

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. MENDELSON, DIRECTOR :
OF THE PENNSYLVANIA CODE and :
BULLETIN, :

No. 41 MD 2022

Respondents, :

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

Senate Intervenor :
Respondents, :

HOUSE SPEAKER BRYAN CUTLER, :
et al., :

House Intervenor :
Respondents. :

JURISDICTIONAL STATEMENT IN SUPPORT OF NOTICE OF APPEAL

Pursuant to Pennsylvania Rules of Appellate Procedure 311(A)(4), 909, and 910, Patrick McDonnell, in his official capacity as Secretary of the Pennsylvania Department of Environmental Protection (“DEP”) and Chairperson of the Environmental Quality Board (“EQB”), Petitioner in the above-captioned action, hereby submits this Jurisdictional Statement in support of his Notice of Appeal from the Commonwealth Court’s April 5, 2022 Order enjoining publication of the Regional Greenhouse Gas Initiative (“RGGI”) Regulation in the *Pennsylvania Bulletin* by the Legislative Reference Bureau (“LRB”), the Respondents in this action.

I. Opinion Below

This is an appeal from the *per curiam* Order of the Commonwealth Court entered on April 5, 2022 (the “Order”). A copy of the Order is attached as Exhibit A. The Court has not issued an opinion to accompany the Order.

II. Basis for Jurisdiction of the Supreme Court

This appeal is commenced as a matter of right. *See* Pa.R.A.P 1101. The Supreme Court has exclusive jurisdiction over appeals from appealable orders of the Commonwealth Court entered in any matter that was originally commenced in the Commonwealth Court. *See* 42 Pa.C.S. § 723(a); Pa.R.A.P. 1101(a)(1). This matter was commenced in the Commonwealth Court pursuant to its original jurisdiction. *See* 42 Pa.C.S. § 761(a)(1) and (2).

The April 5, 2022 Order staying the publication process of the RGGI Regulation by the LRB in the *Pennsylvania Bulletin* is an immediately appealable interlocutory order because it is “[a]n order that grants . . . an injunction[.]” Pa.R.A.P. 311(a)(4). This Order enjoins the LRB from performing its non-discretionary ministerial duty to publish a duly-promulgated regulation in the *Pennsylvania Bulletin*. The Court issued the Order without hearing or oral argument in violation of Pa. R.C.P. 1531. This appeal is focused solely on the Court’s Order enjoining LRB from performing its mandatory, non-discretionary duty to publish the RGGI Regulation and not the merits of the Regulation. The Commonwealth Court’s April 5, 2022 Order was improvidently entered.

III. Text of the Order in Question

This appeal seeks review of the April 5, 2022 Order in its entirety:

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.

IV. Concise Statement of Procedural History

Petitioner commenced this case in the Commonwealth Court’s original jurisdiction on February 3, 2022, by filing a Petition for Review seeking declaratory relief and a writ of mandamus (the “Petition”) to compel the LRB to publish the RGGI Regulation, and an Application for Expedited Special and Summary Relief (the “Application for Relief”). Respondents opposed expedited relief, leading

Petitioner to request an expedited briefing schedule and oral argument on February 23, which the Court denied via a February 25 *per curiam* Order.

On February 24, 2022, the Speaker, Majority Leader, and a committee chair of the Pennsylvania House of Representatives (the “House Intervenors”) filed for leave to intervene. The next day, the President Pro Tempore, Majority Leader, and two committee chairs of the Pennsylvania Senate (the “Senate Intervenors”) also filed for leave to intervene. None of the parties opposed intervention, and the Court issued a March 4 *per curiam* Order granting both applications.

On March 25, 2022, Senate Intervenors (with House Intervenors concurring) filed an application for a preliminary injunction – specifically, to enjoin the parties and any other governmental officials “from promulgating and/or publishing” the RGGI Rule. On March 28, the Court issued another *per curiam* Order, directing the parties to answer the application within 48 hours. Petitioner opposed the application; Respondents took no position, except to note that they would (as required by statute) publish the RGGI Regulation in “the first available *Pennsylvania Bulletin* if deemed approved by the General Assembly.”

On April 1, 2022, the Court issued a *per curiam* Order, setting a hearing on the preliminary injunction application for May 4, 2022. In response, Senate Intervenors immediately submitted a filing that, although styled as a response to

Petitioner’s inquiry regarding the briefing schedule, contained a request to enjoin publication of the RGGI Rule until at least the May 4 hearing.

On April 4, 2022, the Senate failed to override Governor Wolf’s veto of S.C.R.R.R. 1, a concurrent resolution disapproving the RGGI Regulation. Under Section 7(d) of the Regulatory Review Act (71 P.S. §745.7(d)), that failure meant the RGGI Regulation was deemed approved by the General Assembly, and thus duly promulgated. As the LRB noted in its April 1 filing with this Court, “[u]pon expiration of the time period under section 7(d), the [LRB] **must** publish the Trading Program [i.e. the RGGI] Regulation in the next available issue of the *Pennsylvania Bulletin*[.]” Respondents’ Application for Leave, ¶3 (emphasis added).

The next day, April 5, House Intervenors joined Senate Intervenors’ request for an order prohibiting publication by the LRB until at least the May 4 hearing. Within hours, the Court filed the *per curiam* Order that is the subject of this appeal. The Court did not set an argument or hearing date for this Order.

V. Question Presented for Review

Did the Commonwealth Court err as a matter of law in issuing an injunction, without argument or a hearing, enjoining and restraining the LRB's publication of the RGGI Regulation, a ministerial duty mandated by statute?

Suggested Answer: Yes.

Dated: April 7, 2022

Respectfully submitted,

/s/ Matthew A. White
Matthew A. White (Pa. 55812)
Brian N. Kearney (Pa. 326227)
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Attorneys for Petitioner

EXHIBIT A
to Jurisdictional Statement
(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.

CERTIFICATION

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: April 7, 2022

/s/ Matthew A. White

Matthew A. White
(Pa. 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 also hereby state that I have caused to be served upon all parties to the matter a true and correct copy of the accompanying Jurisdictional Statement required by Pa.R.A.P. 909 via the Court's PACFile.

Dated: April 7, 2022

/s/ Matthew A. White
Matthew A. White