

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

**No. 110 MAP 2023
No. 111 MAP 2023**

*JESSICA SHIRLEY, ACTING SECRETARY OF THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND ACTING CHAIRPERSON OF THE
ENVIRONMENTAL QUALITY BOARD,
Petitioners-Appellants,*

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-Appellees.*

*BOWFIN KEYCON HOLDINGS, LLC; CHIEF POWER FINANCE II, LLC,
CHIEF POWER TRANSFER PARENT, LLC; KEYCON POWER HOLDINGS,
LLC; GENON HOLDINGS, INC.; PENNSYLVANIA COAL ALLIANCE; UNITED
MINE WORKERS OF AMERICA; INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; AND INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND
HELPERS,
Petitioners-Appellees,*

v.

*PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD,
Respondents-Appellants.*

*APPEALS OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, CLEAN AIR
COUNCIL, THE SIERRA CLUB AND ITS PENNSYLVANIA CHAPTER, AND
ENVIRONMENTAL DEFENSE FUND
Intervenor-Appellants*

**BRIEF OF AMICI CURIAE
DELAWARE RIVERKEEPER NETWORK and**

**GREEN AMENDMENTS FOR THE GENERATIONS
IN SUPPORT OF THE APPELLANTS**

Appeals from the November 1, 2023 Opinions and Orders of The Commonwealth
Court, No. 41 M.D. 2022 and No. 247 M.D. 2022

Kacy C. Manahan
(Pa. I.D. No. 329031)
Senior Attorney
Delaware Riverkeeper Network
Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

*Counsel for Amici Curiae Delaware
Riverkeeper Network and Green
Amendments for the Generations*

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION4

ARGUMENT5

I. To avoid infringing the environmental rights enumerated in Article I, Section 27’s first clause, the Agencies must act to address the Commonwealth’s GHG emissions, which are contributing to climate change.....6

II. The constitutional public trust requires the Agencies to carry out the purpose of the trust and comply with their fiduciary duties by using their authority to reduce the Commonwealth’s contribution to climate change and to remedy climate-change-induced damage to the public natural resources.....12

III. The Agencies’ statutory authority must be exercised in accordance with Article I, Section 27.....19

CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

<i>Air-Serv Group, LLC v. Com.</i> , 18 A.3d 448 (Pa. Commw. Ct. 2011)	12
<i>Bowfin KeyCon Holdings, LLC v. Pa. Dept. of Env't. Prot.</i> , No. 247 M.D. 2022, 2023 WL 7171547 (Pa. Commw. Ct. Nov. 1, 2023).....	4
<i>Clean Air Coun. v. Dep't of Env't. Prot.</i> , 289 A.3d 928 (Pa. 2023)	19
<i>Del. Riverkeeper Network v. Pa. Dept. of Env't. Prot.</i> , No. 285 M.D. 2019, 2021 WL 96887 (Pa. Commw. Ct. Jan. 12, 2021)	20
<i>Funk v. Wolf</i> , 144 A.3d 228 (Pa. Commw. Ct. 2016)	20
<i>Hartford Acc. & Indem. Co. v. Ins. Com'r of Commw.</i> , 482 A.2d 542 (Pa. 1984)	20, 21, 22
<i>Marcellus Shale Coal. v. Dept. of Env't. Prot.</i> , 193 A.3d 447 (Pa. Commw. Ct. 2018)	20
<i>New Hanover Twp. v. Dept. of Env't. Prot.</i> , Nos. 2018-075-L & 2018-075-L, 2020 WL 2120289 (Pa. Env't. Hrg. Bd. Apr. 24, 2020).....	7
<i>Pa. Env't. Def. Found. v. Commw. (PEDF II)</i> , 161 A.3d 911 (Pa. 2017)	<i>passim</i>
<i>Pa. Env't. Def. Found. v. Commw. (PEDF V)</i> , 255 A.3d 289 (Pa. 2021)	6, 17
<i>Pocono Manor Investors, LP v. Pa. Gaming Ctrl. Bd.</i> , 927 A.2d 209 (Pa. 2007)	16
<i>Robinson Twp., Washington Cty. v. Commw.</i> , 83 A.3d 901 (Pa. 2013)	<i>passim</i>
<i>Shirley v. Pa. Leg. Ref. Bureau</i> , No. 85 MAP 2022, ___ A.3d ___ (Pa. July 18, 2024).....	4
<i>Trust Under Will of Augustus T. Ashton</i> , 260 A.3d 81 (Pa. 2021)	15
<i>Ziadeh v. Pa. Legis.Ref. Bureau</i> , No. 41 M.D. 2022, 2023 WL 7170737 (Pa. Commw. Ct. Nov. 1, 2023).....	4

Statutes

20 Pa. Cons. Stat. Ann. § 7774	15
35 Pa. Stat. § 4004(24).....	9

35 Pa. Stat. § 4005(a)(1)	9
35 Pa. Stat. § 4006.3(a).....	9
35 Pa. Stat. § 4009.2(a).....	9
35 Pa. Stat. §§ 4001–4015	9
71 Pa. Stat. § 1361.3(a).....	7
71 Pa. Stat. § 1361.7(a).....	7
71 Pa. Stat. § 1361.1–1361.8	7

Other Authorities

Dernbach & McKinstry, <i>Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption</i> , 8 Mich. J. of Env't. & Admin. L. 49 (2018)	8
Pa. Dept. of Env't. Prot., Climate Impacts Assessment 2021	8, 10
Pa. Dept. of Env't. Prot., Pennsylvania Climate Action Plan 2021	11

Rules

CO ₂ Budget Trading Program, 52 Pa. Bull. 2471 (2022).....	<i>passim</i>
---	---------------

Regulations

25 Pa. Code § 145.343(b)	16
--------------------------------	----

Constitutional Provisions

Pa. Const. art. I, § 27	<i>passim</i>
Pa. Const. Art. I, § 28.....	21

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Delaware Riverkeeper Network is a nonprofit organization established in 1988 to protect, preserve and enhance the Delaware River, its tributaries, and habitats. Delaware Riverkeeper Network has over 27,000 members, who live, work, and recreate within the Delaware River Basin. Delaware Riverkeeper Network has also appeared before numerous Pennsylvania courts and administrative agencies to enforce Pennsylvania's Green Amendment—article I, section 27 of the Pennsylvania Constitution—and both Maya K. van Rossum, the Delaware Riverkeeper, and her legal team are recognized nationwide as experts on Article I, Section 27 jurisprudence. Delaware Riverkeeper Network represents the recreational, educational, and aesthetic interests of our members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking. Additionally, we represent the economic interests of many of our members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, or boating. Furthermore, Delaware Riverkeeper Network also represents the health interests of those who use the Delaware River watershed's resources for drinking, cooking, farming, swimming, or gardening. Each of these interests is affected by the climate crisis, and rely on the Commonwealth's adherence to Article I, Section 27 for their preservation. Delaware Riverkeeper Network supports the protection and restoration of the Delaware River,

its tributaries and watershed, and the creation and honoring of constitutional environmental rights for the benefit of present and future generations.

Green Amendments For The Generations (“GAFTG”) is a 501(c)(3) education, advocacy, and legal action organization working nationwide to ensure every person and community across the United States is able to experience the health, quality of life, education, joy, and economic prosperity provided by a clean, safe, and healthy environment; to end environmental racism; and to help ensure that nature itself is able to thrive by constitutionally empowering all people to secure and enforce their inalienable human right to pure water, clean air, a stable climate, and healthy ecosystems and environments. GAFTG’s work builds upon a legal victory achieved in 2013, in which Founder Maya K. van Rossum, in her role as the Delaware Riverkeeper, the Delaware Riverkeeper Network organization, and seven municipalities working collaboratively, re-invigorated Pennsylvania’s long-ignored constitutional environmental rights provision to defeat a devastatingly pro-fracking piece of legislation that was slated to give the industry expanded powers and unleash a new wave of fossil fuel fracking and all its devastating harms across the state. Following this achievement, van Rossum identified the unique characteristics of the Pennsylvania amendment that allowed for this stunning victory, determined that among the fifty U.S. states only Montana had a similar amendment, and founded

GAFTG in order to help communities understand and pursue this powerful protection (what we now call a “Green Amendment”) nationwide.

Amici focus this brief on the Department of Environmental Protection’s and the Environmental Quality Board’s duty to help address climate change through regulation of GHG emissions and the use of trust funds to remedy climate change’s adverse effects. Amici have a long-standing interest in the health and wellbeing of Pennsylvania residents and is committed to preserving and protecting Pennsylvania’s natural resources. Amici have a specific interest in ensuring that the Commonwealth’s environmental statutes are administered by Commonwealth trustees in compliance with Article I, Section 27 of the Pennsylvania Constitution. In compliance with Pa. R.A.P. 531(b)(2), no other person or entity other than amici or their counsel paid for or authored this brief.

INTRODUCTION

Amici write to provide this Court with a constitutional perspective not provided by the parties or the Commonwealth Court below.¹ As emphasized by various appellants and amici in this and other related appeals, the Department of Environmental Protection and the Environmental Quality Board (collectively, “the Agencies”) have ample statutory authority to promulgate and implement the CO₂ Budget Trading Program (“RGGI Regulation”).² Amici support and adopt these arguments without reiterating them.

Instead, this brief focuses on the constitutional imperative that requires the Agencies to exercise their statutory authority to both reduce greenhouse gas (“GHG”) emissions and to recover funds generated from the permitted degradation of the atmospheric resource to the constitutional trust *corpus*. In short, the Agencies have a duty pursuant to Article I, Section 27 of the Pennsylvania Constitution to use

¹ Although nonprofit intervenors Citizens for Pennsylvania’s Future, Clean Air Council, and the Sierra Club along with its Pennsylvania chapter thoroughly briefed this case’s Article I, Section 27 implications as amici below, the Commonwealth Court explicitly disregarded their arguments because of their non-party status. *See Ziadeh v. Pa. Legis. Ref. Bureau*, No. 41 M.D. 2022, 2023 WL 7170737 at *6 n.17 (Pa. Commw. Ct. Nov. 1, 2023) and *Bowfin KeyCon Holdings, LLC v. Pa. Dept. of Env’t. Prot.*, No. 247 M.D. 2022, 2023 WL 7171547 *5 n.10 (Pa. Commw. Ct. Nov. 1, 2023). Because this Court recently reversed the Commonwealth Court’s denial of the nonprofit intervenors’ motion to intervene, *see Shirley v. Pa. Leg. Ref. Bureau*, No. 85 MAP 2022, ___ A.3d ___ (Pa. July 18, 2024), the issues identified above are now properly before this Court.

² CO₂ Budget Trading Program, 52 Pa. Bull. 2471 (2022).

their statutory authority to achieve GHG emissions reduction goals designed to alleviate climate change, which is adversely impacting the public natural resources and the environmental rights of the people of the Commonwealth. The Commonwealth Court's willful blindness to this obligation resulted in a weak and blinkered analysis of the RGGI Regulation, stripped of its statutory and constitutional context.

The environmental rights paradigm was entirely omitted from the Commonwealth Court's consideration of the constitutionality of the RGGI Regulation. Instead the court below chased a red herring question of whether the auction proceeds were an unauthorized tax or a permissible administrative fee. Without understanding that the Agencies were carrying out a constitutional duty in promulgating the RGGI Regulation, or considering the impact of its own ruling on the rights protected by Article I, Section 27, the Commonwealth Court incorrectly invalidated it.

ARGUMENT

Pennsylvania's Environmental Rights Amendment guarantees the following:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. Each of the three clauses of Article I, Section 27 require the Commonwealth to do its part to prevent and remedy climate change by reducing the state’s GHG emissions. The Commonwealth is required to abate its contribution to climate change by reducing the emission of greenhouse gases, and must also take appropriate action to remedy the effects of climate change on the public’s rights and resources.

I. To avoid infringing the environmental rights enumerated in Article I, Section 27’s first clause, the Agencies must act to address the Commonwealth’s GHG emissions, which are contributing to climate change.

The structure of Article I, Section 27 is generally divided into three clauses. The first two clauses declare specific rights held by the people, while the third clause establishes a constitutional public trust. Article I, Section 27 creates two enumerated rights—the first being the “declared environmental rights” which “constitute[] a limit on the Commonwealth’s power to act in degradation of those values.” *Pa. Env’t. Def. Found. v. Commw. (PEDF V)*, 255 A.3d 289, 296 (Pa. 2021) (citing *Robinson Twp, Washington Cty. v. Commw.*, 83 A.3d 901, 951 (Pa. 2013) (plurality opinion)).

This clause “requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.” *Robinson Twp.*, 83 A.3d at 952 (plurality opinion) This requirement stems from the simple fact that a failure to do so risks infringement upon individual environmental rights. A “failure to obtain information . . . does not excuse

the constitutional obligation because [it] exists *a priori* to any statute purporting to create a cause of action.” *Id.*

Compliance with the first clause of Article I, Section 27 demands informed decisionmaking, which includes a scientific understanding of the causes and effects of climate change. Without this understanding, the Commonwealth runs the risk of acting—or failing to act—in violation of the rights enumerated. *See, e.g. New Hanover Twp. v. Dept. of Env't. Prot.*, Nos. 2018-075-L & 2018-075-L, 2020 WL 2120289 at *39 (Pa. Env't. Hrg. Bd. Apr. 24, 2020) (“[DEP] cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be.” (quoting *Friends of Lackawanna*, 2017 EHB at 1161)).

The Commonwealth acted in furtherance of its duty to obtain relevant information by enacting the Pennsylvania Climate Change Act of 2008, P.L. 935, No. 70, 71 Pa. Stat. § 1361.1 to 1361.8. That statute requires the Department of Environmental Protection to, among other things, “prepare and publish a report on the potential impact of climate change in this Commonwealth,” *id.* § 1361.3(a), and to create a “climate change action plan” that identifies discusses, and evaluates strategies for reducing GHG emissions. *Id.* § 1361.7(a). Knowledge of these strategies, and an understanding of the impacts resulting from a failure to deploy these strategies, informs the Commonwealth of what is required to comply with its

constitutional duty to protect the rights identified in the first clause of Article I, Section 27.

The right that is perhaps most obviously impacted by GHG emissions and climate change is the right to “clean air.” Because “air and water quality have relative rather than absolute attributes,” one must look to the human health and ecological effects of an increased concentration of GHGs in the atmosphere to determine whether their emissions would cause a violation of environmental rights. *Robinson Twp.*, 83 A.3d at 953. *See also* Dernbach & McKinstry, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 Mich. J. of Env't. & Admin. L. 49, 69 (2018) (“As is the case with most other conventional water and air pollutants, carbon dioxide is a naturally occurring substance necessary for life and the maintenance of the climate, and it is only when the concentration of the pollutant becomes too high that the natural processes are disrupted.”).

In 2021, the Department of Environmental Protection published the latest Climate Impacts Assessment, which acknowledged that the myriad harmful effects of climate change are caused by GHG emissions. *See* Pa. Dept. of Env't. Prot., *Climate Impacts Assessment 2021* at 4 (“Across global climate models, a consensus exists that as global greenhouse gas emissions rise, average temperatures will

increase.”).³ Pennsylvania’s Air Pollution Control Act (“APCA”) is the Commonwealth’s primary legislative tool to protect its air resources as required by Article I, Section 27. *See* 35 Pa. Stat. §§ 4001–4015. As discussed in depth in Appellants’ briefs, it provides the Agencies with ample authority to “adopt rules and regulations[] for the prevention, control, reduction and abatement of air pollution,” *id.* § 4005(a)(1), to “establish fees to support the air pollution control program authorized by [APCA]” which are deposited into a fund for the “elimination of air pollution, *id.* §§ 4006.3(a) & 4009.2(a), and to “cooperate with the appropriate agencies . . . of other states . . . with respect to the control, prevention, abatement and reduction of air pollution,” *id.* § 4004(24). The Agencies are thus armed with both the knowledge and the authority necessary to comply with the constitution by addressing climate change through regulating the emission of GHGs.

Clean air is not the only right affected by climate change, however. The 2021 Climate Impacts Assessment recognized that climate change was “already affecting Pennsylvania,” and that by mid-century, the average annual temperature will increase by 5.9°F, there will be “more frequent and intense extreme heat events,”

³ Available at

<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=3667348&DocName=PENNSYLVANIA%20CLIMATE%20IMPACTS%20ASSESSMENT%202021.PDF%20%20%3cspan%20style%3D%22color:green%3b%22%3e%3c/span%3e%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c/span%3e%204/30/2023>

rainfall will increase but will become more intense (causing flooding) and less frequent (resulting in droughts), and that tidally influenced flooding will increase in the Delaware Estuary. Climate Impacts Assessment 2021 at ix. Flooding and drought both impact the right to “pure water” as heavy precipitation carries and transports contaminants and drought conditions damage pollutant-removing wetlands and increase the concentration of pollutants in surface waters. *See id.* at 32, 54, 62, 117.

The Commonwealth has direct control over its own emissions, and indirectly controls the GHG emissions of others through regulation. The constitutional obligation to avoid infringement upon the first clause’s environmental rights “binds all government, state or local, concurrently” and functions as a “bulwark against actual or likely degradation of . . . our air and water quality.” *Robinson Twp.*, 83 A.3d at 953. Based on the information known to the Commonwealth regarding the ongoing and likely future degradation of air and water quality as a result of GHG-induced climate change, the Agencies are required to act to prevent such degradation and the Commonwealth’s contribution thereto.

In 2021, the Department of Environmental Protection identified the RGGI Regulation as a key strategy to reduce GHG emissions and to increase clean energy funding. *See generally* Pa. Dept. of Env’t. Prot., Pennsylvania Climate Action Plan

2021.⁴ The purpose of the RGGI Regulation is to “reduce anthropogenic emissions of [carbon dioxide (“CO₂”)], a [GHG] and major contributor to climate change impacts, in a manner that is protective of public health, welfare and the environment in this Commonwealth.” RGGI Regulation, 52 Pa. Bull. at 2471. The Agencies promulgated the RGGI Regulation because they found that “regulating CO₂ emissions from fossil fuel-fired [electricity generating units] is necessary to protect public health and welfare from harmful air pollution and to address climate change.” *Id.* at 2477. In other words, the RGGI Regulation is a means of complying with the constitutional requirement to exercise the Agencies regulatory authority in a manner that will reduce GHG emissions.

The Commonwealth Court’s decision to vacate the RGGI Regulation—without consideration of the rights protected in the first clause of Article I, Section 27—both invalidated the Agencies’ constitutionally-required regulation and was unconstitutional itself. *See Robinson Twp.*, 83 A.3d at 952 (explaining that the role of the judiciary as trustee includes the obligation to vindicate ERA rights).

⁴ Available at

<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=3925177&DocName=2021%20PENNSYLVANIA%20CLIMATE%20ACTION%20PLAN.PDF%20%20%3cspan%20style%3D%22color:green%3b%22%3e%3c/span%3e%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c/span%3e%209/21/2023>

II. The constitutional public trust requires the Agencies to carry out the purpose of the trust and comply with their fiduciary duties by using their authority to reduce the Commonwealth’s contribution to climate change and to remedy climate-change-induced damage to the public natural resources.

In addition to the constitutional mandate to avoid infringing on individual environmental rights of the people, Article I, Section 27 establishes a constitutional public trust. The second right identified in that provision is “the common ownership of the people, including future generations, of Pennsylvania’s public natural resources.” *Pa. Env’t. Def. Found. v. Commw. (PEDF II)*, 161 A.3d 911, 931 (Pa. 2017) (citing *Robinson Twp.*, 83 A.3d at 954 (plurality opinion)). Public natural resources are not explicitly defined or listed, and in some cases may be identified by the relationship between the natural resource and the rights protected in the first clause. *See Robinson Twp.*, 83 A.3d at 955 (“[T]he term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns.”) (plurality opinion).

When the *Robinson Township* plurality was written, the concept of public natural resources included “not only state-owned lands, waterways, and mineral reserves, but also *resources that implicate the public interest*, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Id.* at 955 (emphasis added). *See also Air-Serv*

Group, LLC v. Com., 18 A.3d 448, 453–54 (Pa. Commw. Ct. 2011) (explaining that the atmosphere is a part of the public natural resources—common property of all the people—and not subject to private ownership). The atmospheric resource thus belongs collectively to the people of the Commonwealth, including all those yet to be born.

The third clause establishes the constitutional trust that guides the Commonwealth’s duties towards the public natural resources. The trust names the public natural resources as the trust assets, the Commonwealth as trustee,⁵ and the present and future generations as trust beneficiaries. *See* Pa. Const., art. I, § 27. The Commonwealth, as administrator of the trust, is tasked with the overriding duty to “conserve and maintain” the public natural resources “for the benefit of all the people,” *id.*, which means it must “prevent and remedy [their] degradation, diminution, or depletion.” *PEDF II*, 161 A.3d at 932 (citing *Robinson Twp.*, 83 A.3d at 956–57 (plurality opinion)). This is the trust purpose—meaning that the assets of the trust may not be used for any other purpose.

Because GHG emissions degrade the trust *res*—the atmosphere—the Agencies, as Commonwealth entities, must prevent GHG emissions resulting from state action or inaction, whether directly or through the acts of others, and remedy

⁵ All agencies and entities of the Commonwealth are trustees and are bound by the constitutional trust obligations. *See PEDF II*, 161 A.3d at 931 n.23.

the effects of GHG pollution. According to the Agencies, the RGGI Regulation is “necessary to ensure CO₂ emissions continue to decrease and at a rate that shields this Commonwealth from the worst impacts of climate change.” RGGI Regulation, 52 Pa. Bull. at 2474.

As noted previously, GHG emissions do not merely degrade the atmospheric resource, but also, through their climate-changing effects, have interrelated impacts on many other public natural resources. In promulgating the RGGI Regulation, the Agencies noted that climate change impacts “could alter the many fundamental assumptions about climate that are intrinsic to this Commonwealth’s . . . stewardship of its natural resources and environment.” *Id.* at 2472. Because affirmative action on the part of the Commonwealth is required to carry out the trust purpose, the Agencies are required to regulate GHG emissions to protect these resources from adverse effects caused by climate change. *See Robinson Twp.*, 83 A.3d at 955–56 (the Commonwealth’s trustee duties are “both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations)”) (plurality opinion).

The Agencies are also subject to several fiduciary duties by virtue of their trustee status, including the duties of prudence, loyalty, and impartiality. *Id.* Each of these duties plays a role in the Agencies’ promulgation of the RGGI Regulation, and should have factored into the Commonwealth Court’s analysis of the RGGI Regulation’s constitutionality.

The duty of prudence requires the Agencies to “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *PEDF II*, 161 A.3d at 932 (quoting *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979)). It is axiomatic that climate change cannot be solved by a single agency or even a single government.⁶ However, the Agencies “exercis[ed] reasonable care, skill and caution,” 20 Pa. Cons. Stat. Ann. § 7774, in promulgating the RGGI Regulation because although it “will not solve global climate change, it will aid this Commonwealth in addressing its share of the impact, joining other states and countries that are addressing their own impact.” RGGI Regulation, 52 Pa. Bull. at 2475. By utilizing the precautionary principle and taking collective action through the RGGI Regulation, *id.*, the Agencies acted with prudence and caution towards the public natural resources in the face of an existential threat.

The duty of loyalty includes the duty not to use trust resources for the trustee’s own purposes—otherwise known as self-dealing. *See, e.g., Trust Under Will of Augustus T. Ashton*, 260 A.3d 81, 90 (Pa. 2021) (citing Restatement (Second) of Trusts § 170(1) & Comments). Because the Commonwealth Court ignored the constitutional trust created by Article I, Section 27, it failed to consider that if

⁶ *See generally* Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 35, World Bank Policy Research Working Paper No. 5095 (October 2009) (“An important lesson is that simply recommending a single governmental unit to solve global collective action problems—because of global impacts—needs to be seriously rethought and the important role of smaller-scale efforts recognized.”)

allowance proceeds were indeed a tax that could be used according to the Department of Environmental Protection's whims, then the diversion of funds from trust purposes would violate the Agencies' trustee duties. *See PEDF II*, 161 A.3d at 933 ("The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.'" (quoting *Robinson Twp.*, 83 A.3d at 978 (plurality opinion))).

The Commonwealth Court's apparent sticker shock at the amount of money to be added to the Clean Air Fund caused it to forget this Court's instruction that regulations consistent with an agency's statutory authority are presumed constitutional, and that opponents to such regulation face a heavy burden to prove its unconstitutionality. *See, e.g., Pocono Manor Investors, LP v. Pa. Gaming Ctrl. Bd.*, 927 A.2d 209, 223 (Pa. 2007) ("We presume, as we do with all statutes, that the Board intended its regulations to be constitutional.") Indeed, the Agencies crafted the RGGI Regulation in compliance with Article I, Section 27, and limited the use of allowance proceeds to trust purposes. *See* RGGI Regulation, 52 Pa. Bull. at 2525, 25 Pa. Code § 145.343(b) ("The proceeds of the auction will be used in the elimination of air pollution in accordance with the act and Chapter 143 (relating to disbursements from the Clean Air Fund) and for programmatic costs associated with

the CO₂ Budget Trading Program.”). Without consideration of the Agencies’ duty of loyalty, the Commonwealth Court did not recognize this compelling justification in favor of a finding that the allowance proceeds were in fact *not* a tax.

Finally, the duty of impartiality means that the Agencies must act in the interests of all beneficiaries, including future generations. The “conservation and maintenance of the public natural resources is not temporally limited,” meaning that present and future generations are simultaneous beneficiaries and the Commonwealth “must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born.” *PEDF V*, 255 A.3d at 213–14. The Agencies promulgated the RGGI Regulation in recognition of the fact that “it is vital not to leave . . . environmental issues, like climate change, for future generations to solve.” RGGI Regulation, 52 Pa. Bull. at 2479. *See also id.* at 2473 (citing the United States Environmental Protection Agency’s Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009), which identified GHGs as threats to “the public health and the public welfare of current and future generations”). The RGGI Regulation is goal-oriented, seeking to bring the Commonwealth into compliance with its own GHG reduction benchmarks and to ensure that the Commonwealth is doing its part in the global effort to avoid the worst effects of climate change.

The funds generated by the allowance proceeds may appear large, but if properly considered, this Court must recognize that those funds must not only be

used to benefit air quality now, but must also be used to ensure preservation of the atmospheric resource (and all other public natural resources that depend on it) indefinitely into the future. The Commonwealth Court erred in failing to consider that the so-called “disproportionality” of the allowance proceeds to the Department of Environmental Protection’s annual budget is a meaningless metric when the true purpose of, and need for, the funds is properly considered.

The Commonwealth Court also failed to consider that the allowance proceeds will ideally cease in the near future, as GHG emissions are abated and the Commonwealth achieves its reduction goals. Again, the primary purpose of the RGGI Regulation is to decrease GHG emissions, not to raise money (even for trust purposes). The RGGI Regulation is described by the Agencies as a “cap and invest” program, because it features both a “declining emissions budget” and “investment of the proceeds resulting from the auction of CO₂ allowances to further reduce CO₂ emissions.” RGGI Regulation, 52 Pa. Bull. at 2476. In looking to the future, the Department of Environmental Protection has recognized that climate change hazards will only increase. *See* 2021 Climate Action Plan at xi. The funds generated by the allowance proceeds will be needed to address these impacts for decades to come, even if the auction generates less money further down the line.

Because the public trust provisions of Article I, Section 27 require the Agencies to act as trustees of the atmospheric resource, and because the

Commonwealth Court neither acknowledged nor discussed the role of the constitutional public trust in its November 1, 2023 opinions, those decisions should be reversed.

III. The Agencies’ statutory authority must be exercised in accordance with Article I, Section 27.

Even when Article I, Section 27 is not expressly invoked in a statute, regulation, or litigation, “its mandate informs Pennsylvania’s elaborate body of environmental protection statutes and regulations.” *Clean Air Coun. v. Dep’t of Env’t. Prot.*, 289 A.3d 928, 932 (Pa. 2023). All three clauses of Article I, Section 27 *require* the Agencies to use their statutory and regulatory authority to abate and remedy climate change. “Although a trustee is empowered to exercise discretion with respect to the proper treatment of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate to ‘mere subjective judgment.’” *PEDF II*, 161 A.3d at 933 (quoting *Robinson Twp.*, 83 A.3d at 978 (plurality opinion)). This means that where a trustee such as the Department of Environmental Protection or the Environmental Quality Board has authority granted to it by the General Assembly, that authority *must* be used in a manner consistent with Article I, Section 27.

Some recent Commonwealth Court decisions have undermined the role of agencies in complying with Article I, Section 27, erroneously anointing the

Generally Assembly as the arch-trustee.⁷ However, in adopting the reasoning of the *Robinson Township* plurality, this Court has made clear that “duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania’s government,” and instead “the plain intent of the [ERA] is to permit the checks and balances of government to operate in their usual fashion for the benefit of all the people in order to accomplish the purposes of the trust.” *Robinson Twp.*, 83 A.3d at 956 (plurality opinion). *Cf. Marcellus Shale Coal. v. Dept. of Env’t. Prot.*, 193 A.3d 447, 484–85 (Pa. Commw. Ct. 2018) (reading *PEDF II* and *Robinson Township* to interpret the statutory term “public resource agency” to include municipalities). Where a Commonwealth agency or entity has the authority and discretion to act, it must act in compliance with its constitutional duties.

This interplay between statutorily-bestowed authority and a constitutional mandate has played out before in Pennsylvania. In *Hartford Acc. & Indem. Co. v. Ins. Com’r of Commw.*, 482 A.2d 542 (Pa. 1984), the Insurance Commissioner of Pennsylvania rescinded approval of an insurance company’s gender-based auto

⁷ See *Funk v. Wolf*, 144 A.3d 228, 233–35 (Pa. Commw. Ct. 2016) (using the now-rejected *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) framework to suggest that agencies are not subject to the full range of trustee duties imposed on the Commonwealth) and *Del. Riverkeeper Network v. Pa. Dept. of Env’t. Prot.*, No. 285 M.D. 2019, 2021 WL 96887 (Pa. Commw. Ct. Jan. 12, 2021) (interpreting *Funk* to mean that “the legislative process produces a statute that already reflects and incorporates agencies’ relevant duties under the Environmental Rights Amendment”).

insurance rate plan because it was “unfairly discriminatory” based on Pennsylvania’s Equal Rights Amendment, which guarantees “[e]quality of rights under the law” regardless of an individual’s sex. Pa. Const. Art. I, § 28. The insurance company appealed the Commissioner’s decision, arguing that the statute prohibiting “unfairly discriminatory” rates did not define the term to include gender discrimination, that the Equal Rights Amendment is not self-executing, and that the insurance company’s rate plan was not a “state action” subject to Article I’s prohibitions. *See Hartford*, 482 A.2d at 585.

This Court rejected the argument that the Commissioner was independently executing the Equal Rights Amendment, and clarified that the Commissioner was instead properly interpreting an enabling statute’s language—“unfairly discriminatory”—to be “consonant with the Constitution.” *Id.* The Commissioner’s decision was upheld “because the statute *must* be interpreted to include sex discrimination as one type of unfair discrimination, and not because the Commissioner has the power to implement the public policy of this Commonwealth in the absence of legislative direction.” *Id.* (emphasis added).

As applied to the instant case, Article I, Section 27 is not a roving grant of extra-statutory authority to the Agencies, but rather informs the Agencies’ interpretation and execution of their existing authority under APCA—to ignore Article I, Section 27 “would contradict the plain mandate of . . . our Pennsylvania

Constitution.” *Id.* Not only is the Agencies’ use of their statutory authority to address climate change “supported” by Article I, Section 27, but it is constitutionally required.

The *Hartford* Court also held that because the Equal Rights Amendment “circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law,” the insurance company’s rate policy did not need to meet the federal “state action” test to be prohibited by the Equal Rights Amendment, because the Commissioner’s ruling on the rate policy was required to conform to the Pennsylvania Constitution. *Id.* at 586. Similarly here, Article I, Section 27 binds all agencies and entities of the Commonwealth to avoid infringing on individual environmental rights and to act as trustees when carrying out their statutory and regulatory powers. *See PEDF II*, 161 A.3d at 931 n.23. *See also Robinson Twp.*, 83 A.3d at 952 (plurality opinion).

The Commonwealth Court’s November 1, 2023 decisions omitted any discussion regarding how the Agencies’ exercise of their statutory authority complied with, and furthered, their Article I, Section 27 duties. Because of this omission, this Court should reverse both decisions.

CONCLUSION

For the reasons set forth above, Amici respectfully request that this Court reverse the Commonwealth Court's decision granting summary judgment to the challengers to the RGGI Regulation and vacate the order enjoining the Department of Environmental Protection from enforcing the RGGI Regulation.

Respectfully submitted,

Dated: July 29, 2024



KACY C. MANAHAN
(Pa. I.D. No. 329031)
Delaware Riverkeeper Network
25 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

*Counsel for Amici Curiae Delaware
Riverkeeper Network and Green
Amendments for the Generations*

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

In accordance with Pa. R.A.P. 2135(d), I, Kacy C. Manahan, hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 29, 2024




KACY C. MANAHAN
(Pa. I.D. No. 329031)
Delaware Riverkeeper Network
25 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

*Counsel for Amici Curiae Delaware
Riverkeeper Network and Green
Amendments for the Generations*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121. The Proof of Service generated by the PACFile system will follow this Certificate of Service in the paper copy of this brief filed with the Court.

Dated: July 29, 2024



KACY C. MANAHAN
(Pa. I.D. No. 329031)
Delaware Riverkeeper Network
25 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

*Counsel for Amici Curiae Delaware
Riverkeeper Network and Green
Amendments for the Generations*