

IN THE SUPREME COURT OF PENNSYLVANIA

PATRICK J. McDONNELL,
SECRETARY OF THE
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and
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. MENDELSON,
DIRECTOR OF THE PENNSYLVANIA
CODE and BULLETIN,

Respondents,

SENATE PRESIDENT PRO TEMPORE
JAKE CORMAN, *et al.*,

Senate Intervenor
Respondents,

HOUSE SPEAKER BRYAN CUTLER,
et al.,

House Intervenor
Respondents.

Docket No. 45 MAP 2022

PETITIONER’S MOTION TO SUPPLEMENT JURISDICTIONAL STATEMENT

Petitioner Patrick J. McDonnell, Secretary of the Department of Environmental Protection and Chairperson of the Environmental Quality Board, by his undersigned attorneys, respectfully moves for leave to supplement the Jurisdictional Statement he filed on April 7, 2022, and in support thereof avers as follows:

1. On April 5, 2022, Commonwealth Court entered an Order indefinitely prohibiting Respondent Pennsylvania Legislative Reference Bureau (“LRB”) from processing the Regional Greenhouse Gas Initiative (“RGGI”) Regulation for publication in the Pennsylvania Bulletin pending further order of the Court.

2. On April 7, 2022, Petitioner appealed that Order to this Court pursuant to Pa.R.A.P. 311(a)(4) as the Order constituted an injunction against publication of the RGGI Regulation in the Pennsylvania Bulletin. Petitioner also filed a Jurisdictional Statement pursuant to Pa.R.A.P. 909 and 910.

3. On April 8, 2022, this Court entered an Order directing Respondents and Intervenors to respond to Petitioner’s Jurisdictional Statement by April 13, 2022.

4. On April 12, 2022, Respondents filed their Answer to the Jurisdictional Statement. While they stated that they “do not take a position on Petitioner’s Jurisdictional Statement,” they noted that the Commonwealth Court’s Order “enjoined” them and Petitioner from processing the RGGI Regulation for publication, and that they “have a statutory duty to publish the RGGI Regulation in the next available issue of the *Pennsylvania Bulletin* upon the lifting of *the Commonwealth Court’s current injunction to publication.*” (emphasis added). They further stated that “[i]f the injunction is lifted,” they would need ten business day to publish the RGGI Regulation.

5. On April 13, 2022, House and Senate Intervenors filed their respective Answers to Petitioner’s Jurisdictional Statement. They have taken the position that the

April 5, 2022 Order does not constitute injunctive relief and therefore is not appealable under Pa.R.A.P. 311(a)(4).

6. Petitioner respectfully seeks leave to file the attached supplement to its Jurisdictional Statement to address Intervenors' arguments and caselaw so that the Court may have a full consideration of the jurisdictional issue now before it. *See In re Fourth Dauphin County Investigating Grand Jury*, 946 A.2d 666, 668 (Pa. 2008) (granting appellant's Motion for Leave to Supplement Jurisdictional Statement); *Marshall v. Pennsylvania Bd. of Probation & Parole*, 685 A.2d 1384 (Pa. 1996) (same).

Respectfully submitted,

/s/ Matthew A. White

Matthew A. White (Pa. 55812)
Brian N. Kearney (Pa. 326227)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.665.8500

Attorneys for Petitioner

Dated: April 14, 2022

CERTIFICATE OF COMPLIANCE

I, Matthew A. White, 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: April 14, 2022

/s/ Matthew A. White
Matthew A. White (Pa. 55812)

CERTIFICATE OF SERVICE

I, Matthew A. White, hereby state that I have caused to be served a true and correct copy of the foregoing Motion via the Court's PACFile, which satisfies the service requirements of Pa.R.A.P. 121 and 122 per this Court's standing Orders regarding electronic filing, upon the following:

Kandice K. Hull, Esq.
J. Andrew Crompton, Esq.
Brigid L. Khuri, Esq.
Errin T. McCaulley, Esq.
James M. Guthrie, Esq.
Counsel for Senate Intervenor/Appellees

James J. Kutz, Esq.
Erin R. Kawa, Esq.
Rodney A. Corey, Esq.
Counsel for House Intervenor/Appellees

Mark A. Bogush, Esq.
Andrew Butash, Esq.
Peter W. Klein, Esq.
Counsel for LRB Respondent/Appellees

Dated: April 14, 2022

/s/ Matthew A. White
Matthew A. White (Pa. 55812)

IN THE SUPREME COURT OF PENNSYLVANIA

PATRICK J. McDONNELL,
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DEPARTMENT OF ENVIRONMENTAL
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PENNSYLVANIA LEGISLATIVE
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Senate Intervenor
Respondents,

HOUSE SPEAKER BRYAN CUTLER,
et al.,

House Intervenor
Respondents.

Docket No. 45 MAP 2022

ORDER

AND NOW, this _____ day of April, 2022, upon consideration of
Petitioner’s Motion for Leave to Supplement Jurisdictional Statement, it is hereby
ORDERED and DECREED that said Motion is GRANTED.

BY THE COURT:

the Court (Exhibit “A”) and thus is an immediately appealable interlocutory order because it is “[a]n order that grants. . . an injunction.” Pa.R.A.P. 311(a)(4).

As a threshold matter, it bears emphasis that Respondents Legislative Reference Bureau, Vincent C. DeLiberato and Amy J. Mendelsohn (collectively, “Respondents”) filed an Answer to Petitioner’s Jurisdictional Statement that specifically stated that “the Commonwealth Court, by its April 5, 2022, *per curiam* order, *enjoined* Petitioner and Respondents from processing the Regional Greenhouse Gas Initiative Regulation (“RGGI Regulation”) for publication.” (Exhibit “B”) (emphasis added). Respondents further stated that “Petitioner has satisfied the regulatory requirements for publication of the RGGI Regulation and Respondents have a statutory duty to publish the RGGI Regulation in the next available issue of the *Pennsylvania Bulletin* upon the lifting of the Commonwealth Court’s *current injunction to publication.*” (*Id.*) (emphasis added).

The Commonwealth Court’s Order granted the injunctive relief sought by both the Senate Intervenors and House Intervenors. The House Intervenors’ proposed order in support of and joining the Senate Intervenors’ “Application for Special Relief in the Nature of a Preliminary Injunction” had provided as follows:

. . . IT IS HEREBY ORDERED that, *pending a final determination* of Senate Intervenors’ Application for Special Relief in the Nature of a Preliminary [Injunction]¹, 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,

¹ The actual language said “Preliminary Objection,” which was a simple typographical error.

and/or otherwise codify Environmental Quality Board Rulemaking #7-559, also known as the Regional Greenhouse Gas initiative (“RGGI”) Rulemaking.

(Exhibit “C”) (Emphasis supplied).

The Senate Intervenors submitted a very similar proposed order. (Exhibit “D”).

There can be no doubt that if the Commonwealth Court had entered this proposed order, it would have been automatically appealable as an injunction. The mere fact that the Commonwealth Court used the word “stay” rather than “enjoin” in its Order is legally inconsequential. What matters for purposes of appeal under Rule 311(a)(4) is the effect of the order, not semantics, and, as the Respondents accurately pointed out, the order “enjoined” them from processing the RGGI Regulation for publication and constituted an “injunction to publication.” (Exhibit “B”).

Indeed, it is apparent from Respondents’ April 12 Answer that, despite the automatic supersedeas provision at Rule 1736(b) of the Pa.R.A.P., Respondents believe that, even now, Commonwealth Court’s order “staying” the processing of the Regulation for publication prevents—enjoins—the LRB from moving forward with publication.

Respondents state in their answer:

Petitioner has satisfied the regulatory requirements for publication of the RGGI Regulation and Respondents have a statutory duty to publish the RGGI Regulation in the next available issue of the *Pennsylvania Bulletin* upon the lifting of the Commonwealth Court’s current injunction to publication.

If the injunction is lifted, Respondents would require ten business days to publish the RGGI Regulation. (emphasis added).

As this Court recognized in *Commonwealth v. Morris*, 771 A.2d 721, 729 (Pa. 2001), “we have treated stays as injunctions in the past.” One such case was *Blackwell v. State Ethics Comm’n*, 567 A.2d 630 (Pa. 1989). Several Philadelphia City Council Members sought to enjoin an investigation by the State Ethics Commission and also sought to quash a Commission subpoena seeking bank records of one of the Council members. Commonwealth Court denied the injunction but stayed the subpoena. The Commission appealed the stay order to this Court, which noted probable jurisdiction, accepting the Commission’s argument that “the stay order ‘effectively granted a preliminary injunction’” and was therefore immediately appealable under Pa.R.A.P. 311(a)(4). *Id.* at 633. *Accord City of Reading v. Firetree, Ltd.*, 984 A.2d 16, 21 (Pa. Comm. Ct. 2009) (“This Court also does not agree that the October 7, 2008 order was ‘unappealable.’ Again, the trial court’s September 17, 2008 order ‘temporarily ordered that Defendant Orange Stones Company, shall not use said premises for any regular business related activities including either as an office, base office, satellite office or the like.’ *Unquestionably, this restriction was tantamount to a preliminary injunction.*”) (emphasis added).

The reliance by the Senate Intervenors and House Intervenors on *Commonwealth v. Morris* is misplaced. That case involved an appeal by the Commonwealth of an order by the trial court granting a motion for a stay of execution filed by a criminal defendant convicted of first-degree murder and robbery. The trial court entered the stay of execution order at the same time it denied defendant’s PCRA petition. This Court emphasized “once the PCRA court denied the PCRA petition, [defendant] still

had the right to appeal and file a stay of execution to this Court.” 771 A.2d at 736. *Morris* presents a set of facts and the complex statutory regime associated with criminal appeals; it is inapposite to the civil injunction at issue here.

In this case, the Commonwealth Court has restrained and enjoined Respondents from fulfilling their ministerial and non-discretionary statutory duty to publish the RGGI Regulation in the Pennsylvania Bulletin pursuant to 71 P.S. § 745.7(d). Its order is of indefinite duration, and prevents the RGGI Regulation from taking effect. This order enjoins conduct by Respondents, and is immediately appealable under Pa.R.A.P. 311(a)(4).

Respectfully submitted,

/s/ Matthew A. White

Matthew A. White (Pa. 55812)
Brian N. Kearney (Pa. 326227)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.665.8500

Attorneys for Petitioner

Dated: April 14, 2022

CERTIFICATE OF COMPLIANCE

I, Matthew A. White, 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.

I further certify that, if applicable, this filing complies with Pennsylvania Rule of Appellate Procedure 911(a) and does not exceed 1000 words.

Dated: April 14, 2022

/s/ Matthew A. White
Matthew A. White (Pa. 55812)

CERTIFICATE OF SERVICE

I, Matthew A. White, hereby state that I have caused to be served a true and correct copy of the foregoing Supplement via the Court’s PACFile, which satisfies the service requirements of Pa.R.A.P. 121 and 122 per this Court’s standing Orders regarding electronic filing, upon the following:

Kandice K. Hull, Esq.
J. Andrew Crompton, Esq.
Brigid L. Khuri, Esq.
Errin T. McCaulley, Esq.
James M. Guthrie, Esq.
Counsel for Senate Intervenor/Appellees

James J. Kutz, Esq.
Erin R. Kawa, Esq.
Rodney A. Corey, Esq.
Counsel for House Intervenor/Appellees

Mark A. Bogush, Esq.
Andrew Butash, Esq.
Peter W. Klein, Esq.
Counsel for LRB Respondent/Appellees

Dated: April 14, 2022

/s/ Matthew A. White
Matthew A. White (Pa. 55812)

EXHIBIT A

(April 5, 2022 *per curiam* Order)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patrick J. McDonnell, Secretary	:	
of the Department of Environmental	:	
Protection and Chairperson of the	:	
Environmental Quality Board,	:	
Petitioner	:	
	:	
	:	
v.	:	
	:	
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	:	No. 41 M.D. 2022

PER CURIAM

ORDER

NOW, April 5, 2022, processing of the Regional Greenhouse Gas Initiative Regulation for publication in the Pennsylvania Bulletin is stayed pending further order of the Court.

EXHIBIT B

(April 12, 2022 LRB Answer)

IN THE SUPREME COURT OF PENNSYLVANIA

PATRICK J. McDONNELL,
SECRETARY OF THE
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CHAIRPERSON OF
THE ENVIRONMENTAL QUALITY
BOARD

Petitioner,

Docket No. 45 MAP 2022

v.

PENNSYLVANIA LEGISLATIVE
REFERENCE BUREAU; VINCENT
C. DeLIBERATO, JR., DIRECTOR OF
THE LEGISLATIVE REFERENCE
BUREAU; and AMY J. MENDELSON,
DIRECTOR OF THE PENNSYLVANIA
CODE AND BULLETIN,

Respondents,

SENATE PRESIDENT PRO TEMPORE
JAKE CORMAN, *et al.*,

Senate Intervenor
Respondents,

HOUSE SPEAKER BRYAN CUTLER, *et
al.*,

House Intervenor
Respondents.

**RESPONDENTS' ANSWER TO PETITIONER'S JURISDICTIONAL
STATEMENT IN SUPPORT OF NOTICE OF APPEAL**

The Legislative Reference Bureau, Vincent C. DeLiberato and Amy. J. Mendelsohn, collectively known as Respondents, by and through their counsel, Peter Klein, Esq., hereby submit this Answer to Petitioner’s Jurisdictional Statement in Support of Notice of Appeal (“Jurisdictional Statement”).

Upon Senate Intervenor Respondents’ Application for Special Relief in the Form of a Preliminary Injunction, joined by House of Representatives Intervenor Respondents, the Commonwealth Court, by its April 5, 2022, *per curiam* order, enjoined Petitioner and Respondents from processing the Regional Greenhouse Gas Initiative Regulation (“RGGI Regulation”) for publication. Petitioner, pursuant to Rules of Appellate Procedure 311(a)(4), 909 and 910, appeals from the Commonwealth Court’s April 5, 2022, order.

Respondents do not take a position on Petitioner’s Jurisdictional Statement and will act as ordered by the Court.

Upon the General Assembly’s failure to override Governor Wolf’s January 10, 2022, veto of Senate Concurrent Regulatory Review Resolution 1 disapproving the RGGI Regulation, Petitioner is no longer barred from promulgating the RGGI Regulation under section 7(d) of the act of June 25, 1982 (P.L.633, No.181), known as the Regulatory Review Act, 71 P.S. § 745.7(d). Accordingly, Petitioner has satisfied the regulatory requirements for publication of the RGGI Regulation

and Respondents have a statutory duty to publish the RGGI Regulation in the next available issue of the *Pennsylvania Bulletin* upon the lifting of the Commonwealth Court's current injunction to publication.

If the injunction is lifted, Respondents would require ten business days to publish the RGGI Regulation.

Respectfully submitted,

/s/ Peter Klein

Peter Klein (Pa. Bar 313867)

Andrew Butash (Pa. Bar 313940)

Mark Bogush (Pa. Bar 324871)

Legislative Reference Bureau

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Date: April 12, 2022

EXHIBIT C

(House Intervenors' Proposed Order)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PATRICK J. McDONNELL, SECRETARY :
OF THE DEPARTMENT OF :
ENVIRONMENTAL PROTECTION and :
CHAIRPERSON OF THE :
ENVIRONMENTAL QUALITY :
BOARD :

Petitioner, :

v. :

No. 41 MD 2022

PENNSYLVANIA LEGISLATIVE :
REFERENCE BUREAU, VINCENT C. :
DeLIBERATO, JR., DIRECTOR OF THE :
LEGISLATIVE REFERENCE BUREAU, :
And AMY J. MENDELSON, DIRECTOR :
OF THE PENNSYLVANIA CODE AND :
BULLETIN :

Respondents, :

SENATE PRESIDENT PRO TEMPORE :
JAKE CORMAN, *et al.*, :

Senate Intervenor :
Respondents, :

HOUSE SPEAKER BRYAN CUTLER, :
et al., :

House Intervenor :
Respondents. :

ORDER

AND NOW, this _____ day of April, 2022, upon consideration of Senate Intervenors'¹ Request for Interim Relief, Petitioner's response thereto, and House Intervenors'² Application to Join Senate Intervenors' Request for Relief, IT IS HEREBY ORDERED that, pending a final determination of Senate Intervenors' Application for Special Relief in the Nature of a Preliminary Objection, 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.

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.

² The House Intervenor Respondents are Speaker of the House Brian Cutler, Majority Leader Kerry Benninghoff, and House Environmental and Energy Committee Chair Daryl Metcalfe.

""""""EXHIBIT D

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of the Application for Special Relief in the Nature of a Preliminary Injunction filed by Senate Intervenors¹ and Senate Intervenors' Response to Petitioner's request, Petitioner's request is hereby **GRANTED**.

IT IS HEREBY ORDERED that, pending a final determination of Senate Intervenors' Application for Special Relief in the Nature of a Preliminary Injunction, 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 thirty days of the filing of the House Intervenors' Brief, file his Reply Brief to Senate Intervenors' Brief in Support of the Application for Special Relief in the Nature of a Preliminary Injunction.

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.