

I.

This case involves the "Pennsylvania Mercury Rule" (PA Mercury Rule) found at 25 Pa. Code §§123.201-123.215. From the Six-Count Petition for Review, the Rule had its origins when the Board commenced its formal rulemaking process and adopted proposed regulations for the control of mercury emissions from coal-fired electric generating units (EGUs).² Mercury is a hazardous air pollutant as defined in Section 112 of the federal Clean Air Act, 42 U.S.C. §7412,³ in regulations promulgated by the United States Environmental Protection Agency (EPA) at 40 C.F.R. Part 61, and in DEP's regulations at 25 Pa. Code §124.3. The

² The proposed regulations were published on June 24, 2006, at 36 Pa. Bulletin 3185.

³ Section 112(g)(2) provides:

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

PA Mercury Rule was developed pursuant to requirements imposed by certain EPA regulations known as the federal Clear Air Mercury Rule (CAMR) which was codified at 40 C.F.R.

CAMR was developed by EPA in conjunction with EPA's earlier attempt to remove EGUs from the list of sources established under Section 112(c) of the Clean Air Act, 42 U.S.C. §7412. After EPA found it was neither appropriate nor necessary to regulate mercury from the EGUs under Section 112 of the Clean Air Act, it issued a final rule in 2005, which was referred to as the "Delisting Rule." It then created the CAMR which established a mercury emission budget for each state and required each state to develop a program to regulate mercury emissions from coal-fired EGUs. States could either adopt a cap-and-trade system which allowed for trading of mercury emission allowances among sources or not participate at all in the program and establish their own program to control mercury emissions. In the latter situation, the CAMR budget became a firm cap on mercury emissions in that state. Under the CAMR, EPA established emissions caps for each phase of the program, the first phase covering the years 2010 through 2017 and the second phase covering the years 2018 and thereafter. For these phases, EPA allocated to Pennsylvania an annual EGU mercury emission budget of 1.78 tons per year and 0.702 tons per year respectively. Pennsylvania elected not to participate in EPA's cap-and-trade program under the CAMR and was required to develop its own regulatory program that would show its mercury emissions would remain within the mercury budget established by EPA.

Even though the PA Mercury Rule could have only been adopted because it was delisted, Pennsylvania joined with other states in filing a petition for review in the United States Court of Appeals for the District of Columbia (D.C. Circuit) challenging both the Delisting Rule and EPA's promulgation of the CAMR. On February 8, 2008, the D.C. Circuit Court issued a decision holding that EPA's attempt to delist EGUs was unlawful and vacated the Delisting Rule *ab initio*. It also found that because the delisting was declared invalid, CAMR was no longer valid and was vacated. *State of New Jersey v. Environmental Protection Agency*, 571 F.3d 574 (D.C.Cir. 2008).

As a result of the D.C. Circuit Court's decision, PPL alleges in its petition that states are no longer assigned a mercury emission budget for EGUs. However, the Commonwealth continues to implement the PA Mercury Rule in all respects, including the implementation of the annual emission cap derived from the CAMR. Specifically, the Commonwealth has required by January 1, 2010, that PPL reduce mercury emissions at their coal-fired generating units by 80% and ensure that their mercury emissions from those units, regardless of the percentage reduction, do not exceed their combined annual emission caps set forth in the notice they received.⁴

⁴ The notice set forth the following limits:

<u>Plant</u>	<u>Unit</u>	<u>Mercury Allocation (ounces)</u>
Brunner Island	1	794
Brunner Island	2	931
Brunner Island	3	1981
Montour	1	2003
Montour	2	1995

PPL requests that we declare the PA Mercury Rule unlawful, invalid and unenforceable and enjoin the Board from continued implementation/enforcement of that Rule. It alleges that it is contrary to the specific restrictions in Section 6.6 of the Pennsylvania Air Pollution Control Act (APCA).⁵ PPL also requests that we enjoin the Board from promulgating any regulation controlling the emission of hazardous air pollutants from EGUs while EGUs remain listed sources under Section 112 of the Clean Air Act. If the Commonwealth is allowed to continue implementation of the PA Mercury Rule, it contends that it will be required to expend millions of dollars to design, install and operate air pollution control equipment to comply with the Rule, and it would have to begin construction of the necessary control equipment immediately. Further, as a result of the D.C. Circuit's decision vacating the Delisting Rule, EPA is required to develop emission standards for EGUs which represent emission reductions achievable by using the "maximum achievable control technology" standards (MACT) which it has not done to date. While the MACT standard will replace the PA Mercury Rule once promulgated, PPL does not know whether the equipment installed will be appropriate to meet the MACT standard causing irreparable harm.

In response to PPL's petition, the Commonwealth filed preliminary objections contending that PPL's Petition for Review should be dismissed because it is not ripe as a final adjudication has not been issued finding that it was in

⁵ Act of January 8, 1960, P.L. (1959) 2119, 35 P.S. §4006.6(a).

violation of the PA Mercury Rule. It then argues that once a final adjudication is issued and the matter is ripe, PPL has an adequate administrative remedy by which it can contest the lawfulness and validity of the PA Mercury Rule by appealing to the Environmental Hearing Board (EHB) pursuant to Section 4 of the Environmental Hearing Board Act,⁶ 35 P.S. §7514. The final adjudication will only be issued when it issues to PPL a plan approval or operating permit that contains applicable requirements relating to the emission standards and the applicable requirements relating to the emission limitations under 25 Pa. Code §123.207(a). It argues because it has not issued such a plan, approval or operating permit, no final action has been taken by the DEP to enforce the PA Mercury Rule. Only then is the appeal “ripe” to take to the EHB.⁷

Although the Commonwealth contends that PPL’s claim is not ripe and once it becomes so it has an adequate administrative remedy by appealing to the EHB, our Supreme Court in *Arsenal Coal Company v. Department of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333 (1984), has expressly authorized pre-enforcement challenges to the validity of regulations promulgated by the DEP. In that case, the Board adopted regulations governing the anthracite

⁶ Act of July 13, 1988, P.L. 530.

⁷ “In ruling on preliminary objections, we must accept as true all well-pleaded material allegations in the petition for review as well as all inferences reasonably deduced therefrom.” *Stanton-Negley Drug Company v. Department of Public Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). The court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them. *Id.*

coal industry in Pennsylvania but prior to the enforcement of those regulations, coal mine operators filed a petition for review in this Court's original jurisdiction. They sought to enjoin the DEP from implementing the Board's regulations. The DEP filed preliminary objections and this Court dismissed the petition for review on the basis that the challenge of the regulations was not ripe for review because the coal mine operators failed to exhaust their administrative remedies. On appeal, our Supreme Court reversed, noting that this type of pre-enforcement relief was preserved by the Administrative Agency Law, 2 Pa. C.S. §703. It explained:

Pre-enforcement review, however, is clearly not within the authority of the [EHB] and any suggestion to the contrary can only be founded upon a strained and unrealistic construction of the language of the Code. There appears no reference to power in the hearing board to rule on the validity of regulations promulgated and adopted by the Environmental Quality Board in advance of the enforcement and application of the regulations to the litigants; it is only within the context of an appeal from [DEP] action upon the application of the allegedly illegal regulation, contemplated by Section 703(a) of the Administrative Agency Law...that the Board enjoys an ancillary power to rule on the validity of the regulations. (Citations omitted.)

Where the effect of the challenged regulations upon the industry regulated is direct and immediate, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement. (Citations omitted.)

We believe that the asserted impact of the regulations in the instant case is sufficiently direct and immediate to render the issue appropriate for judicial review; the lengthy process by which the validity of the regulations will be addressed on a basis of application to the litigant would result in ongoing uncertainty in the day to day business operations of an industry which the General

Assembly clearly intended to protect from unnecessary upheaval.

The alternative to challenging the regulation through noncompliance is to submit to the regulations. We cannot say that the burden of such a course is other than substantial, accepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint as true. Appellants have alleged that the regulations require the expenditure of substantial sums to comply which, while not immediately calculable, will substantially impair the cash flow of all Appellants. Whether or not this allegation is true, it is clear that if Appellants elect to comply and await judicial determination of validity in subsequent piecemeal litigation, the process would be costly and inefficient.

505 Pa. at 209-210, 477 A.2d at 1339-1340. *See also Duquesne Light Co., Inc. v. Com., Dept. of Environmental Protection*, 724 A.2d 413 (Pa. Cmwlth. 1999).

Similarly, in this case, PPL has alleged in its petition for review that it will be required to expend millions of dollars to design, install and operate air pollution control equipment to comply with the PA Mercury Rule. The impact of the regulation on PPL is direct and immediate to render the issue appropriate for judicial review. Pre-enforcement review is not within the purview of the EHB. Consequently, PPL need not exhaust its administrative remedies, and the Commonwealth's preliminary objections regarding whether the claim is ripe and whether there was a failure to pursue administrative remedies are overruled.⁸

⁸ The Commonwealth also objected contending that one day after PPL filed its petition for review, the Utility Air Regulatory Group filed a petition for *writ of certiorari* with the United States Supreme Court asking that court to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *State of New Jersey v. EPA* and that 10 days after PPL filed this action, EPA filed a request for a hearing *en banc* with the United States Court of Appeals for the District of Columbia Circuit to reconsider the decision to vacate the CAIR. If it
(Footnote continued on next page...)

II.

A.

PPL has filed an application for summary relief⁹ contending that the Commonwealth has no authority to promulgate and/or implement the PA Mercury regulations and the PA Mercury Rule is void based on the D.C. Circuit's ruling in *New Jersey v. Environmental Protection Agency* voiding the "Delisting Rule" *ab initio*. Notwithstanding that the Delisting Rule was declared void and vacated and EGU's have been listed as sources of subject to regulation under Section 112 of the Clean Air Act since December 20, 2000, the Commonwealth continues to implement the PA Mercury Rule. Section 6.6(a) of the APCA, 35 P.S. §4006.6(a), limits the Commonwealth's authority to establish emission or performance standards to only those sources that are not included on the list of source categories under Section 112 of the Clean Air Act. Because EGU's have been delisted as sources and EGU's have been listed as sources since December 20, 2000, under

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accepts the request for a rehearing and overturns the decision in *North Carolina v. EPA*, the outcome in this decision may be affected. Because of the filing of those petitions, it argues that the petition for review is not ripe for adjudication until after that case is finally decided. We have been informed by PPL that the request for reconsideration has been denied. In any event, until *State of New Jersey v. EPA* is overturned, it remains the law.

⁹ An application for summary relief may be granted without the filing of an answer and prior to disposing of outstanding preliminary objections. *Marshall v. Commonwealth, Pennsylvania Board of Probation and Parole*, 638 A.2d 451 (Pa. Cmwlth. 1994.) Summary relief may be granted where the right thereto is clear. Pa. R.A.P. 1532(b). Where there are material issues of fact in dispute or if it is not clear that the applicant is entitled to judgment as a matter of law, the applications will be denied. *Marshall*. Based upon the Court's review of the petition for review, the application for summary relief and PPL's oral argument as well as its brief in support of its application, there is no question that PPL is entitled to judgment as a matter of law.

Section 112 of the Clean Air Act, the PA Mercury Rule violates Section 6.6(a) of the APCA. PPL also alleges that it violates Section 6.6(b) of the APCA because the Commonwealth did not establish emission or performance standards on a case-by-case basis. Finally, PPL argues the PA Mercury Rule violates the APCA because it is inconsistent with the Clean Air Act because it is not a MACT standard.

In response, the Commonwealth has filed a cross-application for summary relief arguing that the PA Mercury Rule was adopted consistent with the provisions of the APCA. It explains that during the entire time of the mercury rulemaking promulgation, EGUs were not on the Section 112(c) list. Further, Section 6.6(a) of the APCA provides the Board with authority to promulgate the PA Mercury Rule by stating that the Board may establish emission standards for source categories which are not included on the list of source categories established under Section 112(c) of the CAA. Because EGUs were removed from the Section 112(c) list under the Delisting Rule, the statutory limitations under Section 6.6(a) did not apply during the period the Board proposed and adopted the PA Mercury Rule. Simply, it contends: "A duly promulgated EQB rule, which is published in the *Pennsylvania Bulletin*, is not affected by a subsequent federal action to place the source category on the Section 112(c) list." (Commonwealth's cross-application for summary relief, ¶1.50, at 15.) The Commonwealth concludes by arguing the limitations under Section 6.6 do not have retroactive effect to invalidate previously and properly promulgated Board rules after a source category is later added to the Section 112(c) list. As such, the PA Mercury Rule remains a validly promulgated regulation that is fully enforceable.

B.

Section 6.6(a) of the APCA unambiguously limits the Board's authority to promulgate emission or performance standards only for sources not listed under Section 112 of the federal Clean Air Act. Section 6.6(a) of the APCA specifies:

The board may establish performance or emission standards for sources or categories of sources **which are not included on the list of source categories established under section 112(c) of the Clean Air Act.** (Emphasis added.)

35 P.S. §4006(a).

The PA Mercury Rule was promulgated pursuant to Section 5 of the APCA, 35 P.S. §4005, which grants the Board authority to adopt regulations consistent with the requirements of the CAA for the prevention, control, reduction and abatement of air pollution. However, Section 6.6(a) of the APCA limits the Board's authority to establish emission or performance standards for sources that emit hazardous air pollutants and are subject to regulation by EPA under Section 112 of the CAA, 42 U.S.C. §7412. The Board may only adopt standards for sources not included on the list of source categories under Section 112 of the CAA. EGUs have been listed as sources under Section 112 of the CAA since December 20, 2000, as a result of the Delisting. The PA Mercury Rule regulating EGUs violates Section 6.6 of the APCA. There is no question that pursuant to the plain language of Section 6.6(a) of the APCA, the Board may only regulate EGUs if

they are not listed as a source or category of sources under Section 112 of the CAA.

In *State of New Jersey v. EPA*, an action in which the DEP participated as a party-plaintiff, the D.C. Circuit Court held that the EPA violated the plain meaning of Section 112 of the CAA, it did not comply with the requirements and procedures of Section 112(c) (9) in delisting EGUs.¹⁰ The Court vacated the Delisting Rule and EGUs remain sources listed under Section 112. In doing so, the Court stated:

EPA promulgated the CAMR regulations for existing EGUs under Section 111(d), but under EPA's own interpretation of the Section, it cannot be used to regulate sources listed under Section 112; EPA thus concedes that if EGUs *remain listed under Section 112, as we hold*, then the CAMR regulations for existing sources must fall. (Emphasis added.)

517 F.3d at 583-584. Because EGUs remain listed as source categories under Section 112 of the CAA, it then follows that because EGUs "remain listed," Section 6.6(a) is applicable and the Board lacked authority to promulgate the PA Mercury Rule. That is so even though the PA Mercury Rule was promulgated during the interim between the action of EPA delisting the materials and *State of New Jersey v. EPA* because the D.C. Circuit found that always remained listed.

¹⁰ The Commonwealth spends much of its brief explaining how it determined to move forward with a Pennsylvania-specific mercury rule and the process. However, none of that information is relevant based on the D.C. Circuit Court's decision.

Accordingly, for the reasons stated above, PPL's application for summary relief is granted and we declare the PA Mercury Rule unlawful, invalid and unenforceable and enjoin the Commonwealth from continued implementation/enforcement of that Rule. We decline to enjoin the Board from promulgating any regulation controlling the emission of hazardous air pollutants from EGUs while EGUs remain listed sources under Section 112 of the Clean Air Act. As conceded by PPL at oral argument, the General Assembly could enact legislation regulating mercury emission which may require the Board to adopt implementing regulations. Correspondingly, the Commonwealth's cross-application for summary relief and preliminary objections are denied.

DAN PELLEGRINI, Judge

