIES

1. Petitioner Patrick J. McDonnell is the duly appointed Secretary of Environmental Protection for PADEP and ex officio Chair of the EQB.
2. Respondent Legislative Reference Bureau ("LRB") is the agency responsible for publication of the Pennsylvania Code and Bulletin ("PCB").
3. Respondent Vincent C. DeLiberato, Jr. is the duly elected Director of the LRB.
4. Respondent Amy J. Mendelsohn is the duly appointed Director of the PCB.
5. Senate Intervenor Respondents are leaders in the Pennsylvania Senate Majority Caucus.
6. Senate Intervenor Respondent Jake Corman is a duly elected member of Pennsylvania's Senate representing the 34th Senatorial District, which, at the time this litigation was initiated, included Centre, Mifflin, and Juniata counties and part of Huntingdon County.² Senator Corman serves as President Pro Tempore of the

² The decennial reapportionment of legislative districts in Pennsylvania received final approval from the Pennsylvania Supreme Court on March 16, 2022. As a result, the geographical boundaries of the districts represented by Senate Intervenor Respondents have changed since this litigation was initiated. The legislative terms of Senate Intervenor Respondents in the Senate remain unchanged. The descriptions of the territories covered by Senate Intervenor Respondents' respective districts reflect the districts as they were delineated at the time this litigation was initiated.

Pennsylvania Senate and serves as ex officio member of the Pennsylvania Senate's twenty-two standing committees.

7. Senate Intervenor Respondent Kim Ward is a duly elected member of Pennsylvania's Senate representing the 39th Senatorial District, which includes part of Westmoreland County. Senator Ward serves as the Senate Majority Leader.

8. Senate Intervenor Respondent Gene Yaw is a duly elected member of Pennsylvania's Senate representing the 23rd Senatorial District, which includes Bradford, Lycoming, Sullivan, and Union counties and part of Susquehanna County. Senator Yaw serves as Chair of the Senate Environmental Resources & Energy ("ERE") Committee.

9. Senate Intervenor Respondent Pat Browne is a duly elected member of Pennsylvania's Senate representing the 16th Senatorial District, which includes part of Lehigh County. Senator Browne serves as Chair of the Senate Appropriations Committee.

10. Senators Corman, Ward, Yaw, and Browne are collectively referred to herein as "Senate Intervenor Respondents."

11. Leaders from Pennsylvania's House of Representatives have also intervened in this matter.

12. Those House leaders include Speaker of the House Bryan D. Cutler, Majority Leader Kerry A. Benninghoff, and Chair of the House ERE Committee

Daryl D. Metcalfe (collectively referred to herein as "House Intervenor Respondents").

FACTUAL BACKGROUND and PROCEDURAL HISTORY

13. On February 3, 2022, Petitioner McDonnell initiated this litigation by filing a Verified Petition for Review in the Nature of a Complaint for Permanent and Peremptory Mandamus and for Declaratory Judgment (the "Petition").

14. At the center of Petitioner's action is a CO2 Budget Trading Program rulemaking adopted by the EQB on or about July 13, 2021, (the "RGGI Rulemaking")³ under its purported rulemaking authority pursuant to the Air Pollution Control Act ("APCA"), 35 P.S. § 4005. Pet. at ¶30.

15. The RGGI Rulemaking was subsequently approved by the Governor's Office of General Counsel on or about July 26, 2021, the Independent Regulatory Review Commission ("IRRC"), by a vote of 3-2 in favor, on or about September 1, 2021, and the Pennsylvania Office of Attorney General on or about November 24, 2021. Pet. at ¶¶31-32, 34.

16. Following IRRC's September 1, 2021, approval of the RGGI Rulemaking, on September 14, 2021, the Senate ERE Committee voted out of committee to the full Senate chamber Senate Concurrent Regulatory Review Resolution ("S.C.R.R.R. 1") to disapprove the RGGI Rulemaking pursuant to

³ The RGGI Rulemaking is also referred to as Environmental Quality Board Rulemaking #7-559.

Section 7(d) of the Regulatory Review Act ("RRA"), 71 P.S. § 745.7(d). S.C.R.R.R. 1 was later adopted by the full Senate on October 27, 2021, and the full House of Representatives on December 15, 2021. Pet. at ¶¶77, 83, 89.

17. On January 10, 2022, S.C.R.R.R. 1 was presented to and vetoed by Governor Tom Wolf. Pet. at ¶92 n.5; Ex. I.

18. Under the RRA, the Senate and the House of Representatives each have 30 calendar days or ten legislative days, whichever is longer, to override Governor Wolf's veto. 71 P.S. § 745.7(d).

19. As of the date of this filing, the Senate is considering whether to override the Governor's veto of S.C.R.R.R. 1 in accordance with the RRA.

20. While Senate Intervenors do not dispute LRB's obligation to publish duly promulgated rulemakings in the Pennsylvania Bulletin, such actions may only be undertaken in accordance with the procedures and timelines prescribed by applicable law, including the RRA and Article III, Section 9 of Pennsylvania's Constitution.

21. Through his Petition, Petitioner seeks to compel Respondents to publish the RGGI Rulemaking in the Pennsylvania Bulletin, and to obtain from this Court a declaration that "Respondents may not continue to disregard their duties . . . based upon Respondents' incorrect interpretation and application of law." Pet. at ¶2.

22. Count One of the Petition seeks an immediate peremptory and permanent writ of mandamus against Respondents, requiring them to publish the RGGI Rulemaking in the Pennsylvania Bulletin. Pet. at ¶69.

23. In Count Two of the Petition, Petitioner seeks a declaratory judgment that the RGGI Rulemaking, among other things, "has been deemed approved by the General Assembly." Pet. at ¶71.

24. Petitioner, in relevant part, requests the following relief from this Court:

(1) enter judgment declaring that, under Section 7(d) of the [RRA] (71 P.S. § 745.7(d)), the House of Representatives was permitted to adopt [S.C.R.R.R. 1] only through October 14, 2021;

(2) enter judgment declaring that, under Section 7(d) of the RRA (71 P.S. § 745.7(d)), the House's adoption of S.C.R.R.R. 1 on December 15, 2021, was a nullity, ineffective and contrary to Section 7(d);

(3) enter judgment declaring that, under Section 7(d) of the RRA (71 P.S. § 745.7(d)), the Trading Program Regulation was deemed approved by the General Assembly on October 15, 2021.

Pet. at p. 24, Omnibus Prayer for Relief.

25. Along with his Petition, Petitioner included an Application for Expedited Special and Summary Relief.

26. On February 23, 2022, Petitioner filed an Application for Expedited Briefing Schedule and Oral Argument on his Verified Application for Expedited Special and Summary Relief.

27. On February 24, 2022, leaders from Pennsylvania's House of Representatives Republican Caucus sought leave from this Court to intervene in the matter and attached proposed preliminary objections, asking the Court to accept the preliminary objections upon grant of intervention.

28. Also on February 24, 2022, Respondents filed preliminary objections to the Petition, arguing that Petitioner is misinterpreting the RRA and failed to join members of the General Assembly, who are indispensable parties to this matter. *See Preliminary Objections of Respondents Legislative Reference Bureau, Vincent C. DeLiberato, and Amy J. Mendelsohn, February 24, 2022.*

29. On February 25, 2022, the Court denied Petitioner's application for Expedited Briefing Schedule and Oral Argument on his Verified Application for Expedited Special and Summary Relief.

30. Also on February 25, 2022, Senate Intervenor Respondents sought leave to intervene in this matter and attached a proposed answer containing a new matter and counterclaims, asking the Court to accept their proposed filing upon grant of intervention.

31. On March 2, 2022, Petitioner consented to the intervention of the House Intervenors and Senate Intervenors.

32. On March 3, 2022, the Court granted the intervention of both the House and Senate Intervenors and ordered the Prothonotary to accept for filing each party's proposed filings.

33. Senate Intervenor Respondents' New Matter and Counterclaims can be summarized as follows:

- a. Petitioner's proposed interpretation of the RRA (71 P.S. § 745.7(d)) is incorrect and his act of sending the RGGI Rulemaking to the LRB for publication while a concurrent resolution disapproving the regulation remains pending violates the RRA.
- b. Petitioner's proposed interpretation of the RRA is incorrect and his act of sending the RGGI Rulemaking to the LRB is a violation of Articles II and III of the Pennsylvania Constitution because it interferes with legislative procedure and legislative authority.
- c. The RGGI Rulemaking is an unconstitutional *ultra vires* action because it is an arbitrary exercise of unnecessary and uncontrolled discretionary power, beyond that granted to PADEP by the General Assembly under the APCA and,

as a result, infringes upon Senate Intervenor Respondents' legislative authority as members of the General Assembly.

- d. The RGGI Rulemaking is unconstitutional because it usurps the Senate Intervenor Respondents' specific, exclusive authority to join interstate compacts as members of the General Assembly under the Pennsylvania Constitution.
- e. The RGGI Rulemaking is unconstitutional because it usurps Senate Intervenor Respondents' authority, as members of the General Assembly, to levy taxes under the Pennsylvania Constitution.
- f. The RGGI Rulemaking is void *ab initio* because the proper procedural requirements for developing regulations were not followed in violation of the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.*, and the APCA.

34. On March 8, 2022, Respondents withdrew their Preliminary Objection relating to the failure to join an indispensable party.

ACTION SOUGHT TO BE ENJOINED

Senate Intervenor Respondents ask this Court to preliminarily enjoin all government officials employed by PADEP, the LRB, and the PCB, including

Petitioner and Respondents, from taking any further action to promulgate, publish, or otherwise codify the RGGI Rulemaking.

Senate Intervenor Respondents further request that the Court order Petitioner to, within forty-eight hours of issuance of its Order issuing the injunction, withdraw the RGGI Rulemaking submission from Respondents.

STANDARD FOR PRELIMINARY INJUNCTION

35. The purpose of a preliminary injunction is "to preserve the status quo and prevent imminent and irreparable harm which might occur before the merits of the case can be heard and determined." *Berger By and Through Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1085 (Pa. Cmwlth. 1995).

36. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court, upon application, may issue a preliminary injunction "in the interest of justice and consistent with the usages and principles of law." Pa.R.A.P. 1532(a).

37. The requirements for obtaining a preliminary injunction under Pennsylvania Rule of Appellate Procedure 1532(a) are the same as those for obtaining a preliminary injunction under Pennsylvania Rule of Civil Procedure 1531, Pa.R.Civ.P. 1531. *Com. Ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004); *see also* Pennsylvania Rule of Appellate Procedure 106, Pa.R.A.P. 106.

38. Pennsylvania Rule of Civil Procedure 1531 sets forth the procedural steps for obtaining a preliminary injunction. Rule 1531 provides that, generally, a preliminary injunction will not issue until after notice and hearing. Pa.R.Civ.P. 1531.

39. In addition to the procedural requirements, there are six prerequisites a moving party must demonstrate to obtain a preliminary injunction, which are as follows:

- (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by 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 interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014).

40. The moving party must establish each prerequisite before a preliminary injunction can be issued. *See Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004).

SENATE INTERVENOR RESPONDENTS HAVE A CLEAR RIGHT TO RELIEF AND ARE LIKELY TO PREVAIL ON THE MERITS

41. As more fully set forth in paragraphs 105 through 228 of Senate Intervenor Respondents' Answer with New Matter and Counterclaims and in the attached Brief in Support of this Application, Senate Intervenor Respondents have a clear right to relief and a strong likelihood of success on the merits of their challenges to the validity and constitutionality of the RGGI Rulemaking for the following reasons:

- a. Petitioner's proposed interpretation of the RRA (71 P.S. § 745.7(d)) is incorrect and his act of sending the RGGI Rulemaking to the LRB for publication while a concurrent resolution disapproving the regulation remains pending is unlawful.
- b. Petitioner's proposed interpretation of the RRA is incorrect and his act of sending the RGGI Rulemaking to the LRB is a violation of Articles II and III of the Pennsylvania Constitution because it interferes with legislative procedure and legislative authority.
- c. The RGGI Rulemaking is an unconstitutional *ultra vires* action because it is an arbitrary exercise of unnecessary and uncontrolled discretionary power, beyond that granted to PADEP by the General Assembly under the APCA and, as a result, infringes upon Senate

- Intervenor Respondents' legislative authority as members of the General Assembly.
- d. The RGGI Rulemaking is unconstitutional because it usurps the Senate Intervenor Respondents' specific, exclusive authority to join interstate compacts as members of the General Assembly under the Pennsylvania Constitution.
 - e. The RGGI Rulemaking is unconstitutional because it usurps Senate Intervenor Respondents' authority, as members of the General Assembly, to levy taxes under the Pennsylvania Constitution.
 - f. The RGGI Rulemaking is void *ab initio* because the proper procedural requirements for developing regulations were not followed in violation of the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.*, and the APCA.

REQUEST FOR INJUNCTION

42. Senate Intervenor Respondents respectfully request this Court preliminarily enjoin, pending further order of the Court, all government officials employed by PADEP, the LRB, and the PCB from taking further steps to promulgate, publish, or otherwise codify the RGGI Rulemaking.

43. A preliminary injunction preventing publication of the RGGI Rulemaking is necessary because publication before the window of time to override

Governor Wolf's January 10, 2022 veto would cause irreparable harm in several ways, including by usurping the General Assembly's legislative authority under Articles II and III of the Pennsylvania Constitution and by violating the RRA and the Commonwealth Documents Law.

44. Even if this window of time expires and the General Assembly does not successfully override Governor Wolf's January 10, 2022 veto, an injunction is necessary to avoid the irreparable harm resulting from the codification of a set of regulations that clearly violates the Pennsylvania Constitution, including the separation of powers between the Executive Department and the General Assembly.

45. The deprivation of a statutory right or a violation of the separation of powers doctrine constitutes irreparable harm.

46. In addition, and as Petitioner explains in his Verified Application for Expedited Special and Summary Relief, if the RGGI Rulemaking is published, the RGGI auction process would soon require Pennsylvania's power generation sector and its customers to pay hundreds of millions of dollars in the form of an unconstitutional tax. *See* Petitioner's Verified Application for Expedited Special and Summary Relief at ¶¶3-12.

47. Mandating these payments is an unconstitutional exercise of the taxing power, a power which is exclusively reserved to the General Assembly.

48. This unconstitutional encroachment upon the General Assembly's authority to levy taxes cannot be remedied via damages.

49. Greater injury would result from refusing the injunction than from granting it because granting the injunction would maintain the status quo, while refusing to grant the injunction would establish a significant, unconstitutional tax on Pennsylvania's energy generation sector, with immediate and significant economic consequences for Pennsylvania.

50. At the same time, granting the injunction would not harm Petitioner because, as noted, the injunction would simply preserve a status quo under the APCA which has existed since it was passed in 1960.

51. An injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct by preventing the unconstitutional regulations from being published and taking effect.

52. As noted above, Senate Intervenor Respondents have a clear right to relief and are likely to prevail on the merits

53. The injunction is necessary to prevent irreparable harm.

54. The injunction is reasonably suited to abate the offending activity because the preliminary injunction will prevent publication of the unconstitutional RGGI Rulemaking until this matter can be resolved on the merits.

55. The preliminary injunction will not adversely affect the public interest because, as noted above, the injunction will maintain the status quo while the matter can be decided on the merits.

56. The public has an interest in upholding the law, in maintaining the Constitutional principles that require three separate but equal branches of government, and in avoiding the financial burden of unconstitutional taxes.

WHEREFORE, for the reasons set forth above, Senate Intervenor Respondents respectfully request this Court preliminarily enjoin all government officials employed by PADEP, the LRB, and the PCB, including Petitioner and Respondents, from taking any further action to promulgate, publish, or otherwise codify the RGGI Rulemaking.

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Dated: March 25, 2022

VERIFICATION

I, Jake Corman, hereby certify that the facts in the foregoing *Application for Special Relief in the Nature of a Preliminary Injunction* and brief in support thereof are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: 3/25/2022

By:  _____

Senator Jake Corman

Senate President Pro Tempore

CERTIFICATE OF COMPLIANCE

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.

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Dated: March 25, 2022

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PROOF OF SERVICE

I certify that I have caused a true and correct copy of the foregoing document to be served on this 25th day of March 2022, upon the persons and at the addresses below via the Court's PACFile System and U.S. Mail, First Class, postage prepaid, as follows, in accordance with Pennsylvania Rules of Appellate Procedure 121 and 1514(c), Pa.R.A.P. §§ 121, 1514(c).

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