

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOWNSHIP OF MARPLE,

Petitioner,

v.

PENNSYLVANIA PUBLIC
UTILITY COMMISSION,

Respondent

THEODORE UHLMAN AND JULIE
BAKER,

Petitioners,

v.

PENNSYLVANIA PUBLIC
UTILITY COMMISSION,

Respondent

CASES CONSOLIDATED

Docket No. 1385 CD 2024

Docket No. 1423 CD 2024

Petitions for Review of the
Opinion and Order of the
Pennsylvania Public Utility
Commission entered September
26, 2024 in Docket No. P-2021-
3024328

ADVANCE FORM BRIEF OF PETITIONERS

THEODORE UHLMAN AND JULIE BAKER

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this appeal pursuant to Section 763(a)(1) of the Judicial Code, 42 Pa. C.S. § 763(a)(1). In relevant part, Section 763(a)(1) provides: “the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies,” including appeals from the Pennsylvania Public Utility Commission (the “Commission”). *Id.*

At issue in this appeal is the Commission’s final Opinion and Order entered September 26, 2024 with respect to the *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619*, Docket No. P-2021-3024328. This Honorable Court has jurisdiction because the case concerns an appeal from a final order of the Commission.

ORDER IN QUESTION

Petitioners Theodore Uhlman and Julie Baker (collectively, the “Marple Citizens”) seek review of the Opinion and Order of the Commission entered on September 26, 2024 with respect to the *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Docket No. P-2021-3024328. This Opinion and Order is attached hereto as Appendix A.

The Ordering Paragraphs from the Decision are set forth below:

IT IS ORDERED:

1. That the Exceptions filed by Marple Township, Delaware County, on April 23, 2024, are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Exceptions filed by Julia Baker and Theodore Uhlman on April 23, 2024, are denied, consistent with this Opinion and Order.
3. That the Amended Initial Decision of Administrative Law Judge Mary D. Long issued on April 3, 2024, is adopted, as modified, consistent with this Opinion and Order.
4. That the Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County is Reasonably

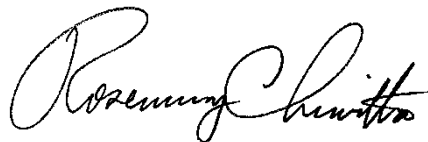
Necessary, at Docket No. P-2021-3024328, is hereby granted in that the proposed two “structures” constitute “buildings,” and their proposed situation in question is reasonably necessary for the convenience or welfare of the public within the meaning of Section 619 of the Municipalities Planning Code Act of July 31, 1968. P.L. 805, as amended, 53 P.S. § 10619.

5. That Finding of Fact No. 42 in the Amended Initial Decision of Administrative Law Judge Mary D. Long, issued on April 3, 2024, is modified to read as follows:

42. The vulnerability zone of 100 feet for “rare” events showed that any potential impact of a “rare” event would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181). The vulnerability zone of an “extremely rare” event extends 220 feet from the potential source. An “extremely rare” event is not expected to occur at a controlled access facility such as the Reliability Station. Marple Township Remand St. No. 2 at 5, 8.

6. That this proceeding at Docket P-2021-3024328 be marked closed.

BY THE COMMISSION,



Secretary

(SEAL)

ORDER ADOPTED: September 26, 2024

ORDER ENTERED: September 26, 2024

SCOPE AND STANDARD OF REVIEW

I. SCOPE OF REVIEW.

“Appellate review of a PUC order is limited to determining whether a constitutional violation, an error of law, or a violation of PUC procedure has occurred and whether necessary findings of fact are supported by substantial evidence.” *Popowsky v. Pennsylvania Pub. Util. Comm’n*, 589 Pa. 605, 622, 910 A.2d 38, 48 (2006), citing 2 Pa. C.S. § 704.

II. STANDARD OF REVIEW.

Standard of review is the degree of scrutiny that the appellate court should apply. *Morrison v. Commonwealth, Dept. of Public Welfare*, 646 A.2d 565, 570 (Pa. 1994). The degree of scrutiny to be applied is determined by whether the issue before the Court is an error of law or substantial evidence issue. *See Chester Water Auth. v. Pennsylvania Pub. Util. Comm’n*, 868 A.2d 384, 389 n.9 (Pa. 2005). The Court’s standard of review in determining whether the Commission committed an error of law is de novo. *Id.*; *see also Mercury Trucking, Inc. v. Pa. P.U.C.*, 55 A.3d 1056, 1082 (Pa. 2012) (“With respect to issues of law, which were in dispute in this case, the Commonwealth Court was to apply a de novo standard of review and, to the extent necessary, a plenary scope of review.”). The Court will also review whether an error of law occurred when the facts of the case do not support the legal

conclusions of the agency. *Pa. Game Comm'n v. Civil Serv. Comm'n*, 747 A.2d 887, 892-93 (Pa. 2000). The Court must also determine whether the Commission abused its discretion in making its decision. *Jones Motor Co. v. Pa. P.U.C.*, 195 A.2d 125, 131 (Pa. Super.1963).

Finally, the Court may reverse a decision where the petitioners demonstrate a lack of substantial evidence to support the Commission's findings of fact. *W.C. McQuaide, Inc. v. Pa. P.U.C.*, 585 A.2d 1151, 1154 (Pa. Cmwlth. 1991).

"Substantial evidence" is such relevant evidence that a reasonable mind might accept, without weighing the evidence or substituting its judgment for that of the fact finder, as adequate to support a conclusion. *Id.* at 1155; *see also Kviatkovsky v. Pa. P.U.C.*, 618 A.2d 1209, 1212 (Pa. 1992).

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commission err as a matter of law by concluding that the Environmental Rights Amendment (“ERA”) does not require the Commission to consider greenhouse gas (“GHG”) impacts in its adjudication of PECO’s Section 619 Petition (the “Petition”)?

Answer by the Commission: No

Suggested Answer: Yes

2. Did the Commission’s approval of the Petition violate the ERA and Section 619 because the Commission failed to consider reasonably foreseeable GHG impacts?

Answer by the Commission: No

Suggested Answer: Yes

3. Did the Commission’s approval of the Petition violate the ERA and Section 619 because the Commission failed to consider alternatives that could reduce reasonably foreseeable GHG impacts?

Answer by the Commission: No

Suggested Answer: Yes

STATEMENT OF THE CASE

I. FORM OF THE ACTION AND BRIEF PROCEDURAL HISTORY.

A. Form of the Action.

This matter comes before the Court on appeal filed by the Marple Citizens with respect to the Opinion and Order entered by the Commission on September 26, 2024 with respect to the *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Docket No. P-2021-3024328.

B. Brief Procedural History.

On February 26, 2021, PECO filed a Petition for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County is Reasonably Necessary for the Convenience and Welfare of the Public (“Petition“). *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619*, Opinion and Order at 2, Docket No. P-2021-3024328 (Mar. 10, 2022) (“Mar. 2022 Opinion and Order”).

The Commission convened hearings on PECO’s Petition (the “Initial Proceeding”). During the Initial Proceeding, Marple Township and the Marple Citizens argued that the Commission needed to consider the environmental impacts of approving the Petition as part of its public convenience and welfare review. The

Commission determined that it did not have the statutory power to do so. *Id.* at 44. The Commission approved the Petition. *Id.* at 81.

Marple Township filed an appeal of the Mar. 2022 Opinion and Order with this Court. *Twp. of Marple v. Pennsylvania Pub. Util. Comm’n*, 294 A.3d 965 (Pa. Cmwlth. 2023), *reconsideration and reargument denied* (Apr. 25, 2023) (“*Twp. of Marple*”). This Court determined the Commission has a fiduciary duty under the Environmental Rights Amendment (“ERA”) to the Pennsylvania Constitution to consider the environmental impacts of approving the Petition and has the statutory powers to do so. *Id.* at 974. This Court vacated the Mar. 2022 Opinion and Order, remanded the matter to the Commission with instructions to complete a “constitutionally sound environmental impact review” and to incorporate the findings of that review into a new determination on the Petition. *Id.* at 975.

The Commission convened additional hearings on remand (the “Remand Proceeding”). *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619*, Opinion and Order, Docket No. P-2021-3024328 (Sept. 26, 2024) (“Sept. 2024 Opinion and Order”). During the Remand Proceeding, Marple Township and the Marple Citizens argued, *inter alia*, that the Commission needed to consider the reasonably foreseeable GHG impacts of approving the Petition, as well as other elements required for a constitutionally

sound environmental impact review, including alternatives that could reduce those impacts. *Id.* at 63-68. The Commission ultimately evaluated only a small portion of the GHG impacts that Marple Township and the Marple Citizens argued needed to be considered, and did not consider alternatives that could reduce GHG impacts. The Commission approved the Petition. *Id.* Marple Township and the Marple Citizens filed an appeal of the Sept. 2024 Order with this Court.

II. BRIEF STATEMENT OF ANY PRIOR DETERMINATION.

The Commission's Sept. 2024 Opinion and Order was entered on September 26, 2024 and is attached hereto as Appendix A. There are no prior determinations of any court or other government unit in this matter, other than the proceedings leading to the remand.

III. NAMES OF OFFICIALS WHOSE DETERMINATIONS ARE TO BE REVIEWED.

The Commission's Sept. 2024 Opinion and Order was adopted by Pennsylvania Public Utility Commissioners the Honorable Stephen M. DeFrank, Chairman, the Honorable Kimberly Barrow, Vice Chairman, the Honorable John F. Coleman, Jr., the Honorable Ralph V. Yanora, and the Honorable Kathryn L. Zerfuss.

IV. STATEMENT OF FACTS.

This proceeding concerns PECO’s Petition to override Marple Township’s zoning disapproval to construct a proposed “gas reliability station” at 2090 Sproul Road in the Township (the “Station”). Sept. 2024 Opinion and Order at 6. The term “gas reliability station” is not a term of art in the natural gas industry. Amended Initial Decision at 4; RR __. However, the Station is designed to serve as a gas distribution facility. Amended Initial Decision at 6; RR __.

The Station will receive gas from a new 11.5 mile gas pipeline and convey it directly to end-users in the vicinity for combustion. PECO Petition at 4; RR __. The Station’s design includes two buildings (the “Buildings”), piping, valves, regulators, a line heater, and other equipment. Sept. 2024 Opinion and Order at 5-6. The purpose of the line heater is to regulate the temperature of gas flowing out of the station to end-users in Delaware County. Sept. 2024 Opinion and Order at 4.

The Station’s purpose is to expand PECO’s capacity to distribute gas in the Delaware County. Sept. 2024 Opinion and Order at 4. PECO determined its need for this increase in capacity on a simple, straight line model projecting past use into the future. Marple Township, Theodore Uhlman & Julie Baker Remand Statement No. 2 at 17 (“Najjar Direct”). This simple modeling did not include any consideration of warming winters caused by climate change, reductions in demand

due to incentives for electrification other factors. *Id.* 13-16; TR2021-23, 2254-59; RR __.

The Marple Citizens presented evidence on remand that a reasonably foreseeable impact of approving the Petition is increased GHG emissions. As Dr. Najjar testified, increasing the volume of gas distributed will also increase GHG emissions when that gas is, as intended, combusted by end-users, or leaks in the course of distribution. Najjar Direct at 17; RR __; Schmid Direct at 6; RR __.

As Dr. Najjar also testified, GHG emissions contribute to climate change, which is having “overwhelmingly negative” effects on human society and the environment. Najjar Direct at 6; RR __. As a result, every ton of GHGs emitted leads to significant damage, including loss of human life. *Id.* at 18; RR __; TR2259; RR __. By one estimate, every 500 metric tons of carbon dioxide, one of the primary GHGs, leads to a human death by 2100. TR2259; RR__.

Climate change is also having severely negative impacts on Pennsylvania’s environment. In 2021, the Pennsylvania Climate Action Plan prepared by the Pennsylvania Department of Environmental Protection (“DEP”) and a multi-agency advisory committee, including the Commission, determined that “[c]limate risks and related impacts in Pennsylvania could be severe, potentially causing increased infrastructure disruptions, higher risks to public health, economic

impacts, and other changes, unless actions are taken by the Commonwealth to avoid and reduce the consequences of climate change.” DEP, Pennsylvania Climate Action Plan at 5 (2021) (“CAP”); RR __.

Over the next 30 years and beyond, the average summer temperature across Pennsylvania is expected to increase by about 6 degrees Fahrenheit. *Id.* at xi; RR __. Days with 90+ degree temperatures are expected to increase to 37 days per year, up from 5 days per year historically. *Id.*; RR __. Total rainfall is expected to increase, but in the form of less frequent but more extreme storms alternating with increasingly frequent periods of drought. *Id.*; RR __.

Climate change is projected to harm forests and wildlife in Pennsylvania through disrupting seasonal temperature and snowfall patterns. Najjar Direct at 7-8; RR __. Climate change also harms air quality through contributing to increased wildfire frequency, and harms water quality through causing flooding and sea-level rise impacting sources for drinking and industrial water. *Id.* at xx; RR __.

In order to address the threat of climate change to the Commonwealth, the state’s Climate Action Plan evaluated potential means of reducing GHG emissions. CAP at 31; RR __. The Commission was identified in the plan as an implementation partner given its role in oversight over utilities. *Id.* at 160; RR __. One strategy included in the plan, which is identified as a significant opportunity to

reduce GHG emissions, is incentivizing building electrification. *Id.* at 50; RR __.

The Marple Citizens presented evidence that the Commission's environmental assessment should evaluate alternatives that could reduce GHG impacts, such as electrification. Najjar Direct at 15-16; RR __; TR2257-9; RR__; Schmid Rebuttal at 8-11; RR__.

The Commission's Sept. 2024 Opinion and Order, however, stated that the Commission was not required to consider climate change and not required to analyze all of the reasonably foreseeable GHG impacts from approving the Petition. Sept. 2024 Opinion and Order at 67; RR __. Instead, the Commission relied on data from PECO regarding GHG emissions from the operation of the Station's line heater and backup emergency generators, which it determined was de minimis. Sept. 2024 Opinion and Order at 67-69; RR __.

PECO did not provide any data on GHG emissions from the combustion and leakage of gas conveyed by the Station. Schmid Rebuttal at 6-7; RR __. PECO did not provide any data on the volume of gas expected to be conveyed by the Station. *Id.* The Sept. 2024 Opinion and Order included nothing on either.

PECO did not provide any data regarding alternatives that could reduce reasonably foreseeable GHG emissions. Schmid Rebuttal at 6-8; RR __. The Sept. 2024 Opinion and Order contains nothing regarding such alternatives.

V. BRIEF STATEMENT OF THE ORDER UNDER REVIEW.

The Marple Citizens seek review of the Commission's Sept. 2024 Opinion and Order entered with respect to the *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Docket No. P-2021-3024328.

SUMMARY OF ARGUMENT

This Court should vacate the Commission’s approval of PECO’s Section 619 Petition (the “Petition”), which authorized construction of a gas distribution facility (the “Station”) in Marple Township over the Marple Citizens’ objections about greenhouse gas (“GHG”) impacts and climate change. This Court previously ordered the Commission to complete a constitutionally sound environmental impact review of the Petition, but on remand, the Commission refused to meaningfully consider the GHG impacts of the Petition, rendering its review constitutionally deficient.

The Commission erred as a matter of law when it concluded that the ERA did not require consideration of GHG impacts in its review. The ERA imposes a constitutional duty on all Commonwealth agencies, including the Commission, to conserve and maintain Pennsylvania’s environment as trustees for the benefit of current and future generations. Since (1) climate change is a serious threat to Pennsylvania’s environment, (2) climate change is driven by GHGs, and (3) the Commission is an ERA trustee, the Commission had a fiduciary duty to consider GHG impacts when it evaluated the Petition.

The Commission’s contention that it cannot be required by the ERA to consider GHG impacts because it lacks the statutory power to do so is unavailing.

This Court has already ruled that the Commission has the statutory power to consider the environmental impacts of the Petition under Section 619, and there is no carveout in the statute that excludes climate change. Though other statutes authorize other Commonwealth agencies to take different actions relating to climate change, those statutes do not contain any provision revoking the Commission's Section 619 authority. Such statutes should also not be construed to imply such a revocation since statutes are to be construed consistently with the Pennsylvania Constitution, and the Commission has a constitutional duty to consider GHG impacts as an ERA trustee.

The Commission violated the ERA and Section 619 when it approved the Petition without considering the reasonably foreseeable GHG impacts of the Petition. Any environmental impact review is an exercise in foreseeing, and based on trust law principles applicable to its role as ERA trustee, the appropriate standard for the Commission's review is reasonable foreseeability. Yet the Commission confined its review of GHG emissions to those arising from inside the Station. Such emissions constitute an insignificant proportion of the reasonably foreseeable GHG emissions from the combustion and leakage of the gas to be conveyed by the Station. The Commission's deficient review left it largely in the

dark as to the full environmental consequences of the Petition, but the Commission approved it anyway.

The Commission's approval of the Petition also violates the ERA and Section 619 because it does not include evaluation of alternatives that could reduce reasonably foreseeable GHG impacts. The ERA is not merely informational. Where the ERA requires consideration of environmental impacts, it also requires consideration of prudent alternatives that could avoid those impacts. Such an evaluation of lower-impact alternatives to PECO's proposal in the Petition is needed to determine the reasonable necessity of the Petition and to enable the Commission to carry out its constitutional duty as trustee to avoid, wherever possible, contributing to harms to the corpus of the trust.

ARGUMENT

I. THE COMMISSION ERRED BY CONCLUDING THAT THE ERA DOES NOT REQUIRE IT TO CONSIDER GHG IMPACTS IN ITS ADJUDICATION OF THE PETITION.

In its Opinion and Order, the Commission determined that it did not need to include consideration of GHG impacts in its adjudication of PECO's Section 619 Petition, as advocated by the Marple Citizens, because the Commission does not have an "obligation under the ERA to consider climate change when reviewing the exemption from the Township's zoning ordinance regulating the use of the buildings on the site in this matter." Sept. 2024 Opinion and Order at 63.

This conclusion is erroneous. As demonstrated in Subsection A, the ERA requires the Commonwealth to act prudently to reduce the risk to Pennsylvania's environment from significant threats, and this includes climate change.

Subsection B explains that there is no Section 619 exemption from this general principle. Section 619 adjudications, like all Commission decisions, are (1) subject to fiduciary duties arising from the ERA's public trust clause that require that when it acts, it consider the full environmental consequences of its actions; and (2) bound by limitations to its authority arising from the ERA's fundamental rights clause that require that when it acts, it ensure that its actions do not unreasonably impair the people's fundamental environmental rights.

Subsection C then establishes that the Commission has the necessary statutory powers to consider GHG impacts in a Section 619 adjudication consistent with its constitutional duties. This Court has already held that the Commission has the necessary statutory powers to consider environmental impacts, consistent with its constitutional duties in evaluating a Section 619 petition, and there is no basis to conclude that it does not include the power to consider GHG impacts.

A. The ERA Requires the Commonwealth to Protect Pennsylvania’s Environment from Significant Threats, Including Climate Change.

Article I, Section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment (“ERA”), requires all Commonwealth agencies protect Pennsylvania’s environment from significant threats, including climate change.

The ERA provides:

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.

The ERA establishes this constitutional duty of environmental protection by means of two broad provisions. *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d

911, 932 (Pa. 2017) (“*PEDF II*”). First, the ERA’s public trust clause¹ (in its second and third sentences) establishes the Commonwealth as trustee of Pennsylvania’s “public natural resources,” and impose on the Commonwealth a fiduciary duty to exercise its powers prudently to “conserve and maintain” those resources for the benefit of current and future generations. *PEDF II*, 161 A.3d at 931–32, quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956–57 (Pa. 2013) (“*Robinson Twp.*”).

Upon the enactment of the ERA, “public trustee duties were delegated concomitantly to all branches and levels of government,” meaning that all Commonwealth entities are ERA trustees. *Id.* at 919, quoting *Robinson Twp.*, 83 A.3d at 960–63. The public trust clause requires that ERA trustees “prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.” *PEDF II*, 161 A.3d at 933, citing *Robinson Twp.*, *PEDF II*, 161 A.3d at 933, citing *Robinson Twp.*, 83 A.3d at 957. The constitutional adequacy of a trustee’s actions in this regard are to be reviewed using trust law principles for

¹ The Supreme Court has referred to each of the ERA’s three sentences as clauses. *PEDF II*, 161 A.3d at 931. Because the ERA’s last two sentences have been construed to operate together to create a public trust, we refer herein to those two sentences together as a single clause, the public trust clause.

evaluating a trustee’s compliance with its fiduciary duties, including the duties of prudence, impartiality, and loyalty. *PEDF II*, 161 A.3d at 932, citing *Robinson Twp.*, 83 A.3d at 956–57.

Second, the ERA’s fundamental rights clause (in its first sentence) also recognizes the people’s fundamental rights to “clean air,” “pure water,” and to “the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I, § 27. This clause limits the Commonwealth’s authority to exercise its powers in a way that unreasonably impairs those rights. *PEDF II*, 161 A.3d at 931.²

This Court has recognized that climate change is a threat to Pennsylvania’s “public natural resources” and must be addressed under the ERA’s public trust obligations. In *PEDF IV*, this Court noted that “[a]s a trustee, the Commonwealth has discretion to use corpus funds provided those funds are used to further its trustee duties in accomplishing Section 27 objectives,” in particular, “to benefit a wide array of Pennsylvania’s cherished natural resources.” *Pa. Env’t. Def. Found. v. Commonwealth*, 241 A.3d 119, 2020 WL 6193643, at *9 (Pa. Cmwlth. 2020)

² This Court and the Supreme Court have decided at least six cases with this caption. To distinguish them, the Pennsylvania Supreme Court has adopted a numbering system we employ here. *Pa. Env’t Def. Found. v. Commonwealth*, 279 A.3d 1194, 1198 n.4 (Pa. 2022) (“*PEDF VI*”).

(“*PEDF IV*”), *aff’d PEDF VI*. This Court thereafter specifically named “climate change” as a “threat” to these environmental resources that the ERA’s trustee duties require addressing. *Id. at* *9.³

The Pennsylvania Supreme Court affirmed. *PEDF VI*. In so doing, the Court quoted and reaffirmed this Court’s identification of climate change as within the scope of the ERA’s public trust clause, noting that since “the Commonwealth was confronting a multitude of ‘environmental threats from climate change to polluted waters to invasive species’” the “broad language of Section 27” permitted the use of corpus funds to address such environmental threats beyond the region in which the oil and gas leases generating the funds were located. *Id. at* 1207-08.⁴

The Pennsylvania Supreme Court’s decision in *Shirley v. Legislative Reference Bureau*, ordering that environmental advocate be permitted to intervene

³ Fuller discussions of the rationale for concluding that climate is among the environmental attributes subject to Article I, Section 27 can be found in Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 9 Mich. J. Env’tl & Admin. L 50 (2018), and John C. Dernbach & Robert B. McKinstry, Jr., *Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment*, 37 Georgetown Env’tl. L.R. 1 (2025) (“*Agency Statutory Authority*”).

⁴ The Supreme Courts of Montana and Hawaii have also recognized that climate change is among the threats that the environmental rights amendments in their state constitutions require their state governments to protect against. *Held; Matter of Maui Elec. Co., Ltd.*, 506 P.3d 192, 202 (2022), *as corrected* (Mar. 3, 2022); *In re Haw. Elec. Light Co.*, 152 Hawai’i 352, 526 P.3d 329 (2023).

in a case regarding a proposed GHG regulation in order to raise arguments premised on the applicability of the ERA to climate change further, supports the interpretation articulated in the cases above. *Shirley v. Pa. Legis. Reference Bureau*, 318 A.3d 832 (Pa. 2024). These cases cannot be read consistently if the ERA does not apply to climate change.

These determinations that the ERA's public trust duties apply to climate change make sense, because climate change is causing severe harms to Pennsylvania's "public natural resources," as the record in this proceeding reflects. CAP at xix; RR __; Najjar Direct at 6-13; RR __; Schmid Rebuttal at 10, RR __. The term "public natural resources" is not defined in the ERA, but the Pennsylvania Supreme Court has held that this is because it is intended to "be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law." *Marcellus Shale v. Dep't of Env't Prot.*, 292 A.3d 921, 940 (Pa. 2023), quoting *Robinson Township*, 83 A.3d at 955.

The *Robinson Township* plurality opinion found that "[a]t present, the concept of public natural resources includes 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.” *Robinson Twp.*, 83 A.3d at 955. The “basic principles” of this plurality opinion were later adopted in *PEDF II*, which recognized the state forest lands at issue in the case as “public natural resources.” *PEDF II*, 161 A.3d at 933-937. The record reflects the serious ongoing and projected harms to Pennsylvania’s public lands, forests, waterways, air, and ecosystems from climate change, harms which the Commonwealth formally recognized in its 2021 Climate Action Plan. CAP at 3; Najjar Direct at 6-13; RR __; Schmid Rebuttal at 10, RR__.

Climate change is also harming the people’s rights to clean air, pure water, and the preservation of the environment that are protected by the ERA’s fundamental rights clause. Pa. Const. art. I, § 27. Climate change is harming air quality through contributing to increased wildfire frequency and its exacerbation of conventional air pollution. Najjar Direct at 5-6; RR __; Pa. Bulletin, Vol. 52, No. 17, at 2473-4 (Apr. 23, 2022). Climate change is harming water quality through causing flooding and sea-level rise impacting sources for drinking and industrial water. Najjar Direct at 8-12; RR __; CAP at xi; RR __. The broad and systemic harms from climate change to Pennsylvania’s public natural resources, discussed above, are also harms to the “the preservation of the natural, scenic, historic and

esthetic values of the environment” protected by the fundamental rights clause. Pa. Const. art. I, § 27.

As the Commonwealth has recognized, climate change is driven by GHGs, and avoiding increased harms from climate change requires reducing GHG emissions. CAP at 1-2; RR __; Najjar Direct at 14-16; RR __; TR2259; RR __. Every ton of GHG emissions “has a human and environmental cost”, and “every 500 metric tons emitted now anywhere results in a human death between now and 2100.” TR2259; TR __.

Numerous ERA trustees have formally recognized the need to reduce GHG emissions to reduce the harms from climate change to Pennsylvania’s environment. In 2019, Governor Wolf issued EO 2019-01, which cited the ERA, and provided that “the Commonwealth is committed to further reducing its net greenhouse gas emissions which, left unchecked, would create a high risk of irreversible, widespread, severe climate impacts in the Commonwealth and beyond.” EO 2019-01 (Jan. 8, 2019). EO 2019-01 set a goal of “a 26 percent reduction of net greenhouse gas emissions statewide by 2025 from 2005 levels, and an 80 percent reduction of net greenhouse gas emissions by 2050 from 2005 levels.” *Id.* at 2. It ordered that “[a]ll Commonwealth agencies shall work to achieve the Goals set forth in this Order.” *Id.* at 3.

In 2021, the Pennsylvania Climate Action Plan prepared by DEP and a multi-agency advisory committee, including the Commission, determined that “[c]limate risks and related impacts in Pennsylvania could be severe, potentially causing increased infrastructure disruptions, higher risks to public health, economic impacts, and other changes, unless actions are taken by the Commonwealth to avoid and reduce the consequences of climate change.” CAP at 5; RR __.

In 2022, DEP issued a regulation to effectuate the state’s participation in the Regional Greenhouse Gas Initiative, a cap and invest system for reducing Pennsylvania’s GHG emissions. 25 Pa. Code §§ 145.301-145.409. In the preamble to the regulation, DEP recognized that “[g]iven the urgency of the climate crisis, including the significant impacts on this Commonwealth...concrete, economically sound and immediate steps to reduce GHG emissions are necessary.” Pa. Bulletin, Vol. 52, No. 17, at 2474 (Apr. 23, 2022).

B. The Commission Has a Constitutional Duty to Consider GHG Impacts in a Section 619 Adjudication.

In *Twp. of Marple*, this Court confirmed that under the ERA, the Commission has a constitutional duty to review environmental impacts and consider those impacts as part of its public convenience and welfare evaluation in a Section 619 adjudication. *Twp. of Marple*, 294 A.3d at 974. This constitutional

duty includes GHG impacts, because they are a significant type of environmental impact. As this Subsection B explains, this constitutional duty to consider GHG impacts, include evaluating whether any GHG impacts can reasonably be avoided arises from both the ERA's public trust clause and the fundamental rights clause.

1. The Commission Must Consider GHG Impacts Because It Is Subject to Fiduciary Duties Arising from the ERA's Public Trust Clause.

- a) *The Commission is a Trustee Under the ERA*

Our Supreme Court and this Court have recognized numerous times since the *PEDF II* decision that individual agencies such as the Commission are trustees under the ERA. In spite of abundant authority to this effect, the Commission nonetheless cites this Court's much earlier decision in *Funk v. Wolf* for the contrary proposition that the Commission is not a trustee under the ERA. According to the Commission, the Commonwealth is a trustee, but not individual agencies. Sept. 2024 Opinion and Order at 13, *citing Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016), *aff'd without opinion*, 158 A.3d 642 (Pa. 2017). ("*Funk*"). This is manifestly wrong.

Our Supreme Court has confirmed that when the people of Pennsylvania enacted the ERA, "public trustee duties were delegated *concomitantly to all branches and levels of government* in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that

all government neither infringed upon the people’s rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.” *PEDF II*, 161 A.3d at 69, quoting *Robinson Twp.*, 83 A.3d at 963. (emphasis added). The Court’s use of the term “concomitantly,” meaning simultaneously, is important. It confirms that the effect of the ERA was, upon enactment, to simultaneously impose public trustee duties to consider environmental consequences of their actions on all Commonwealth entities.

Accordingly, as the Pennsylvania Supreme Court has instructed, “[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania’s government, and instead *all agencies and entities of the Commonwealth government*, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.” *Marcellus Shale*, 292 A.3d at 942, quoting *PEDF II*, 161 A.3d at 931 n.23 (emphasis added).

This point was further articulated in *Monsanto*: “Although the Commonwealth is the named trustee of public natural resources under the ERA, and individual agencies and departments are not referenced therein, [as] the Pennsylvania Supreme Court has described[,] *public trustee duties were delegated concomitantly to all branches and levels of government.*” *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 644 (Pa. Cmwlth. 2021) (citations omitted)

(emphasis added); *See also Cmty. Coll. of Delaware Cnty. v. Fox*, 342 A.2d 468, 482 (Pa. Cmwlth. 1975) (“[M]unicipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, *are not only agents of the Commonwealth, too, but trustees of the public natural resources* as well, just as certainly as is the DER [DEP’s predecessor].”) (emphasis added).

This Court, in an unreported opinion, has ruled that the Commission is a trustee under the ERA: “[W]e assume that *the PUC, as a trustee*, has a duty to administer the trust with prudence, which involves consideration of the purposes and circumstances of the trust and requires the exercise of reasonable care, skill, and caution when dealing with the corpus of the trust...More specifically, *the ERA imposes upon the PUC ‘a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties’*” *City of Lancaster v. Pennsylvania Pub. Util. Comm’n*, No. 251 M.D. 2019, 2020 WL 864986, at *5–6 (Pa. Cmwlth. 2020) (emphasis supplied). Because this decision is consistent with the authority cited above, it provides additional persuasive authority for the conclusion that the Commission is a trustee.

For authority for its claim that it is not a trustee, the Commission relies on the Commonwealth Court’s opinion in *Funk*, which provides that “it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA.” *Funk v. Wolf*, 144 A.3d 228, 235 (Pa. Cmwlth. 2016). As demonstrated above, two Pennsylvania Supreme Court decisions that followed *Funk* clarified that the correct rule is actually: both the General Assembly and the agencies are themselves trustees under the ERA. *Marcellus Shale*, 292 A.3d at 942, citing *PEDF II*, 161 A.3d at 931 n.23. Consequently, the cited phrase from *Funk* can no longer be considered good law on this point, and therefore cannot serve as an authority supporting the Commission’s legal position that it is not a trustee. It is also merits mention that *Funk*’s discussion of the nature of ERA trusteeship was dicta, not decisional law, and for that reason, never binding at all. *Funk*, 144 A.3d at 235.

The Commission also cites, but does not discuss, an unpublished Commonwealth Court opinion from 2021, *Delaware Riverkeeper*. In dicta, this opinion quotes *Funk*’s dicta that individual agencies are not ERA trustees. *Delaware Riverkeeper Network v. Pennsylvania Dep’t of Env’t Prot.*, 247 A.3d 1188 (Pa. Cmwlth. 2021), quoting *Funk*, 144 A.3d at 235. The Pennsylvania Supreme Court’s decision in *Marcellus Shale* should decisively foreclose the

viability of this theory. More broadly, the Commission cannot launder and refresh *Funk*'s overruled *dicta* by citing to *dicta* in a later unpublished Commonwealth Court opinion that was also overruled by subsequent Pennsylvania Supreme Court precedent. *Marcellus Shale*, 292 A.3d at 942.

Notably, prior to this case, the Commission recognized its status as an ERA trustee. As the Commission explained in a 2019 order, “[t]he Commonwealth Court determined in PEDF II that the ERA was not merely an aspirational goal for the Commonwealth to aspire to, but instead a responsibility of every instrumentality of the Commonwealth to ‘conserve and maintain’ the public natural resources of the Commonwealth.” *Ctr. Park Historic Dist., Inc.*, No. C-2015-2516051, 2019 WL 5592911, at *45 (Oct. 24, 2019).

As the Commission further explained, “[t]aken together, this leads to the conclusion that the instrumentalities of the Commonwealth have a duty to everyone in the Commonwealth, present and future, to protect the environment with prudence, loyalty, and impartiality.” *Id.* at *45. The Commission concluded that “these duties are undisputedly required of the Commission,” and that consequently, “the Commission [has] an affirmative duty to protect all facets of the environment under the ERA.” *Id.*

Given the overwhelming authority demonstrating the Commission’s status as trustee, and the Commission’s own prior recognition of its status as trustee, this Court should reject the Commission’s contention, relying on *Funk*, that it is not a trustee under the ERA.

b) *As an ERA Trustee, the Commission Must Comply With its Fiduciary Duties When Adjudicating a Section 619 Petition*

One of the most important constitutional protections built into the ERA is its requirement that when a trustee acts, it does so in compliance with its fiduciary duties of prudence, loyalty, and impartiality. Fiduciary duties are not just words on a page. They change the way in which the Commission must exercise its statutory authority under Section 619. As a constitutional trustee, the Commission must consider in advance how its decisions will impact the corpus of the trust—including the GHG impacts. Indeed, this Court has upheld an Environmental Hearing Board decision rescinding DEP’s issuance of permits because DEP failed to comply with its fiduciary duties under the ERA when considering a permit application.⁵

⁵ *New Hanover Township v. Commonwealth, Department of Environmental Protection*, 2020 EHB 124, EHB Docket No. 2018-072-L, aff’d sub nom. *Gibraltar Rock, Inc. v. Pa. Dep’t of Env’t Prot.*, 316 A.3d 668 (Pa. Cmwlth. 2024); *See Agency Statutory Authority*, supra note 3, at 16-18 (explaining EHB decision).

These constitutional requirements are designed to serve as a check on agencies, including the Commission, requiring them to inform themselves in advance of the environmental consequences of their actions, to resist politically-driven pressure for short-term thinking and planning, and to avoid or minimize wherever possible harm to the corpus of the environmental trust. For these reasons, this Court held that actual analysis of the environmental impacts of the Petition is needed to fulfill the Commission’s fiduciary duties. *Twp. of Marple*, 294 A.3d 974-5. A “substantively nonexistent” environmental impact review of the Petition under adjudication paired with an “illusory” invocation of DEP’s general environmental regulatory work is “entirely deficient from a constitutional standpoint.” *Twp. of Marple*, 294 A.3d at 975.

In the context of climate change, the Commission is now attempting precisely the same evasive maneuver it did with environmental effects generally that this Court rejected in *Marple II*. The Commission has taken the position that it does not need to include GHG impacts in its environmental impact review because the General Assembly has tasked DEP with “the responsibility to develop air quality standards and a climate change action plan.” Sept. 2024 Opinion and Order at 61-62.

This is the same argument the Commission made in *Twp. of Marple* in this matter. Previously, the Commission contended that DEP, generally, has been tasked with developing pollution standards and formulating environmental policy, and so therefore the Commission did not need to analyze the environmental impacts of its own actions. That maneuver was rightly rejected by this Court. *Twp. of Marple*, 294 A.3d at 973-75.

It is revived here. The Commission emphasizes that DEP is responsible for promulgating air pollution regulations and for leading the process of preparing a climate action plan for the state every three years. Sept. 2024 Opinion and Order at 61-62. However, the record is bare of any actual analysis of the GHG impacts of approving PECO's Petition.

In the same way that its "illusory" gesture towards DEP's general environmental regulatory work cannot substitute for actual environmental impact analysis of the Petition at issue in this proceeding, the Commission's "illusory" gesture towards general work that PA DEP performs relating to climate change cannot substitute for actual analysis of the GHG impacts of the specific Petition under adjudication here. *Twp. of Marple*, 294 A.3d at 974-75.

By failing to consider GHG impacts in evaluating PECO's Section 619 Petition, the Commission violated its duty of prudence. The duty of prudence

involves “considering the purposes” of the trust and exercising “reasonable care, skill, and caution” in managing the trust corpus. *PEDF II*, 161 A.3d at 938 (citing 20 Pa. Cons. Stat. § 7780).⁶ The purpose and duties of the public trust under Section 27 are the same—to conserve and maintain public natural resources for the benefit of present and future generations. The Commission, as trustee, failed to use “reasonable care, skill, and caution” because it excluded climate change, a significant environmental issue, from the comprehensive environmental review this Court required in *Marple II* for the PECO Section 619 petition.

The Commission also violated its duty of loyalty. The duty of loyalty requires the trustee to manage the trust corpus “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” *PEDF II*, 161 A.3d at 932. As the Supreme Court made clear in 2021, a trustee, such as the Commission, has a duty to consider both present and future generations at the same time. Thus, the

⁶ George T. Bogert, *Trusts* § 93 (Hornbooks, 6th ed. 1987). *See also In re Estate of McAleer*, 248 A.3d 416, 445 (Pa. 2021) (Donohue, J., concurring) (“In navigating the potentially complex legal landscape of trust administration, a trustee should seek competent [professional advice] not only for guidance on what will best serve the trust’s purpose, but also to determine the potential risks that a trustee is subject to when making these difficult decisions in the course of trust administration.”); *PEDF II*, 161 A.3d at 932 n.24 (“[T]he duty to administer with prudence involves ‘considering the purposes, provisions, distributional requirements and other circumstances of the trust and . . . exercising reasonable care, skill and caution.’”).

trustee cannot be “shortsighted” and must instead “*consider* an incredibly long timeline.” *Pa. Env’t Def. Found. v. Commonwealth*, 255 A.3d 289, 310 (Pa. 2021) (“*PEDF V*”) (citing *Robinson Twp.*, 83 A.3d at 959) (emphasis added). Because the adverse effects of climate change are significant and increasing, the Commission failed to exercise its duty of loyalty toward present and future generations by failing to consider GHG impacts as part of its comprehensive environmental review.

Finally, the Commission violated its duty of impartiality. The duty of impartiality requires trustees to manage “the trust so as to give *all of the beneficiaries* due regard for their respective interests in light of the purposes of the trust.” *PEDF II*, 161 A.3d at 932 (emphasis added). The ERA requires that these beneficiaries include future generations who will bear the full effect of the additional climate disruption caused by the expansion of gas use and infrastructure that would result from PECO’s proposal.

In *Robinson Township*, the Supreme Court held a legislative provision unconstitutional because, under that provision, “some properties and communities will carry much heavier environmental and habitability burdens than others.” *Robinson Twp.*, 83 A.3d at 980. This result, the Court decided, is inconsistent with the express constitutional obligation that the trustee act for the benefit of “*all the*

people.” *Id.* (emphasis supplied). The Commission’s duty of impartiality in this case extends not only to ratepayers; it also extends to the Intervenors, other citizens of Marple Township, and all people whose rights are recognized under Article I, Section 27, including future generations.

This Court should reject the Commission’s arbitrary and unlawful refusal to include GHG impacts in that analysis and order it to fully carry out its fiduciary duties.

2. The Commission Must Consider GHG Impacts Because It Is Bound By the ERA’s Fundamental Rights Clause.

The ERA’s fundamental rights clause also requires the Commission to consider GHG impacts. Because the ERA’s fundamental rights clause applies to climate change, its limitation on the state’s power to act contrary to the right,” *PEDF II*, extends to the Commission.

More specifically, such rights “circumscrib[e] the conduct” of agencies, and require agencies to consider those fundamental rights “in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.” *Hartford Accident & Indem. Co. v. Ins. Comm’n*, 482 A.2d 542, 549 (Pa. 1984). While the subject of a protected fundamental right “may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.” *PEDF II*, 161 A.3d at 931.

What this means in practice is that the ERA’s protection of the people’s fundamental environmental rights “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.

This is so because “[t]he corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.” *Marcellus Shale*, 292 A.3d at 940, quoting *Robinson Twp.*, 83 A.3d at 952. Accordingly, the ERA’s fundamental rights clause imposes a separate and independent constitutional requirement for the Commission to consider GHG impacts as part of its adjudication of PECO’s Section 619 petition.

C. The Commission Has the Statutory Powers to Carry Out Its Constitutional Duty to Consider GHG Impacts in a Section 619 Adjudication.

1. The Commission Has the Statutory Powers Under Section 619 to Consider Air Emissions Impacts, Which Includes GHG Impacts.

As a defense against its constitutional duties, the Commission claims that it cannot be required by the ERA to consider GHG impacts because it lacks the statutory powers to do so. Sept. 2024 Opinion and Order at 62-3. This contention is meritless.

This Court’s decision in *Twp. of Marple* has already confirmed that the Commission has the statutory power under Section 619 needed to carry out its fiduciary duty to review environmental impacts, including air emissions impacts, of the Petition and include them in its final decision on it. *Twp. of Marple*, 294 A.3d at 974-75. This makes sense, because the language of Section 619 is broad and inclusive. Section 619 empowers the Commission to investigate whether granting a Section 619 petition is “reasonably necessary for the convenience or welfare of the public.” Section 619. It follows naturally that this includes the power to consider environmental impacts that affect “the convenience or welfare of the public.”

This construction is also consistent with the ERA, which requires the Commonwealth to protect the environment, and statutes are to be construed as consistent with the Pennsylvania Constitution wherever possible. *Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) (“[W]e are bound to interpret a statute, where possible, in a way that comports with the constitution’s terms.”) (citations omitted); *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017) (“Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of

which would not, we adopt the latter construction.”) (citation omitted); 1 Pa.C.S. § 1922(3).

Hartford Accident & Indem. Co. illustrates this principle for a different right in Pennsylvania’s Declaration of Rights. *Hartford*, 482 A.2d at 585-86. There, the Supreme Court decided that gender-based auto insurance rates were “unfairly discriminatory” under a state insurance statute. The decision was based largely on the Equal Rights Amendment to the Pennsylvania Constitution, providing: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Pa. Const. art. I, § 28.

Because of this amendment, the Court held, “the statute must be interpreted to include sex discrimination as one type of unfair discrimination.” *Hartford*, 482 A.2d at 585. The Constitution did not merely allow the Insurance Commissioner to interpret the statute in that manner, the Court reasoned; the Constitution required that interpretation.

Since the ERA’s general duty to protect the environment includes a specific duty to protect the environment from climate change, this means that Section 619’s authorization of the Commission to consider environmental impacts in fulfillment of its ERA trusteeship duties must be construed to include GHG impacts. This is all

the more true given that this Court has already held that the Commission has the power to consider air emissions in a Section 619 adjudication, and GHG emissions are a type of air emission. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 529 (2007) (holding that GHGs are “air pollutants” within the meaning of the Clean Air Act).

This construction is also consistent with giving full meaning to the public convenience or welfare clause of Section 619. This Court has confirmed that the environment must be understood as a core aspect of the public’s convenience and welfare under Section 619. *Twp. of Marple*, 294 A.3d at 974. Climate change, as the Commonwealth has recognized, is a severe threat to Pennsylvania’s environment. As such, failing to include climate change in the environmental component of the Commission’s public convenience or welfare review would significantly diminish its meaning.

Accepting the Commission’s contention that it lacks statutory authority to include GHG impacts in its Section 619 environmental impact review would require the invention of a special carveout in Section 619 specifically excluding statutory authorization to consider GHG impacts. There is no basis for that in the text of Section 619, and as discussed above, the Commission’s constitutional duties to consider climate change militate against inventing such a carveout.

Indeed, this Court and our Supreme Court have repeatedly rejected requests to invent exceptions to broad statutes through which the Commonwealth's ERA duties are carried out. These cases all involve Section 316 of the Clean Streams Law, which imposes liability on landowners for water pollution on their land. 25 P.S. § 691.316. Courts have rejected claims that Section 316 should be read to exclude certain sources of water pollution,⁷ to require fault,⁸ and apply only to private parties.⁹ Courts rejected these exceptions not only because they were inconsistent with the statutory text; they also would “fundamentally undermine” the protections afforded Pennsylvania citizens under the ERA.¹⁰

Because the courts have refused to create exceptions to a broad statute that furthers the ERA, it is similarly impermissible here to create an exception excluding GHG impacts here. *See also Poyser v. Newman & Co.*, 514 Pa. 32, 38, 522 A.2d 548, 551 (1987) (rejecting a litigant's attempt to “engraft upon section 303(a) of the Act an exception the legislature did not see fit to put there.”).

⁷ *National Wood Preservers, Inc. v. Com., Dept. of Env't Res.*, 414 A.2d 37, 40-41 (Pa. 1980).

⁸ *Adams Sanitation Company, Inc. v. Com., Dept. of Env't Prot.*, 715 A.2d 390, 391 (Pa. 1998).

⁹ *Dresser Industries v. Commonwealth, Dep't of Env't Prot.*, 604 A.2d 1177 (Pa. Cmwlth. 1992).

¹⁰ *Id.* at 1180 (quoting *National Wood Preservers*, 414 A.2d at 40-41).

Since the Commission has the statutory power to do so, it needs to include GHG impacts in its environmental impact review, and the Commission’s argument that it cannot consider those impacts because “the ERA cannot expand the statutory powers of an administrative agency” is misplaced. Sept. 2024 Opinion and Order at 67. The Marple Citizens are simply arguing Section 619 must be construed, consistent with the ERA, to include GHG impacts as one of the environmental impacts that Section 619 grants the Commission statutory authority to consider in its adjudication.

This Court has previously rejected the contention that when an agency exercises a statutory power expressed in general terms for an environmentally protective purpose, this means that the ERA is operating to expand the agency’s statutory powers. *Appeal of Gaster*, 556 A.2d 473, 477 (Pa. Cmwlth.1989) (recognizing the ERA as not expanding an agency’s statutory powers, but as providing a rationale for exercising them to protect the environment).

Furthermore, determining that the Commission’s statutory powers include the power to observe procedural safeguards designed to protect constitutional rights, such as an environmental impact review, does not expand the Commission’s statutory powers, it limits them. As discussed above, constitutional rights, like those protected by the ERA, “circumscrib[e] the conduct” of agencies, and require

agencies to consider those constitutional rights “in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.” *Hartford*, 482 A.2d at 549.

The Commission is prohibited by the ERA from exercising its statutory powers in a way that contributes to the degradation of the environmental trust. *PEDF II*, 161 A.3d at 933. The Commission can only ensure that it stays within these constitutionally-permissible boundaries for action by examining the projected consequences of its actions, including GHG impacts. As such, the Commission’s obligation and authority to examine the GHG impacts of approving a Section 619 petition is a limit on its powers, not an expansion. *See Dernbach and McKinstry, Agency Statutory Authority, supra* note 3, at 6 (“Constitutional rights operate as a limit on government authority, and the [ERA] is no exception. Both clauses of Article I, Section 27 impose limits on government discretion, including, for example, the ability of the state to make decisions without first understanding the impact of those decisions on the resources and values protected by the [ERA].”).

2. The Statutory Powers Granted to the Commission by Section 619 to Carry Out Its Constitutional Duty to Consider GHG Impacts Are Not Revoked by Other Statutes.

As explained above, Section 619 confers on the Commission the statutory powers needed to consider GHG impacts in its environmental impact review. The Commission argued below, however, that the Pennsylvania Climate Change Act (“PCCA”), 71 P.S. §§ 1361.1-8, and the Air Pollution Control Act (“APCA”), 35 P.S. §§ 4001 *et seq.*, somehow revoke the Commission’s powers under Section 619 to consider GHG impacts in its decision. Sept. 2024 Opinion and Order at 62-63. This contention is meritless, as neither the text nor the purpose of either statute support that result.

The PCCA is a brief statute, consisting of eight sections, including the title section and definitions section. It is an ‘information only’ statute, meaning that it requires DEP to produce informational reports about climate change every three years, but it does not specify any action that the Commonwealth must take to reduce GHG emissions. 71 P.S. §§ 1361.1-1361.8.

As an informational statute, Section 3 of the PCCA requires DEP, every three years, to produce a report on current and project climate impacts to Pennsylvania. 71 P.S. § 1361.3. Section 4 requires DEP to compile an annual inventory of GHG emissions from all sources in Pennsylvania to be published

every three years. 71 P.S. § 1361.4. Section 5 requires DEP to establish a climate change advisory committee to advise DEP on preparing the reports required by the PCCA. 71 P.S. § 1361.5.¹¹

Section 6 requires DEP to establish a website where interested businesses, governments, and other entities can voluntarily record avoided GHG emissions or reductions in GHGs emissions achieved “in the absence of any government mandate to reduce such emissions.” 71 P.S. § 1361.6. Section 7 requires DEP, every three years, to produce a climate action plan that identifies GHG emission trends and evaluates potential GHG reduction strategies for various sectors of the Commonwealth. 71 P.S. § 1361.7. Section 8 requires that if the federal government ever enacts GHG reporting requirements, affected entities must also submit to DEP any information required by such a federal law. 71 P.S. § 1361.8.

No provision in the PCCA bars any Commonwealth agency from developing more detailed GHG emissions information in the course of its duties, as the Commission would if it studied the projected GHG emissions from approving PECO’s Section 619 Petition. In fact, for the Commission or any other agency to

¹¹ The Chairman of the Commission is, by statute, an ex officio member of this committee. 71 P.S. § 1361.5(b)(3).

develop more detailed GHG emissions information would affirmatively advance the informational purpose of the PCCA.

Notably, the PCCA provides for a voluntary registry through which “interested businesses, governments, institutions and other entities can record any reductions in greenhouse gas emissions or any avoided emissions of greenhouse gas emissions that are achieved in the absence of any government mandate to reduce such emissions.” 71 P.S. § 1361.7. Thus, the PCCA expressly contemplates Commonwealth agencies in Pennsylvania (1) studying baseline GHG emissions; (2) identifying opportunities to avoid or reduce those GHG emissions; and (3) taking steps to avoid or reduce GHG emissions even in the absence of a DEP mandate to do so. The PCCA therefore cannot be construed as stripping statutory power from the Commission to consider GHG impacts in a Section 619 adjudication.

The PCCA also requires publication of a climate action plan containing information about potential strategies for reducing GHG emissions. 71 P.S. § 1361.7. This provision of the PCCA similarly should not be construed to, by implication, strip the Commission of its constitutional and statutory authority under Section 619 to study and reduce GHG emissions. It would make little sense to conclude that a statute with the purpose of publishing a plan identifying statewide

opportunities to reduce GHG emissions somehow operates to prohibit agencies from taking steps to reduce GHG emissions consistent with the plan.

This conclusion would violate the requirement that statutes are to be constitutionally construed because the ERA requires all Commonwealth entities to exercise their powers to avoid harm to Pennsylvania's environment wherever possible, including from climate change. As noted above, EO 2019-01 cites the ERA and directs "[a]ll Commonwealth agencies" to work to achieve the statewide objective of an 80% reduction of GHG emissions by 2050 from 2005 levels. EO 2019-01 (Jan. 8, 2019).

An implied removal of the Commission's power to consider GHG impacts under Section 619 by the PCCA would also be inconsistent with the rule that repeals by implication can only be found where there is "irreconcilable conflict between statutes embracing the same subject matter." *HSP Gaming, L.P. v. City of Philadelphia*, 954 A.2d 1156, 1175 (Pa. 2008), quoting *Kelly v. City of Philadelphia*, 115 A.2d 238, 244 (Pa. 1955). As discussed above, there is no conflict between the two statutes, let alone an irreconcilable one, and they address different matters.

The Commission also attempts to deflect its constitutional duty to consider GHG impacts by making a reference to the fact that DEP is responsible for

developing “air quality standards.” Sept. 2024 Opinion and Order at 63. Here, the Commission appears to be referring to the APCA, which tasks DEP with promulgating air pollution regulations. 35 P.S. § 4001 *et seq.* The implication appears to be that because the GHG emissions that drive climate change are a kind of air pollution, the APCA should be construed to strip the Commission’s statutory authority to consider them in a Section 619 adjudication.

As a starting point, there is no express provision of the APCA limiting the Commission’s powers under Section 619. Moreover, the rules relating to constitutional construction and implied repeals discussed above in connection with the PCCA also apply with equal force here.

More importantly, this Court has already considered and dismissed the theory that DEP’s statutorily-assigned role as air regulator under the APCA strips the Commission of any powers to consider air emissions in a Section 619 adjudication. In *Twp. of Marple*, the Commission argued that it was “not empowered under Section 619 of the MPC” to consider air emissions from the Station, because DEP has “jurisdiction over such environmental impacts.” 294 A.3d at 973.

This Court rejected this argument, finding that ERA imposes a constitutional duty on the Commission to consider environmental impacts, including air

emissions, in a Section 619 adjudication, and that Section 619 supplies the necessary statutory powers to do so. The Court held that to the extent that the Commission identifies another agency, such as DEP, that has already made an actual determination about the impact at issue in the adjudication, the Commission may defer to that finding. But in the absence of such a finding, the simple fact that another agency has regulatory authority over a form of pollution does not operate to excuse the Commission from its duty to evaluate and consider the impact of such pollution as part of its adjudication. *Twp. of Marple* at 973-75.

II. THE COMMISSION’S APPROVAL OF THE PETITION VIOLATES THE ERA AND SECTION 619 BECAUSE THE COMMISSION FAILED TO CONSIDER REASONABLY FORESEEABLE GHG IMPACTS.

As discussed above, the Commission’s primary line of defense against its constitutional duties is to deny categorically that consideration of GHG impacts is either required by the ERA or authorized under Section 619. We have explained above why these contentions are unavailing. *See supra* at Point I. But the Commission also presents an argument in the alternative in its Sept. 2024 Opinion and Order.

The Commission’s argument in the alternative is that it actually did consider GHG emissions in a “constitutionally sound” fashion, because it considered analysis submitted by PECO that quantified the GHGs emissions from when the

Station's emergency generators and line heater are running. Sept. 2024 Opinion and Order at 70.

At the same time, the Commission refused to consider GHG emissions from combustion and leakage of gas conveyed by the Station. *Id.* at 61. These emissions are excluded from a Section 619 review, the Commission explained, because “they result from operations that are located outside the buildings.” *Id.* at 61. As the record reflects, the Commission did not consider these impacts. Schmid Rebuttal at 6-7; RR __; Sept. 2024 Opinion and Order at 61.

Since the Sept. 2024 Opinion and Order actually did include some, albeit minimal, consideration of GHG emissions, this Court should assign little weight to the Commission's argument that it would be *ultra vires* for the Commission to consider GHG emissions in a Section 619 adjudication. As explained above, this categorical opposition is legally untenable in any event. *See supra* at Point I.C.

If the Commission's categorical opposition is set aside, this also narrows and clarifies the dispute. The Commission's position then, for practical purposes, is that under Section 619, the only GHG emissions permissible to include in a review are GHG emissions from operations that occur within the Station's buildings.

This contention is unavailing. Under applicable trust law principles, the appropriate standard is reasonable foreseeability, and here, it is reasonably

foreseeable that gas conveyed by the Station will be combusted or leak, resulting in GHG impacts. The Commission has a constitutional duty to consider those impacts, and Section 619 poses no barrier to doing so.

A. A Constitutionally Sound Environmental Impact Review Must Include Reasonably Foreseeable GHG Impacts.

A trustee’s duty of prudence requires “considering the purpose of the trust” and “exercising reasonable care, skill and caution” in light of that purpose. *PEDF II*, 161 A.3d at 938 (internal citation omitted). These duties, individually and collectively, require the Commission to consider the reasonably foreseeable environmental impacts of its decision under Section 619. *In re Duncan Trust*, 391 A.2d 1051, 1057 (Pa. 1978) (ruling against trustee based on trustee’s failure to account for “reasonably foreseeable” circumstances); *In re Lerch’s Est.*, 159 A.2d 506, 512 (Pa. 1960) (holding that “[t]he judgment of the trustee, reasonably exercised in the light of all the facts and circumstances then existing or reasonably foreseeable, should not be disturbed.”); *In re Mereto’s Est.*, 96 A.2d 115, 118 (Pa. 1953) (holding that a trustee’s decision is to be evaluated “in the light of all the facts and circumstances then existing or reasonably foreseeable[.]”).¹²

¹² See also Restatement (Third) of Trusts § 77 (Duty of Prudence) (Oct. 2024 update) (citing cases in which courts declined to hold trustees liable for events that were not reasonably foreseeable).

Since the purpose of the ERA trust is to protect Pennsylvania’s environment, and this includes climate change, it follows that a trustee must inform itself about and consider the reasonably foreseeable GHG impacts of a potential action. This standard is also consistent with the fiduciary duties of loyalty and impartiality, which require trustees to act “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries,” which include both current and future generations. *PEDF II*, 161 A.3d at 932. As such, the trustee cannot be “shortsighted” and must “consider an incredibly long timeline” when considering potential impacts to trust resources. *Pa. Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289, 310 (Pa. 2021) (citations omitted) (“*PEDF V*”).

A further indication of the reasonableness of the reasonably foreseeable standard is that the federal National Environmental Policy Act (“NEPA”) uses this standard to define the required scope of environmental impact review for federal agencies. 42 U.S.C. § 4332(C)(i) (requiring review of the “reasonably foreseeable environmental effects of the proposed agency action”). This standard is also used in many state environmental impact review acts. For example, New York’s State Environmental Quality Review Act uses a similar standard, requiring inclusion of “environmental impacts that can be reasonably anticipated” in environmental impact review. 6 CRR-NY 617.9.

GHG impacts from the combustion and leakage of gas conveyed by the Station must be recognized as among the reasonably foreseeable GHG impacts of the approving the Petition. Najjar Direct at 17; RR __; Schmid Direct at 6.; RR __. The express purpose of the Station is to increase throughput of gas in order to distribute it directly to end-users in the immediate vicinity for combustion. Najjar Direct at 17; RR __. A portion of that gas will likely leak, releasing methane, a highly potent GHG, and the rest will serve its intended purpose of combustion, releasing carbon dioxide, another potent GHG. *Id.*; RR __; Schmid Direct at 6; RR __.

The record does not contain any quantification of this impact, because the Commission did not analyze it. Schmid Direct at 6; RR __. But because this impact is reasonably foreseeable, the Commission has a constitutional duty to analyze it, and its failure to do so renders the review constitutionally deficient.

B. Section 619 Does Not Exclude Consideration of Reasonably Foreseeable GHG Impacts from Gas Combustion and Leakage.

While Section 619 concerns siting a building on a parcel over the objections of a municipality, by its plain terms, it authorizes a broad inquiry into whether granting such a petition would serve the public's convenience and welfare. 53 P.S. § 10619. There are no statutory terms in Section 619 that express the

Commission’s preferred rule, which is that the only GHG impacts permissible for consideration are those which emanate from inside the Station.

Since the ERA requires trustees to consider all the reasonably foreseeable environmental impacts of their actions, not just an artificial subset, this Court should not accept the Commission’s proposal to ‘read into’ Section 619 implied exclusionary terms that would limit its constitutional duties. The canon of constitutional construction cuts precisely in the opposite direction. *See supra* at 39–40.

The Commission does recognize, on a selective basis, that Section 619 authorizes it to consider evidence on reasonably foreseeable impacts outside the Station. However, the Commission was only willing to consider reasonably foreseeable *benefits* occurring outside the Station, not any reasonable foreseeable *harms* occurring outside the Station. The Commission gave detailed consideration to the offsite benefits it concluded would accrue from granting the Petition, including “enhanc[ing] reliability and supply services to PECO Customers.” Sept. 2024 Opinion and Order at 15.

But when it came to harms in the form of increased GHG emissions that accompany the provision of those claimed benefits, the Commission determined that GHG emissions can only be considered if they come from inside the Station.

This approach arbitrarily tilts the field in favor of the Petition. If the claimed benefits of the Stations of conveying gas to the adjoining areas are to be factored into the Section 619 decision, then so must the GHG impacts that accompany and are intrinsically tied to that process.

This Court's decision in *Del-AWARE* is not to the contrary. That opinion stated that the Commission "may evaluate only the environmental impacts of placing the pumphouse at the proposed location," and upheld the Commission's environmental impact review, finding that it committed "no error of law." *Del-Aware Unlimited, Inc. v. Pennsylvania Pub. Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986) ("*Del-Aware*").

Notably, this Court's ruling does not state that only on-site environmental impacts may be evaluated and that reasonably foreseeable off-site impacts must be excluded. In fact, the underlying Commission order reveals that the review that the *Del-AWARE* court upheld as committing "no error of law" discussed reasonably foreseeable off-site environmental impacts of the pumphouse. *Id.* at 596.

The function of the pumphouse was to supply cooling water to PECO's Limerick nuclear reactor, which it would do by pumping water out of the Delaware River and transmitting it several miles through a pipe to the East Branch Perkiomen Creek, from which it would be pumped into the reactor. *Re*

Philadelphia Electric Company, Opinion and Order at 2, Docket No. A-00103956, 59 Pa.P.U.C. 414, 0085 WL 1095163 (Pa.P.U.C.) (May 13, 1985) (“*Re Philadelphia Electric Company*”). The volume of water to be conveyed was significant, moving at a rate of 27 cubic feet per second, raising concerns about erosion and water quality impacts on the creek. *Id.* at 10-11.

The Commission explained that it did not need to conduct its own inquiry as to the environmental impacts of that water transfer because DER¹³ had already performed a detailed environmental impact analysis of this specific water transfer proposal as part of its own permitting review for the project. *Id.* at 26. The Commission attached a copy of DER’s environmental impact analysis as an appendix to its order. *Id.* The Commission also noted that “[t]here is no question in our minds that if the DER was without responsibility with regard to the effect of discharges into the creek this Commission would have both the authority and obligation under Section 27 to consider the effect of such discharge.” *Id.* at 26, n. 28.

As such, *Del-AWARE* is properly understood as standing for the rule that the Commission commits “no error of law” when, in a Section 619 review, the

¹³ The Department of Environmental Resources, DEP’s predecessor agency.

Commission (1) discusses reasonably foreseeable offsite environmental impacts of a building siting proposal; (2) considers and incorporates a detailed environmental impact analysis of that specific project impact prepared by a sister agency; and (3) confirms that if a sister agency had not already performed that review, the Commission would be required under the ERA to do so. *Del-Aware*, 513 A.2d at 596.

This is consistent with the positions on this point the Marple Citizens have articulated here. The difference in this case, of course, is that (1) no sister agency has already performed an environmental impact analysis of the reasonably foreseeable offsite GHG emissions from the Station; (2) the Commission has incorporated no such analysis into its determination; and (3) the Commission, in a change from its prior position, is now claiming that it is neither required under the ERA nor authorized under Section 619 to consider reasonably foreseeable offsite impacts.

C. No Other Agency Has Made a Determination about GHG Impacts to Which the Commission Can Defer.

Under *Twp. of Marple* and *Del-AWARE*, as explained above, the Commission can constitutionally defer to another agency's environmental impact determination if that agency has actually conducted an environmental impact analysis. *Twp. of Marple*, 294 A.3d at 975; *Del-Aware*, 513 A.2d at 596.

But another defense raised by the Commission against its constitutional duty to consider reasonably foreseeable GHG impacts is that the Marple Citizens had not identified any “DEP requirements or standards that apply” to the Station’s GHG impacts. Sept. 2024 Opinion and Order at 63. The ALJ, the Commission said, “appropriately deferred to DEP determinations for air permitting” for the Station. *Id.* This is wrong because it conflates the ERA with statutory requirements. After the Supreme Court’s decisions in *PEDF II* and *PEDF V*, each of which used the ERA to hold statutes unconstitutional, it should be clear that compliance with the ERA *cannot* be conflated with statutory or regulatory compliance.

While air pollution control statutes and regulations can unquestionably further the purposes of the ERA by preventing or controlling air pollution, they are not the same as the ERA. This is particularly true here because the reasonably foreseeable offsite GHG effects that concern the Marple Citizens are not regulated by DEP. They consist of carbon dioxide emissions from the combustion of gas in individual residences and businesses, as well as some methane leakage from gas pipelines. The Marple Citizens did not identify any relevant regulations because there are no relevant regulations. Nor has there been any actual analysis—by any agency—of these GHG impacts from the Station. Just like in *Twp. of Marple*, the Commission’s deferral to DEP here is “illusory.” *Twp. of Marple*, 294 A.3d at 975.

The ERA has long been seen as having a “gap filling” effect when statutes and regulations do not provide adequate environmental protection in particular situations. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 Dick. L. Rev. 97, 135 (1999). See also *New Hanover Township*, *supra* note 5.¹⁴ Under this Court’s *Marple II* decision, that is precisely the role that the ERA plays here. That no statute has been passed imposing requirements for permitting or studying GHG impacts from gas distribution does not excuse the Commission from its constitutional duty to consider the reasonably foreseeable impacts of its action.

D. The Commission’s Claim that the Marple Citizens are at Fault for Not Conducting an Analysis of GHG Impacts is Unavailing, Because a Trustee May Not Offload Its Duties onto Trust Beneficiaries.

The Marple Citizens participated actively in the underlying Section 619 adjudication and identified for the Commission the need to include in its review the reasonably foreseeable GHG impacts from increased gas combustion enabled by the Station. Uhlman and Baker Main Brief at 35; RR ___. However, the

¹⁴ Other state courts have also held that compliance with statutes and regulations is not sufficient under their constitutional public trust. See *Save Ourselves, Inc. v. La. Env’t Control Comm’n*, 452 So. 2d 1152, 1160 (La. 1984).

Commission also attempted to defend its omission of this analysis from its final order by finding the Marple Citizens at fault for not conducting the analysis themselves. Sept. 2024 Opinion and Order at 61.

This contention is meritless. As this Court held in *Marple II*, the Commission, not intervenors, is responsible for conducting an environmental impact review of the PECO petition. *Twp. of Marple*, 294 A.3d at 974 (“[A] Section 619 proceeding is constitutionally inadequate unless *the Commission* completes an appropriately thorough environmental review of a building siting proposal.”) (emphasis added).

This makes sense, because the duties of ERA trustees are governed by private trust law principles. *PEDF II*, 161 A.3d at 930, 935. A trustee’s duties are the *duties of the trustee*, and the Commission has provided no authority for the proposition that they may be offloaded onto trust beneficiaries. The trustee’s duty of loyalty to the beneficiaries for whom the trust corpus is managed cannot be reconciled with the ad hoc, nonconsensual assignment of those responsibilities to the beneficiaries in litigation. Nor should this Court countenance delegation of trustee duties to beneficiaries; trustees and beneficiaries play different roles, and ones that (as this case indicates) may come into conflict.

III. THE COMMISSION’S APPROVAL OF THE PETITION VIOLATES THE ERA AND SECTION 619 BECAUSE THE COMMISSION FAILED TO CONSIDER ALTERNATIVES THAT COULD REDUCE REASONABLY FORESEEABLE GHG IMPACTS.

A. The ERA Requires Evaluation of Alternatives that Could Reduce Reasonably Foreseeable GHG Impacts as Part of a Section 619 Determination.

The Marple Citizens argued below that the ERA requires that the Commission’s Section 619 determination regarding the reasonable necessity of granting PECO’s Petition must include consideration of reasonable alternatives that could reduce GHG impacts. Uhlman and Baker Main Brief at 49; RR ___. The Sept. 2024 Opinion and Order did not include consideration of any such alternatives, and this omission is erroneous for several reasons.

To start, the focal point of a Section 619 adjudication is an inquiry into the public’s convenience and welfare. This Court has determined that when Section 619 is construed consistent with the ERA, as it must be, environmental protection must be recognized as an integral part of the Section 619 public convenience or welfare evaluation. *Twp. of Marple*, 294 A.3d at 974. After all, reasonable alternatives with lower GHG emissions would have public convenience and welfare benefits in the form of reduced harms to the environmental trust.

The ERA, notably, requires not simply the quantification of environmental impacts, but prudent actions to reduce environmental impacts where possible. A

foundational aspect of the ERA is that it has not only a procedural component (the requirement for an environmental impact analysis); it also has a substantive component requiring the protection, conservation, and maintenance of the environment.

The duty of prudence requires the trustee to consider alternatives. This duty involves, among other things, considering “the purposes” and “provisions” of the trust, and “exercising reasonable care, skill and caution.” *PEDF II*, 161 A.3d at 932, n.24. The purpose of the ERA is to prevent and reduce environmental harms, which means that as a trustee, the Commission must refrain from permitting or encouraging “the degradation, diminution, or depletion of our public natural resources....” *PEDF II*, 161 A.3d at 933. As a trustee exercising “reasonable care, skill, and caution,” the Commission must examine opportunities to conserve and maintain public natural resources where possible, which requires considering alternative options. *PEDF II*, 161 A.3d at 938 (internal citation omitted).

The provisions of the trust expressly require the Commission to conserve and maintain public natural resources for the benefit of present and future generations. That means the Commission must “prohibit the degradation, diminution, or depletion of our public natural resources....” *PEDF II*, 161 A.3d at 933. The requirement to consider the protection of natural resources for future

generations underscores the need to examine the reasonably foreseeable environmental impacts of alternatives.

Accordingly, a trustee that only informs itself about the environmental impacts of a utility proposal as filed, but not about problem-solving means of reducing those impacts, is only half-informed. Such a trustee lacks the information needed to evaluate these impacts as constitutionally required.

Additionally, the ERA's fundamental rights clause means the Commission cannot exercise its statutory powers in a way that unreasonably impairs the right to clean air, pure water, and the preservation of certain environmental values. *PEDF II*, 161 A.3d at 931. Ensuring that, similarly, requires the consideration of alternatives.

This conclusion is supported by a long history of consideration of project alternatives as an integral part of environmental review practices. As Mr. Schmid testified, “[d]ocumentation of project planning and the formal recording of reasons for rejecting alternatives deemed not viable are basic to the environmental review process.” Schmid Rebuttal at 3; RR ___. This sound practice is reflected in federal environmental impact reviews under NEPA, which require consideration of a reasonable range of alternatives. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b); *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 742 (2d Cir. 1983).

As a landmark early case on NEPA established, the purpose of the alternatives requirement is:

to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971). This is entirely consistent with an ERA trustee's duty of prudence as described above.

B. The Commission's Section 619 Determination Did Not Include Any Evaluation of Alternatives that Could Reduce Reasonably Foreseeable GHG Impacts.

In spite of its constitutional duty to consider alternatives that could reduce GHG impacts, the Commission failed to do so. The Commission's Initial Decision in this proceeding noted PECO's consideration of fifteen alternative sites on which the Station could be constructed. Initial Decision at 16; RR ___. However, the record does not contain any information concerning differences in GHG impacts, if any, among these sites. Nor does the Commission's determination reflect any consideration of whether these alternative sites, or other alternatives, could reduce GHG impacts.

This renders the Commission’s decision constitutionally deficient, and requires a remand to supplement the factual record with such consideration. Of note, an illustrative example of a potential alternative that the Commission refused to consider is the use of additional electrification incentives to reduce gas demand and thereby defer or avoid the need to construct the Station. Schmid Rebuttal at 8; RR __. As the record reflects, projections of rising demand for gas over the next 10 years, including from new customers not yet connected to the gas system, is a major contributing factor identified by PECO in justifying the need for the Station. Sept. 2024 Opinion and Order at 4, n.3.

Yet the Commonwealth identified electrification programs as a significant opportunity for reducing GHG emissions from buildings in its 2021 Climate Action Plan. CAP at 50 (2021). This does not substitute for the Commission’s duty to conduct an up-to-date evaluation of this alternative in this context, but it does suggest that this alternative may be feasible and beneficial, and that the public welfare is not served by refusing to consider it.

The Commission’s alternatives analysis, and therefore reasonable necessity finding, was also inadequate because they failed to consider record evidence that indicated that the demand growth that PECO projected was overstated due to a failure to incorporate projected future winter temperature increases from climate

change and market trends toward electrification. Najjar Direct at 13-16; RR ___. To the extent that demand projections are inflated, this defect impairs meaningful consideration of alternatives by overstating the amount of demand that must be reduced in order to defer or avoid construction of the Station. Dr. Najjar also identified federal incentives for electrification, but the Commission failed to examine alternatives that would assist customers in availing themselves of these incentives or other mechanisms that would reduce demand and render the Station unnecessary. Najjar Direct at 16; RR ___.

By refusing to meaningfully assess PECO's straight-line extrapolation gas demand projections, and failing to examine other means of managing gas demand growth, the Commission unlawfully stacked the deck in favor of PECO's preferred solution, more gas infrastructure. The public suffers from this malfeasance, because it is denied an appropriately complete review of alternatives that may have lower environmental and financial costs. This is all the more true for future generations, for whom these costs will only be compounded.

IV. CONCLUSION.

For the reasons explained above, this Court should vacate the Commission's Sept. 2024 Opinion and Order. This Court should remand this matter back to the Commission with instructions to conduct a constitutionally sound environmental

impact review that includes (1) analysis of the reasonably foreseeable GHG impacts from approving PECO's Petition, including from the combustion and leakage of gas conveyed by the Station and (2) evaluation of a reasonable range of alternatives that could address need and reduce reasonably foreseeable GHG impacts, including the use of electrification, and issue a new Opinion and Order regarding PECO's Petition.

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February 26, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 2135 because this brief contains 13,949 words, excluding the Supplementary Matter exempted by Pa.R.A.P. 2135(b).

I further certify that this filing complies with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania as set forth in Pa.R.A.P. 127.

Dated: February 26, 2025

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