



December 10, 2021

Amy J. Mendelsohn
Pennsylvania Code and Bulletin Director
Legislative Reference Bureau
501 North 3rd Street
Room 647, Main Capitol Building
Harrisburg, PA 17120-0033

Dear Director Mendelsohn:

The Department of Environmental Protection (DEP) received your letter dated November 30, 2021, in which you assert that the Legislative Reference Bureau (LRB) is not authorized at this time to publish the Environmental Quality Board Final Rulemaking #7-559: CO₂ Budget Trading Program. You further state that the LRB is not authorized because the concurrent resolution process provided under section 7(d) of the Regulatory Review Act (71 P.S. § 745.7(d)) is still ongoing. While we consider our legal options, I wanted to first write to you to see if we can resolve this without time-consuming litigation.

First, I want to address the concurrent resolution process itself. The concurrent resolution process outlined in section 7(d) has been construed by the General Assembly—and the Legislative Reference Bureau—as if it were the same as the process for a bill. It is not. A *consecutive* resolution process is used for bills—not a concurrent resolution process.

Given the clear and specific process laid out in the Regulatory Review Act, there is no legal authority for the LRB to substitute its own interpretation of the statute as a rationale for failing to perform its administrative role in the regulatory process. Here, the section at issue provides:

(d) 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, the concurrent resolution shall be presented to the Governor in accordance with section 9 of Article III of the Constitution of Pennsylvania. ...

71 Pa. Stat. Ann. § 745.7 (emphasis added). Here, on September 14, 2021, the Senate Environmental Resources and Energy (ERE) committee reported its concurrent resolution. The House ERE

committee reported its concurrent resolution on September 2, 2021. *Those are the dates “on which the concurrent resolution[s have] been reported.”* The 30 calendar days or 10 legislative days from both September 2, 2021 and September 14, 2021, have long since expired, and thus the regulation has been deemed approved by the General Assembly.

I understand, given the nature of this particular rulemaking, that the LRB does not want to make a misstep. However, the General Assembly’s interpretation, if followed, could lead to the absurd result that the rulemaking would go from one chamber to the other chamber’s committee, and *never leave committee*. Note above that there is no time limit upon the second committee’s report of the concurrent resolution. Thus, the General Assembly’s interpretation does not make sense given the plain language above and is contrary to the statute. It is a violation of the separation of powers doctrine, unnecessarily impeding the executive branch’s ability to execute its rulemaking authority.

In addition to being incorrect in its interpretation of section 7(d), the LRB lacks the authority to refuse to publish the final rulemaking. Section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732-204(b)) provides that “[t]he Attorney General shall review for form and legality, all proposed rules and regulations of Commonwealth agencies before they are deposited with the Legislative Reference Bureau....” Section 205 of the Commonwealth Documents Law (45 P.S. § 1205) provides that “[a]ll administrative regulations and changes therein shall be approved as to legality by the Department of Justice [predecessor of the Office of Attorney General] before they are deposited with the Legislative Reference Bureau” and that, except where the Department of Justice rules the regulations or any part of them illegal, *“the decision of the Department of Justice is final.”* (Emphasis added.) Additionally, under section 301(10) of the Commonwealth Attorneys Act (71 P.S. § 732-301(10)), the General Counsel is also responsible for reviewing a regulation for form and legality before the regulation is deposited with your office. Importantly, there is no statutory authority anywhere in either the Commonwealth Attorneys Act or the Commonwealth Documents Law that would allow the LRB to refuse to publish a duly-promulgated regulation that has received these approvals.

On November 29, 2021, DEP submitted the CO₂ Budget Trading Program final rulemaking along with a face sheet demonstrating that the final rulemaking had been approved for form and legality by both the Attorney General and the General Counsel.

Since both the Attorney General and the General Counsel approved the CO₂ Budget Trading Program final rulemaking for form and legality, your office is required to publish the Environmental Quality Board Final Rulemaking #7-559: CO₂ Budget Trading Program, submitted November 29, 2021, in accordance with the Commonwealth Documents Law.

I look forward to your reconsideration and timely publication of this final regulation.

Sincerely,



Patrick McDonnell
Secretary