ARTICLES

Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment

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ABSTRACT

Deteriorating global environmental conditions, especially the accelerated warming of the atmosphere, have prompted a growing interest in constitutional environmental protection in the United States and around the world. Four states have incorporated judicially enforced environmental rights into their state constitutions and two of these states, Pennsylvania and Hawaii, have also made public natural resources the subject of a constitutional public trust. This Article focuses on the Pennsylvania Environmental Rights Amendment (ENRA), a key impediment to its full implementation, and the opportunities that overcoming this impediment present for addressing the existential challenge of climate change.

A major impediment to implementation by state agencies of Pennsylvania's ENRA is the erroneous view that their authority to carry it out is more limited than it really is. They argue that the ENRA does not expand what an agency can do under its existing statutory authority. As a result, all too often, they do not even recognize the ENRA as part of the law they must implement.

This Article's basic premise is that state agencies are essential to the effective implementation of the ENRA. It is not enough for citizens and nongovernmental organizations to file lawsuits to protect rights guaranteed by the ENRA. State agencies, too, must be guarantors of these rights.

Agency failure to implement the ENRA is an enormous impediment to the full realization by Pennsylvanians of their constitutionally protected environmental

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rights. It means that individual citizens and nongovernmental organizations are obliged to fight, on a case-by-case basis, for protection of their environmental rights, with little or no support from the state. Integration of the ENRA into state agency decision-making processes would put greater government resources in support of the ENRA and better protect the public's constitutional environmental rights. As recent litigation has shown, this is particularly true for climate change. Significantly, other constitutional rights in Pennsylvania are already integrated into the day-to-day activities of state agencies. Environmental rights should be no different.

In this Article, we discuss three broad ways in which Pennsylvania state agencies can and should apply the ENRA, consistent with their existing statutory authority. First, agencies should employ the ENRA as a constraint on government action and agency action in particular. Second, agencies should use the ENRA as a tool for statutory construction to strengthen their authority to protect and preserve the values and resources identified in the ENRA. Third, agencies (and the courts) should carry out their affirmative duty to implement the public trust clause of the ENRA—to conserve and maintain public natural resources for the benefit of present and future generations.

TABLE OF CONTENTS

INTRODUCTION

Deteriorating global environmental conditions, and especially the accelerated warming of the atmosphere and resulting climate disruption, have prompted a growing interest in constitutional environmental protection in the United States and around the world.[1] For example, Our Children's Trust, a public interest law firm focused on vindicating the right of children to a safe climate,[2] succeeded, at the state supreme court level, when it brought an action under Montana's environmental rights amendment which resulted in a decision invalidating statutes that prohibit the consideration of climate in state decision-making.[3] A similar action based on Hawaii's environmental rights amendment was settled on terms that commit the state to develop and implement a plan to decarbonize the state's transportation system by 2045.[4] Montana and Hawaii, along with New York and Pennsylvania (the subject of this Article), are the only four U.S. states with judicially enforced constitutional environmental rights.[5] The case law under these provisions provides a rich source of information about their effectiveness.[6] Although advocates use these cases to argue for the great promise in these amendments,[7] others use

1. *See, e.g.*, G.A. Res. A/76/L.75, The Human Right to a Clean, Healthy and Sustainable Environment (July 26, 2022); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015).

2. OUR CHILDREN'S TRUST, *Mission*, https://perma.cc/8RCN-9WNW.

3. Held v. Montana, No. CDV-2020-307, at *101 (Mont. 1st Dist. Ct. Aug. 14, 2023) (Climate Change Litigation Databases, U.S. Climate Litigation), *aff'd*, 560 P.3d 1235 (Mont. 2024) (holding that Montana ENRA rights were "fundamental" requiring application of strict scrutiny).

4. Navahine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. June 20, 2024) (joint stipulation and order re: settlement), https://perma.cc/G9TW-WFBA. The 2045 date is the date on which Hawaii is committed by statute to achieving zero greenhouse gas emissions. HAW. REV. STAT. § 225P-5.

5. John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 PACE ENV'T L. REV. 153, 160-65 (2024).

6. *See id. See also* John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis,* in ENVIRONMENTAL LAW BEFORE THE COURTS (Giovanni Antonelli et al. eds., 2023).

7. MAYA VAN ROSSUM, THE GREEN AMENDMENT: THE PEOPLE'S FIGHT FOR A CLEAN, SAFE, AND HEALTHY ENVIRONMENT 13-14 (2d ed. 2022).

many of the same cases to argue otherwise.[8] A basic limitation in the persuasive value of competing arguments is that the database on which they rely is limited to a few states over a few decades.[9]

In these states, many substantial issues remain to be addressed. In the great majority of appellate court cases involving these provisions, for example, citizens or nongovernmental organizations acting on their behalf allege that the government has violated their environmental rights. The premise, in other words, is that these provisions provide citizens and nongovernmental organizations with the means to continually prod the government to protect their rights. We do not dispute that premise.

In this Article, we offer a critical counterpoint: the government should, on its own, work to protect these rights on a day-to-day basis as part of its ordinary activities. This duty applies, in the first instance to state agencies, but also to the courts themselves and the legislature. We use Pennsylvania as a case study for two reasons. First, Pennsylvania is one of only two states (along with Hawaii) whose environmental rights amendment recognizes both a constitutional right to a clean environment and a constitutional public trust for public natural resources. And second, Pennsylvania has extensive case law on that amendment.[10]

Yet Pennsylvania's administrative agencies are at best inconsistent in expressly protecting the environmental rights contained in Article I, Section 27,[11] the Pennsylvania Environmental Rights Amendment (ENRA).[12] Their inconsistency applies both to the first sentence or clause, which recognizes a right to a quality environment, and its second and third sentences, or public trust clause. Common recurring explanations by agency officials and lawyers, mostly informal and off the record, include 1) claims that the ENRA does not enlarge an agency's existing statutory and regulatory authority[13] and 2) acknowledgments that the

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8. Quinn Yeargain, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. 1, 48-50 (2023); Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 179 (2023).

9. A standard feature of many state appellate court decisions involving constitutional rights is an examination of federal court decisions involving the same or similar rights. For many state constitutional provisions, the federal analogues to those provisions provide a useful source of data about how they work or should work. For constitutional environmental rights, however, there is no federal analogue.

10. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, *supra* note 5, at 160-65.

11. Article I, Section 27 of the Pennsylvania Constitution 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.

12. We use ENRA instead of ERA to avoid confusion with the Equal Rights Amendment of the Pennsylvania Constitution, PA. CONST. art. I, § 28. *See infra* note 30; Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024) (majority, concurring, and dissenting opinions refer to Article I, § 28 as "Equal Rights Amendment" or "ERA" more than 200 times). In so doing, we also avoid confusion with the proposed federal Equal Rights Amendment or ERA.

13. Older court decisions appear to be the source of this view. *See, e.g.*, Cmty. Coll. of Del. Cnty. v. Fox, 342 A.2d 468 (Pa. Commw. Ct. 1975). The court held that, although the ENRA "may impose an

effect of the ENRA would limit the agency's discretion.[14] These contradictory explanations capture the ambivalence of state agencies toward the ENRA, even agencies most directly responsible for protecting the environment. Honoring the boundaries of their statutory and regulatory authority and preserving as much discretion as possible tend to be core values of government agencies. But justifying an agency's unwillingness to invoke constitutional environmental rights on its own in this manner fails to take into consideration the wide variety of different ways in which constitutional rights, including constitutional environmental rights, affect an agency's statutory and regulatory authority. It also runs the risk

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obligation upon the Commonwealth to consider the propriety of preserving land as open space, it cannot legally operate to expand the powers of a statutory agency. . ." *Id*. at 482. It added that the ENRA "could operate only to limit such powers as had been expressly delegated by proper enabling legislation." *Id*.; *see also* Funk v. Wolf, 144 A.3d 228, 235 (Pa. Commw. Ct. 2016) [hereinafter Funk II], *aff'd* 158 A.3d 642 (2017) ("[C]ourts assessing the duties imposed upon executive branch departments and agencies by the E[N]RA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling statute."), *quoted with approval* in Commonwealth Dep't of Env't Prot. v. Monsanto Co., 269 A.3d 623, 645 (Pa. Commw. Ct. 2021).

The *Fox* and *Funk* decisions may no longer be viable following the Pennsylvania Supreme Court's invalidation of acts of the General Assembly in Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013) and Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 938 (Pa. 2017) [hereinafter PEDF II]. At a minimum, these more recent decisions limit the General Assembly's power to remove agency authority in cases where statutes provide authorization to protect or enhance public natural resources that are the subject of the public trust created by the ENRA. Thus, an act of the General Assembly similar to the Montana law at issue in *Held*, removing or reducing state agency authority to regulate greenhouse gas emissions under existing law, would undoubtedly be held unconstitutional under the Pennsylvania ENRA, just as the limitations on municipal authority to protect the people's environmental rights were found unconstitutional in *Robinson Township*. Moreover, as discussed in Part IV of this Article, agency statutory authority must be construed in light of the agencies' responsibilities as trustees under the ENRA. In this sense, the ENRA can be said to broaden agencies' authority and duties in implementing statutory authority.

14. A third argument, often made by regulated parties, is that insertion of the ENRA into day-to-day Pennsylvania Department of Environmental Protection (DEP) decision making would add an unnecessary and inappropriate level of uncertainty to DEP regulatory decisions, especially permitting, where most regulations are expressed in technical or numerical terms. That argument overlooks two points. First, every single agency decision adverse to a property owner is potentially subject to a claim that it constitutes an unlawful taking of private property in violation of the Pennsylvania and federal constitutions. The legal test for most alleged unconstitutional takings is a three-factor balancing test that is hardly a model of technical precision. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The test also plays a key role in constitutional takings analysis in Pennsylvania law. *See* United Artists' Theater Cir., Inc. v. City of Phila., 635 A.2d 612 (Pa. 1993). The uncertainty created by this test is also real, but it works against the government, not against regulated parties. Second, and more fundamentally, the DEP and other state agencies are not allowed to choose whether to apply ENRA on a day-to-day basis. The Pennsylvania Constitution requires that they do so.

This argument has also often been raised with respect to consideration of the ENRA in municipal land use and zoning decisions. The Pennsylvania Supreme Court plurality in *Robinson Township* specifically decided that municipalities act as trustees under the ENRA in making land use decisions. In *PEDF II*, a majority of the Pennsylvania Supreme Court adopted the reasoning of the plurality in *Robinson Township* and stated that local governments are trustees. *PEDF II*, 161 A.3d at 932 n.23.

of ignoring the ENRA as a source of constitutional law altogether and treating it merely as a platitude.

Consider this example: In 2022, the state adopted regulations limiting greenhouse gas emissions from large fossil-fuel-fired power plants.[15] The regulations were intended to provide the basis for the state to join the Regional Greenhouse Gas Initiative (RGGI), a partnership of northeastern and mid-Atlantic states that have adopted substantially similar market-based regulations to reduce emissions.[16] In adopting the RGGI Regulation, the state failed to cite the ENRA in support of its statutory authority, even though the Pennsylvania Supreme Court has many times used the ENRA to support the state's claimed statutory authority to make decisions and adopt regulations that protect environmental rights.[17] In subsequent litigation, when petitioners claimed that the state lacked the authority to adopt the RGGI Regulation, the Pennsylvania Department of Environmental Protection (DEP) still did not invoke Article I, Section 27. Environmental groups sought to intervene precisely to raise Article I, Section 27, and the Commonwealth Court denied their request.[18] The court subsequently enjoined the regulation without discussing either the regulation's statutory authority or the ENRA.[19] In July 2024, when a decision on the merits of the litigation was pending, the Pennsylvania

15. This example is treated in much greater detail in section III.(B).(1).

16. REGIONAL GREENHOUSE GAS INITIATIVE, *Welcome* (Mar. 11, 2024), https://perma.cc/3S4W-LEFL.

17. This is likely an example of an agency seeking to preserve its discretion. The ENRA limits agency discretion because it imposes on the Commonwealth the duty to protect the people's environmental rights and because it means that an agency is a trustee for public natural resources, with all the responsibilities that entails. *See infra* Part II. It also supports and strengthens an agency's statutory authority. *See infra* Part III. But acknowledging this latter point necessarily means acknowledging the limits that the ENRA imposes. The governor's announcement of the Commonwealth's intention to join RGGI was made after the authors and more than fifty others filed a rulemaking petition to the Environmental Quality Board (EQB), the rulemaking authority for DEP, and the EQB's acceptance of the petition for study. The petition invokes the ENRA and seeks to establish, under the Pennsylvania Air Pollution Control Act, a far broader and more effective, economy-wide greenhouse gas auction cap-and-trade program modeled on a comparable California regulation, but with a cap descending to reach zero by 2052. Letter from Robert B. McKinstry, Jr. et al. to Patrick McDonnell, Sec'y, Dep't of Env't Prot., & Laura Edinger, Regul. Coordinator, Env't Quality Bd. (Feb. 28, 2019) (with attached petition for rulemaking), https://perma.cc/4XGR-J34P.

18. Ziadeh v. Pa. Legis. Reference Bureau, No. 41 M.D. 2022, 2022 Pa Commw Unpub Lexis 581 (Pa. Commw. Ct. July 8, 2022), Court Opinion, *rev'd* Shirley v. Pa. Legis. Reference Bureau, 318 A.3d 832 (Pa. 2024).

19. At oral argument in the state's appeal to the Pennsylvania Supreme Court of the Commonwealth Court's preliminary injunction, Justice Christine Donohue asked the state's attorney why the state was not advancing the ENRA in support of its argument. Justice Donohue looked at the other justices and asked if anyone disagreed with the ENRA's relevance to this case. No justice seemed to disagree. The attorney responded that although the Commonwealth had not specifically argued the ENRA, the Commonwealth was exercising power under the ENRA in enacting the RGGI Regulation and that funds from the auction are to be deposited in the Clean Air Fund to be used to protect air resources. Pa. Sup. Ct., Dep't of Env't Prot. v. Pa. Legis. Reference Bureau, Oral Recording of Argument at 1:40-1:47 (May 24, 2023), https://perma.cc/NG9L-GF8H. That argument took place several months after the completion of all briefing and argument before the Commonwealth Court.

Supreme Court held that environmental groups were entitled to intervene as parties in the case because the state did not invoke the ENRA in support of the RGGI Regulation.[20]

Although this is almost certainly the most prominent example of the state failing to invoke the ENRA, it is by no means the only example. In numerous day-to-day occurrences, state agencies proceed as if the only relevant legal authority is their statutes and regulations, and the ENRA simply does not exist. Remarkably, agencies act this way even though they would never consider ignoring other rights recognized in the state constitution, such as equal protection and due process.[21] To be sure, there are counterexamples, some of which are identified in this Article. At best, however, state agencies have failed to *systematically* integrate the ENRA into their decision-making processes.

This failure seriously impedes the full realization of Pennsylvanians' constitutionally protected environmental rights. It means, in the RGGI case, that the state has never said in the rulemaking or argued in court what is unquestionably true—that the implementation of the RGGI Regulation would provide improved protection of their rights to "clean air," to the preservation of environmental values, and to have the state "conserve and maintain" public natural resources such as the atmosphere.[22] Beyond that, it means that individual citizens and nongovernmental organizations are obliged to fight, on a case-by-case basis, for protection of their environmental rights, with little or no support from the state. The modern environmental movement marked a transition from common law litigation to statutes as the primary means of environmental protection. A critical reason for the increased effectiveness of statutes is their more-or-less systematic enforcement by government, which has more resources than citizens and nongovernmental organizations. Similarly, here, state agency integration of the ENRA into its decision-making processes would put greater government resources in support of the ENRA, and better protect the public's constitutional environmental rights.

Finally, and perhaps most fundamentally, environmental rights are just as important as other constitutional rights. For more than four decades after Article I, Section 27 was adopted in 1971, the Pennsylvania courts employed a balancing

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20. Shirley v. Pa. Legis., Reference Bureau, 318 A.3d 832, 857 (Pa. July 18, 2024). "Although DEP raised other arguments in support of the RGGI Regulation, it made none whatsoever premised upon the [ENRA]. Nonprofits sought intervention, inter alia, to fill this void and defend the RGGI Regulation under the [ENRA]." *Id.* at 844.

21. Sometimes, courts overturn agency decisions for failure to integrate the ENRA into their decisions. *See, e.g.*, Twp. of Marple v. Pa. Pub. Util. Comm'n, 294 A.3d 965, 974-75 (Pa. Commw. Ct. 2023) (reversing decision of the Pennsylvania Public Utility Commission due to its failure to consider in advance environmental effects of its decision, in dereliction of its duties under Article I, § 27).

22. PA. CONST. art. I, § 27; Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 9 MICH. J. ENV'T & ADMIN. L. 50 (2018) ("*Applying the ENRA*").

test in lieu of the constitution's text, and the ENRA languished.[23] In landmark decisions in 2013[24] and 2017,[25] the Pennsylvania Supreme Court reinvigorated the ENRA, employing primarily the text of the ENRA and rejecting the balancing test. In so doing, it made clear that it saw environmental rights as on the same level of importance as other constitutional rights. That vision has yet to be fully realized. State agencies do not hesitate to protect other constitutional rights, but they lag in integrating environmental rights into their day-to-day activities.

The basic premise of this Article is that state agencies are essential to the effective implementation of the ENRA. Those agencies must consider their duties under the ENRA when taking actions affecting ENRA rights and trust resources and invoke the ENRA when they do so. It is not enough for citizens and nongovernmental organizations to file lawsuits to protect rights guaranteed by the ENRA. The government, too, must be a guarantor of these rights.

As exemplified by the RGGI litigation, however, agencies may be more attentive to their institutional prerogatives than to their responsibilities under the ENRA. It is therefore important that the ENRA applies to the Commonwealth and all of its branches. The ENRA applies equally to the administrative, legislative and judicial branches. Just as legislation must be interpreted under the presumption that the legislature is acting consistent with its duty as a trustee, the courts are also bound to act as trustees. They cannot ignore this duty simply because a party has not raised it, as the Commonwealth Court did in the RGGI litigation. As recognized by the Pennsylvania Supreme Court in reversing the Commonwealth Court on this issue, the courts must allow representatives of the beneficiaries, including future generations, to step in and represent those interests where agencies fail to do so. Courts must also allow representatives to compel actions and even rulemaking where authorized by and consistent with statutory authority and necessary to protect the corpus of the trust created by the ENRA.[26]

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23. Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). The Commonwealth Court adopted the following test as a "realistic and not merely legalistic" means of deciding whether the Amendment had been violated: "The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" *Id.* at 94; *see also* John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2015) (explaining that test has little relationship to text of Article I, Section 27, describing cases employed under it, and showing that litigants invoking ENRA under that test almost never prevailed).

24. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013) (plurality opinion by Chief Justice Castille). *See* John C. Dernbach, James R. May & Kenneth Kristl, Robinson Township v. Commonwealth of Pennsylvania: *Examination and Implications*, 67 RUTGERS U. L. REV. 1169 (2015).

25. *PEDF II*, *supra* note 13; *see* John C. Dernbach, James R. May & Kenneth Kristl, *Recognition of Environmental Rights for Pennsylvania Citizens:* Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 RUTGERS U. L. REV. 803 (2018).

26. *Shirley*, 318 A.3d at 848-55.

In this Article, we discuss three broad ways in which Pennsylvania state agencies can and should apply the ENRA, consistent with their existing statutory authority. For each of these, we use examples to illustrate the use (or failure to use) Article I, Section 27. In Part I, we argue that the ENRA should be employed as a constraint on government action and agency action in particular. In Part II, we argue that the ENRA should be used as a tool for statutory construction to strengthen agency authority to protect and preserve the values and resources identified in the ENRA. Finally, in Part III, we argue that agencies (and the courts and the legislature) have an affirmative duty to implement the public trust clause of the ENRA—to conserve and maintain public natural resources for the benefit of present and future generations. This does not mean that agencies are free to ignore their statutory authority, only that they should implement it consistent with the constitution.

I. THE ENRA AS A CONSTRAINT ON EXISTING AGENCY AUTHORITY

Constitutional rights operate as a limit on government authority, and the ENRA 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 ENRA. In *Township of Marple v. Pennsylvania Public Utility Commission*,[27] a decision that could have significant consequences for all state agencies, the Commonwealth Court reached that conclusion, holding that the Pennsylvania Public Utility Commission (PUC) must consider the likely effects of its decisions on ENRA values and resources prior to making a decision. That is a direct constraint on the statutory authority of the PUC, and it flows from the ENRA. Similarly, when agencies make decisions involving public natural resources, they must interpret and apply their statutes and regulations in a manner that is consistent with their public trust fiduciary duties of prudence, loyalty, and impartiality. This, too, is a constraint on agency authority.

A. RIGHTS AS CONSTRAINTS ON GOVERNMENTAL AUTHORITY

Under the Pennsylvania constitution, as in other state constitutions and the U.S. constitution, rights operate as limits on what the government, including government agencies, can do. Article I of the state constitution contains a Declaration of Rights that is similar to, but not the same as, the Bill of Rights to the U.S. Constitution. Article I, Section 25 (Reservation of Powers in People) states: "To guard against the transgressions of the high powers which we have delegated, we declare that *everything in this article* is excepted out of the general

27. Twp. of Marple v. Pa. Pub. Util. Comm'n, 294 A.3d 965 (Pa. Commw. Ct. 2023).

powers of government and shall forever remain inviolate."[28] Article I, Section 25 has long been held to be self-executing.[29]

The case law is replete with examples of Article I rights operating as limits on governmental authority. Professor Seth Kreimer's comprehensive compilation of Pennsylvania Supreme Court decisions between 1968 and 2018 shows a wide variety of Article I challenges to actions by state and local legislatures, state and local agencies, and, particularly in criminal procedure, courts.[30] Indeed, the principle that Article I rights limit governmental power is so well established that extensive justification is not ordinarily necessary. Relatively few cases cite Article I, Section 25 unless necessary to reinforce the principle.[31]

Because many Article I rights are drafted simply as prohibitions, their limitation on government is clear. Article I, Section 28, for example, prohibits the state from denying or abridging equality of rights based on an individual's gender.[32] The provision contains no qualifying language. As the Pennsylvania Supreme Court has explained, "it 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."[33] Other rights in Article I have both prohibitory and qualifying language. Article I, Section 10, the state constitution's eminent domain provision, provides in part: "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."[34] Part of the prohibition is categorical; the state cannot use eminent domain to transfer property from one private owner to another for the new owner's private use.[35] But part of the prohibition comes with a qualification. The state can take private property for public use if there is legal authority and if the state first provides or agrees to provide just compensation. The overall effect of the provision is to prevent the state from doing what it might otherwise be able to do under state law.[36] The qualification—permitting

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28. PA. CONST. art. I, § 25 (emphasis added).

29. Erdman v. Mitchell, 56 A. 327 (Pa. 1903); Robert F. Kravetz, *Declaration of Rights Excepted Out of General Powers of Government*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 755, 759-61 (Ken Gormley & Joy G. McNally eds., 2020) (discussing Erdman v. Mitchell).

30. Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287, 366-456 (2018). Many equal protection claims were brought under both Article I, § 26 and Art. III, § 32.

31. Kravetz, *supra* note 29, at 766.

32. PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.").

33. Hartford Acc. and Indem. Co. v. Ins. Comm'r of Com., 482 A.2d 542, 549 (Pa. 1984).

34. PA. CONST. art. I, § 10.

35. Robinson Twp. v. Commonwealth, 147 A.3d 536, 588 (Pa. 2016) (holding that statutory provision violates Article I, Section 10 because it "confers a broad power on private corporations to take private property of other landowners to store natural gas therein.").

36. The U.S. Constitution contains a similar provision. U.S. CONST. Amend. V ("nor shall private property be taken for public use, without just compensation.").

eminent domain in specified circumstances—is not a grant of authority but rather a limitation on state authority, because the state can only engage in eminent domain under state law if it adheres to that qualification.

B. ENVIRONMENTAL RIGHTS AND PUBLIC TRUST DUTIES AS CONSTRAINTS ON AGENCY ACTION

Like other rights, those articulated in Article I, Section 27 effectuate clear limits on agency authority. In revitalizing the ENRA, Pennsylvania courts recognized what the balancing test did not—that the ENRA is located in Article I of the state's constitution.[37] "The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, 'particular sections of the Declaration of Rights represent specific limits on governmental power.'"[38] The placement of Section 27 in Article I—along with such rights as the right to property (Section 1), religious freedom (Section 3), freedom of speech (Section 7), and security from searches and seizures (Section 8)—was no accident. As then-Representative Franklin Kury, the chief legislative sponsor of the amendment as well as its primary author and advocate, explained when he introduced the resolution that would become Article I, Section 27:

> I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life—indeed to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy.[39]

The text of the amendment further underscores the recognition of environmental rights in the public. Each of the three sentences in the ENRA refers to "the people." The Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF II)* explained that the amendment recognizes two sets of rights in the people.[40] Each of these sets of rights imposes

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37. *PEDF II*, 161 A.3d at 916, 918.

38. *Robinson Twp*., 147 A.3d at 948.

39. John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, Widener L. Sch. Legal Stud. Res. Paper Series No. 14-18 at 6-7 (July 2014). The legislative history, in fact, is replete with references to the importance of Section 27's placement in Article I. *See id*. at 14-15, 66-68. Under the Pennsylvania Constitution, a constitutional amendment must be passed by both houses of the legislature in one session, passed by both houses in the next consecutive legislative session, and then approved in a public referendum. PA. CONST. art. XI, § 1. The ENRA was adopted by a vote of nearly four to one in 1971. *PEDF II*, 161 A.3d at 918.

40. *Id*. The Pennsylvania Commonwealth Court and 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) [hereinafter PEDF VI]. In *PEDF II*, the Pennsylvania Supreme Court applied Article I, Section 27 to invalidate legislation allowing royalties from oil and gas leasing to be spent for purposes other than the conservation and maintenance of public natural resources. In Pa. Env't Def. Found. v. Commonwealth,

a limit on the power of the Commonwealth. The first sentence or clause 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."[41] This sentence, the court said, "places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional."[42] Thus, the state, including state administrative agencies, is constrained from acting in ways that impair the right to clean air, pure water, and the preservation of certain environmental values.

The second and third sentences of Article I, Section 27, the Court said, create a constitutional public trust.[43] These sentences, which constitute the ENRA's public trust clause, provide: "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."[44] Under this clause, the Court noted, the Commonwealth is the trustee.[45] The corpus, or body, of the trust is public natural resources, which the Court held includes state parks and forests, as well as the oil and gas they contain.[46] The people, including present and future generations, are "the named beneficiaries" of this trust.[47] The Court also explained that "all agencies and entities of the Commonwealth government, both statewide and local," have a constitutional trust responsibility.[48]

Under this trust, the Pennsylvania Supreme Court said, the Commonwealth has two duties: "First, the Commonwealth has 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. Second, the Commonwealth must act affirmatively via legislative action to protect the environment."[49] These trust duties, particularly the first, limit the Commonwealth's power

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255 A.3d 289, 315-16 (Pa. 2021) [hereinafter PEDF V], the court applied the *PEDF II* holding to bonuses, rentals, and interest payments from oil and gas leasing, invalidating legislation allowing such moneys to be spent for purposes other than conservation and maintenance of public natural resources. In *PEDF VI*, the court held that legislation appropriating much of the oil and gas leasing money to fund the day-to-day operations of the Department of Conservation and Natural Resources was not facially unconstitutional under the ENRA. 279 A.3d at 1193. The other numbered cases are prior decisions by the Commonwealth Court and are not discussed in this Article.

41. PA. CONST. art. 1, § 27.

42. *PEDF II*, 161 A.3d at 931. The Montana Supreme Court's decision in *Held*, *supra* note 3, that its ENRA created a "fundamental right" requiring application of strict scrutiny suggests a more stringent standard of review.

43. *Id*. at 931-32.

44. PA. CONST. art. I, § 27.

45. *PEDF II*, 161 A.3d at 932.

46. *Id*. at 916.

47. *Id*. at 931-32.

48. *Id*. at 932 n.23.

49. *Id*. at 933 (internal citation omitted).

to act contrary to these duties when public natural resources are involved. These duties, the *Robinson Township* plurality stated, apply to "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."[50] Just as a traditional trust limits the ability of the trustee to manage the trust corpus in any way it likes, the public trust established by Section 27 prevents the Commonwealth from using or managing public natural resources in any way it chooses. The public has the right to have the Commonwealth perform these duties. These are actual rights under the Pennsylvania Constitution coequal to those of freedom of speech and religion.[51] They cannot be denied, altered, or abridged by the state, and they are not mere considerations or statements of aspiration.

C. APPLICATIONS OF THE ENRA TO CONSTRAIN AGENCY ACTION

Although the Pennsylvania Supreme Court has used the constitutional principles described above to invalidate legislation as violative of the ENRA, Pennsylvania judicial and administrative appellate bodies have also applied these principles to agency adjudications. In so doing, they have articulated principles of law that build on and supplement these general constitutional principles. They have decided that Article I, Section 27 requires the PUC and DEP to understand the environmental impacts of their decisions under the ENRA prior to making a decision. They have also held that DEP must exercise its fiduciary duties as an ENRA trustee in making decisions. These are closely related but distinct concepts. When public natural resources are involved, these fiduciary duties support the requirement for pre-decision environmental review. But fiduciary duties should also influence day-to-day agency activities in the interpretation and application of their statutes and regulations, including in permitting and enforcement actions. These requirements are also illustrative of the ways agencies can and should employ the ENRA in making decisions, and both operate as constraints on agency action. In addition, there is no constitutional reason for limiting the application of these judicial and administrative appellate decisions to these particular agencies.

1. Requirement for Pre-decision Environmental Review

The ENRA's prohibition against violation of environmental rights, and its recognition of trustee duties for public natural resources, mean that agencies must

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50. *Robinson Twp*., 83 A.3d at 955.

51. *Id*. at 953-54 ("The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I.") (citations omitted); *id*. at 960 ("[T]he Pennsylvania Constitution now places citizens' environmental rights on par with their political rights.").

ensure that information about the likely effects of a decision on protected environmental resources and values is available to them and trust beneficiaries prior to making a decision, and that they evaluate and make a decision based on that knowledge. The duty to consider these impacts is a limitation on their statutory authority. This duty applies not just to the DEP, but to other agencies as well. Because this procedural duty derives from the substantive rights and duties contained in the ENRA, it is not enough to simply *consider* environmental impacts in advance of a decision; agencies must *use* this information in a way that is consistent with these substantive rights and duties.

This understanding of the ENRA goes back to its origins. Before the ENRA's adoption, then-Representative Franklin Kury explained the requirement to consider environmental impacts in advance as a logical consequence of adopting Article I, Section 27:

> Those who propose to disturb the environment or impair natural resources would in effect have to prove in advance that the proposed action is in the public interest. This will mean that the public interest in natural resources and the environment will be fully weighed against the interest of those who would detract from or diminish them before—not after—action is taken.[52]

Pennsylvania case law has confirmed this understanding. As part of its explanation of the ENRA in *Robinson Township*,[53] a plurality of the Pennsylvania Supreme Court recognized that under the first sentence or clause, an agency may not act unless it considers the impact of its decision on the rights and values recognized in that clause.[54]

This understanding of the ENRA was confirmed in the Commonwealth Court's decision in *Township of Marple v. Pennsylvania Public Utility Commission*.[55] The court held that the PUC is required to consider the environmental effects of a decision under Article I, Section 27 prior to making that decision. The *Township of Marple* case could have significant consequences, not only for the PUC but also for other agencies. In that case, Pennsylvania Electric Co. (PECO) sought to build what it described as a natural gas reliability station in

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52. 1970 Pa. Legis. J. House 2269, 2272 (April 14, 1970). *See also* Question and Answer Sheet on Joint Resolution: "Q. Will the amendment make any real difference in the fight to save the environment? A. Yes, once Joint Resolution 3 is passed and the citizens have a legal right to a decent environment under the State Constitution, every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people's rights before it acts. If the public's rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate lawsuit." Dernbach & Sonnenberg, *supra* note 39, at 66. The Question and Answer Sheet was cited with approval in *Robinson Twp*., 83 A.3d at 954.

53. *Robinson Twp*., 83 A.3d 901 (Pa. 2013).

54. *Id*. at 952 ("Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.").

55. 294 A.3d 965 (Pa. Commw. Ct. 2023).

Marple Township that would be linked to a liquefied natural gas facility located some distance away. Although state public utility law is generally comprehensive,[56] Section 619 of the Municipalities Planning Code recognizes that municipalities have the authority to regulate the location of a building (such as the proposed station) and creates an exception.[57] PECO requested permission from the township to build the station, which the township's Zoning Hearing Board denied.[58] Section 619's exception to local zoning authority allows it to be overridden by a PUC decision that "the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."[59] While litigation over the zoning denial was pending, PECO filed a Section 619 petition asking the PUC to exempt the station from local zoning.[60] The PUC granted that request based on its compliance with relevant utility law in the face of objections by the township and intervenors about "noise, gas emissions, aesthetics, traffic, and other health and safety concerns."[61] Those issues, the PUC decided, were beyond the PUC's statutory authority under Section 619.[62]

On appeal, the township and intervenors relied on Article I, Section 27 in arguing that the PUC erred by not considering these environmental and public health and safety concerns. The Commonwealth Court agreed. It held that a "Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting."[63] The requirement to conduct an "appropriately thorough environmental review" limits the PUC's authority. The court thus instructed the PUC that it could not approve the station unless it conducted such a review and incorporated the results of the review into its ultimate determination.[64]

This framing of an environmental assessment requirement as a limit on agency authority, instead of a grant of agency authority, is not clever wordplay. It is how constitutional rights are protected. Prior to the Commonwealth Court decision, the PUC made its determination without considering environmental impacts in advance, and apparently believed it was fully justified in doing so because its authorizing statute and regulations did not require such an evaluation. After the decision, the PUC cannot make that determination without first completing a

56. *Id*. at 970-72.
57. 53 PA. STAT. § 10619 (2024).
58. *Twp. of Marple*, 294 A.3d at 969 (explaining Zoning Hearing Board's denial of proposed special exception).
59. 53 PA. STAT. § 10619 (2024).
60. *Twp. of Marple*, 294 A.3d at 969.
61. *Id*. at 970.
62. *Id*.
63. *Id*. at 974.
64. *Id*. at 975.

constitutionally thorough environment review. As explained above, eminent domain works in a similar way under Article I, Section 10. An agency is constitutionally prohibited from engaging in eminent domain unless it adheres to certain rules. If it complies with those rules, it can engage in eminent domain. Here, too, the constitution operates as a limit on agency authority.

Although the Commonwealth Court did not spell out the scope and other details of this required environmental review in *Township of Marple*, its scope is straightforward: the scope of the ENRA. Does this particular proposal implicate clean air, pure water, and the preservation of certain environmental values? Does this particular proposal implicate public natural resources? If it does, the implicated resources and values fall within the scope of the review. Because clean ambient (that is, outdoor) air is required for a stable climate and because climate change adversely affects protected values and resources, the impact of a proposal on climate change should also be considered.[65]

This limitation does not require a full-throated environmental impact statement of the kind required under the National Environmental Policy Act (NEPA) for "major federal actions that significantly affect the quality of the human environment."[66] Rather, it requires an environmental analysis that is proportionate to the environmental values and trust resources at stake in any given proposal, its impact on the people who are protected by the ENRA, and other factors. This might take the form of a less detailed environmental review, conceptually similar to an environmental assessment under NEPA[67] or of the sort that many states require for a variety of activities, including land use approvals, under their state environmental policy acts.[68]

Such a review already occurs in Pennsylvania for some proposals. Indeed, the Environmental Hearing Board (EHB), the administrative body which hears appeals of DEP adjudications such as permitting and enforcement decisions, has interpreted the ENRA to require it. In "assessing Article I, Section 27 challenges," the EHB has repeatedly stated, "[w]e must first determine whether the Department has considered the environmental effects of its action . . ."[69] The

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65. For a more detailed explanation, *see* McKinstry & Dernbach, *supra* note 22, at 63-78. Because Article I, Section 27 applies to climate change, it imposes limits on an agency's authority to contribute to climate change in ways that impair the public's constitutional rights.

66. 42 U.S.C. § 4332(2).

67. 40 C.F.R. § 1501.5 (2024). The Council on Environmental Quality's NEPA regulations identify categories of actions for which no further assessment is required, *id.* § 1501.3, then provide for a more expedited environmental assessment, which can lead to a finding of no significant impact, *id.* §1501.6. Only actions with significant impacts require a full environmental impact assessment.

68. *See, e.g.*, California Env't Quality Act Guidelines, CAL. CODE REGS. tit. 14, div. 6, ch. 3 (2018), https://perma.cc/V6AG-8SGX; NY Env't Conservation L. Implementing Regs., N.Y. COMP. CODES R. & REGS. tit. 6, ch. VI, pt. 617 (2019); *see* City of Long Beach v. City of Los Angeles, 228 Cal. Rptr. 3d 23, 28-29 (2018) (finding an analysis of air quality impacts to be inadequate). Other states have also required cumulative impacts assessments in environmental reviews.

69. Liberty Twp. v. Commonwealth, Dep't of Env't Prot., EHB Docket No. 2021-007-I, slip. op. at 105 (Jan. 8, 2024) (citing or quoting four previous decisions). In referring to "environmental effects,"

EHB's decision in *New Hanover Township v. Commonwealth, Department of Environmental Protection*, [70] which the Commonwealth Court affirmed,[71] exemplifies this constitutional duty to consider environmental impacts prior to making a decision. In this case, the constitutional duty plays an interstitial or gap-filling role because it concerns the relationship between different DEP programs—mining regulation and hazardous sites cleanup. The case involved the appeal of DEP-issued mining permits and water quality permits for a proposed quarry. The quarry would have been operated "adjacent to a hazardous site with contaminated groundwater that is being cleaned up pursuant to the Hazardous Sites Cleanup Act[.]"[72]

The EHB rescinded the permits because DEP "failed to consider how quarry operations would impact the [Hazardous Sites Cleanup Act] remediation" at the site, known as the Hoff VC Site.[73] Quarry pumping was of particular concern; because quarrying would be conducted below the water table, continuous pumping of groundwater would be necessary to keep the quarry dry. But the groundwater was already contaminated from the adjacent hazardous site, and the contamination was spreading. The EHB explained:

> There is no doubt whatsoever that the two sites should be considered in tandem. There is no program or protocol in place for the Department to coordinate its regulatory oversight of the quarry with its remediation of the hazardous site. It would seem that one of the first and most important objectives of any site cleanup is to contain the problem. Yet quarry pumping will have exactly the opposite effect, extending the plume of contaminated groundwater toward the quarry. Quarry pumping will expand the area of contamination, which seems entirely at odds with how we would expect remediation of a hazardous site should be responsibly managed, both fiscally and with the best interests of the environment in mind.[74]

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the EHB in recent years has not distinguished between effects to clean air, pure water, and the preservation of certain values of the environment (ENRA's first clause) and effects to public natural resources (ENRA's second clause). *But see* Ctr. for Coalfield Just. v. Commonwealth, Dep't of Env't Prot., EHB Docket No. 2014-072-B, 58-65, 68-69 (separately discussing environmental effects for each clause).

70. 2020 EHB 124, EHB Docket No. 2018-072-L.

71. Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot., 316 A.3d 668 (Pa. Commw. Ct. 2024). This was the second time this appeal had come before the Commonwealth Court. In 2021, the Commonwealth Court reversed the EHB's decision. Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot., 258 A.3d 572 (Pa. Commw. Ct. 2021). The Pennsylvania Supreme Court, however, reversed and remanded the 2021 decision. 286 A.3d 713 (Pa. 2022).

72. 35 PA. STAT. §§ 6020.101-.1305 (2024). The act is Pennsylvania's analogue to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75.

73. *New Hanover Twp*., 2020 EHB at 68.

74. *Id*. at 71.

DEP, in short, had not given "any serious thought" to the question of what it would do if quarrying expanded the groundwater contamination area.[75] The EHB concluded: "This is inconsistent with [DEP's] constitutional duty to fully understand and consider the environmental effects of its actions."[76] Affirming the EHB decision, the Commonwealth Court concluded that the EHB had substantial evidence that DEP failed to consider how it would address site remediation after issuing the permits.[77]

This case is unusual because it involves a problem that fell between the proverbial cracks of two different DEP programs. Generally, the permit application regulations for any given program require detailed information about the environmental impact of the project. When sufficient information is provided—which is most of the time—the constitutional duty to consider environmental impacts in advance is fulfilled by application of the regulations. But, as *New Hanover Township* indicates, that is not always the case. DEP has a duty to consider information about the impact of its decisions on constitutionally protected environmental rights, whether or not such consideration is required by regulation. This is also true of other state agencies, whose regulations may not require the development and submission of the type of environmental information required by DEP regulations. Under the ENRA, state agencies do not have the legal authority to act in the absence of such information.

Many Commonwealth agencies whose responsibilities impact constitutionally protected environmental rights may not have explicit statutory authority directing them to consider the impact of their decisions on these rights. Under *Township of Marple*, the lack of a specific statutory directive is irrelevant, because these agencies lack the legal authority to adversely affect environmental rights. The obligation to consider potential environmental impacts in advance applies to them. Although they may believe they lack the staffing and expertise necessary to make legally defensible decisions concerning the ENRA, that cannot be a legally sufficient reason to ignore the people's constitutional rights. When an agency believes that it lacks the staff or expertise to consider environmental impacts, the agency may consider entering agreements with agencies with the appropriate expertise to conduct the studies and prepare reports to provide the necessary environmental review.[78]

Under the ENRA, of course, it is not enough for state agencies to consider the impact of their decisions on constitutionally protected rights. They are also prohibited from violating these rights. Under NEPA, by contrast, an agency need only consider in advance the foreseeable environmental effects of its decision; if

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75. *Id.*

76. *Id.*

77. Gibraltar Rock, Inc., 316 A.3d at 671.

78. This is an established approach at the federal level. Under the regulations promulgated by the President's Council on Environmental Quality to implement NEPA, an agency lacking the adequate resources or expertise may make an arrangement by letter or memorandum of understanding to designate another agency as the lead agency in the NEPA process. 40 C.F.R. § 1501.7(c) (2024).

it does that, it may proceed, regardless of the environmental impact.[79] The ENRA requires that agencies not only consider foreseeable impacts of their decisions, but also act on that information in a way that protects constitutional rights and, where public natural resources are involved, carries out their public trust duties. For many agencies, much of the time, compliance with existing statutes and regulations will accomplish that. But where that is not true, Article I, Section 27 requires protection of those rights and adherence to these duties anyway. This, again, is not additional authority; it is a limit on existing authority.

2. Requirement to Exercise Fiduciary Duties in Applying Statutes and Regulations

When making decisions involving public natural resources, agencies are also required to interpret and apply their statutes and regulations in a manner that is consistent with their public trust fiduciary duties of prudence, loyalty, and impartiality. Because the agencies are trustees in this context, agencies have no other legal choice. These fiduciary duties support the requirement for pre-decision environmental review, to be sure. But they should also influence day-to-day agency activities in the interpretation and application of their statutes and regulations.

The Pennsylvania Supreme Court has held that the trust duties of prudence, loyalty, and impartiality should be used to interpret Section 27's public trust clause.[80] "The plain meaning of the terms 'conserve' and 'maintain' implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As fiduciaries, state agencies have a duty to act toward the corpus of the trust—public natural resources—with prudence, loyalty, and impartiality."[81] These trust responsibilities, individually and collectively, impose limits on an agency's statutory authority. The duty of prudence, the Pennsylvania Supreme Court has said, involves "considering the purposes" of the trust and exercising "reasonable care, skill, and caution" in managing the trust corpus.[82] It is impossible for a trustee to be prudent without carrying out some advance investigation of the reasonably foreseeable effects of its decisions on public natural

79. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 228 (1980) ("In the present litigation there is no doubt that [the Department of Housing and Urban Development] considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more.").

80. This duty of the trustee to consider impacts on public natural resources before making a decision also derives from classic expressions of the public trust doctrine. *Robinson Twp.*, 83 A.3d at 958 (citing Nat'l Audubon Soc'y v. Sup. Ct., 658 P.2d 709, 728 (Cal. 1983)); *see also PEDF II*, 161 A.3d at 945 (Baer, J., concurring). The classic expression of the public trust doctrine is rooted in the U.S. Supreme Court's decision in Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), and Professor Joe Sax's influential article about the case. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

81. *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956–57).

82. *Id.*, 161 A.3d at 938 (citing 20 PA. CONS. STAT. § 7780).

resources.[83] But the duty of prudence should also guide, among other things, what information is gathered, the imposition of environmentally protective permit conditions, and agency enforcement decisions to prevent and control contamination.

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."[84] Agency trustees have a duty to consider both present and future generations at the same time. Thus, the trustee cannot be "shortsighted" and must instead "*consider* an incredibly long timeline."[85] All too often, agencies make decisions based on their immediate or short-term effects, particularly economic effects. This duty forces agencies to gather information and make decisions based on both their short- and long-term effects on public natural resources. The duty of loyalty is not to the regulated parties, but to the public as trust beneficiaries (which includes regulated parties that are people).

Finally, the duty of impartiality requires the Commonwealth 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."[86] Although the most relevant case addressing the duty of impartiality applies to legislation, the decision also applies to agencies because the public trust duties of the ENRA apply to the Commonwealth as a whole. In *Robinson Township*,[87] a plurality of the Pennsylvania Supreme Court decided that two legislative provisions were unconstitutional under Article I, Section 27, for violating the duty of impartiality. In both, the plurality did not address whether the legislature intended for disparate effects to occur; instead, the plurality said that these provisions were unlawful because they had disparate effects on different groups of beneficiaries. One provision required local governments to approve unconventional gas permits in all zoning districts, including residential zoning districts.[88] Under that provision, the court reasoned, "some properties and communities will carry much heavier environmental and

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83. GEORGE T. BOGERT, TRUSTS § 93 (6th ed. 1987); *see also In re* Est. 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.")

84. *PEDF II*, 161 A.3d at 932 (citing Metzger v. Lehigh Valley Trust & Safe Deposit Co., 69 A. 1037, 1038 (1908); *In re* Hartje's Est., 28 A.2d 908, 910 (Pa. 1942); Restatement (Second) of Trusts § 186).

85. *PEDF V*, 255 A.3d at 310 (quoting *Robinson Twp.*, 83 A.3d at 959).

86. *PEDF II*, 161 A.3d at 932.

87. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013). The plurality opinion was joined by two other justices on the seven-member court. Justice Baer concurred in the plurality opinion, providing a fourth vote for holding these statutory provisions unconstitutional. Justice Baer reached his decision on the basis of substantive due process, not Article I, Section 27. *Id.* at 1001.

88. 58 PA. STAT. AND CONS. STAT. § 3304 (2012) (held unconstitutional in *Robinson Twp.*, 83 A.3d at 973-74).

habitability burdens than others."[89] The plurality reasoned that this result is inconsistent with the express constitutional obligation that the trustee act for the benefit of "*all the people*."[90] The second legislative provision allowed, but did not require, DEP to consider comments by municipalities on applications for well permits, and it specifically prohibited municipalities from appealing DEP well permit decisions even though permit applicants were allowed to appeal.[91] This provision "marginalizes" participation by municipalities, the plurality found. Such "inequitable treatment of trust beneficiaries is irreconcilable with the trustee duty of impartiality."[92] An agency cannot give any beneficiaries "due regard," or ensure that it does not treat beneficiaries disparately, without considering in advance the impact of its decisions on those beneficiaries.[93] And more basically,

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89. *Robinson Twp.*, 83 A.3d at 980.

90. *Id.* (emphasis added).

91. 58 PA. STAT. AND CONS. STAT. § 3215(d) (2012) (held unconstitutional in *Robinson Twp.*, 83 A.3d at 973-74, 984-85).

92. *Id.* at 984 (citing *Hamill's Est.*, 410 A.2d 770, 773 (Pa. 1980); 20 PA. CONS. STAT. § 7773).

93. In other cases, zoning ordinances have been challenged as violative of Article I, Section 27 because they were not based on a pre-decision environmental impact analysis. The Commonwealth Court has repeatedly held that such an analysis is not required in that context. The leading case for that proposition is Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677 (Pa. Commw. Ct. 2018), (appeal denied, 208 A.3d 462 (Pa. 2019)). These cases are distinguishable from *Township of Marple* because they involve the enactment of zoning ordinances after procedural requirements that assured consideration of environmental effects, whereas *Township of Marple* involved an administrative or adjudicatory action with no required environmental consideration.

Frederick involved the enactment of a zoning ordinance that allowed oil and gas development—an activity subject to extensive statewide regulation and permitting requirements from the Pennsylvania Departments of Environmental Protection and Transportation—in all zoning districts of the township. *Id.* The Commonwealth Court concluded that the Township was not required to engage in environmental, health, and safety studies prior to enacting that ordinance. *See id.* at 700-702. In *Frederick*, the Commonwealth Court was concerned with the administrative burden that would be borne by legislative bodies by requiring documentation of an environmental impact analysis. *Id.* at 700 n.44; *see also* Pa. Env't Def. Found. v. Commonwealth., 285 A.3d 702, 716 (Pa. Commw. Ct. Nov. 8, 2022), *aff'd*, 2023 WL 8101630 (Pa. 2023) (holding that "the General Assembly is not required to document 'some sort of pre-action environmental impact analysis' as a pre-condition to enactment of a statute" because it is "presumed that the General Assembly enacts legislation that conforms to any and all applicable constitutional mandates") (quoting *Frederick*, 196 A.3d at 700). In fact, the ordinances challenged in *Frederick* and subsequent cases relying on *Frederick* all contain detailed permit application requirements intended to ensure that any unconventional gas drilling approved under the ordinances is protective of the environment as well as public health and safety. *See, e.g.*, Murrysville Watch Comm. v. Mun. of Murrysville Zoning Hearing Bd., No. 579 C.D. 2020 at *10 (Pa. Commw. Ct. 2022).

Frederick and the zoning cases relying upon *Frederick* are distinguishable not only because they concerned legislative action, but also because extensive environmental review requirements are already required under the Municipalities Planning Code before the adoption of zoning ordinances. The local legislative body must consider impacts on Article I, Section 27 resources and undergo multiple levels of review both in the adoption of a zoning ordinance itself and the precedent comprehensive plan. *See* 53 PA. STAT. AND CONS. STAT. §§ 10302, 10303(a)(3) (requirements and process for adoption of comprehensive plan); § 10301(a)(2), (6), (7) (requirements for consideration of environmental trust resources in comprehensive plans); § 10601 (requirement that purpose of zoning ordinance enactment, amendment, or repeal be to "implement" the comprehensive plan); §§ 10603, 10604(1) (zoning

agencies cannot make permitting, enforcement, and other decisions that have disparate effects on different classes of beneficiaries.

In its decisions under Article I, Section 27, the EHB recognizes these fiduciary responsibilities: "we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision."[94] Because the EHB reviews DEP decisions for their compliance with trustee duties, it follows that DEP should make permitting, enforcement, and other decisions in accordance with these duties. Critically, the fiduciary duties affect not only the information that DEP and other agencies must gather prior to making a decision under particular statutes and regulations; they also affect how DEP and other agencies must weigh and evaluate that information in making a decision. An agency's constitutional public trust duties and its statutory and regulatory duties are not separate here; they are blended.[95] An agency's duty to implement statutes and regulations in a manner that is consistent with its fiduciary responsibilities is not an expansion of its authority; it is a limit on how its statutory and regulatory authority may be exercised.

The EHB's decision in *New Hanover Township* again illustrates the application of this principle. DEP is prohibited by statute from issuing a quarry permit unless the applicant demonstrates, among other things, that it "will not cause pollution to the waters of the Commonwealth."[96] The EHB used Article I, Section 27 to evaluate the information DEP considered (and did not consider) under this statute. As the EHB explained:

> The obvious purpose of cleaning up the Hoff VC Site is to contain and hopefully restore the public natural resources in the area such as the groundwater. Permitting a source of active groundwater migration immediately adjacent to the site without a full scientific understanding of the consequences of that migration and how to deal with those consequences is not prudent

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ordinances must consider and preserve "the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains."); §§ 10609, 10610 (zoning ordinances must be prepared by the planning commission and are subject to review and comment by the county planning commission and any proposed ordinance is subject to requirements for public notice and a public hearing).

In upholding ordinances authorizing unconventional gas development ordinances under *Frederick* and similar subsequent cases, the Commonwealth Court held that the municipalities adopting these ordinances had complied with the relevant provisions of the Municipalities Planning Code requiring protection of the environment as well as public health and safety. *Murrysville Watch Comm.*, 272 A.3d at *14-15.

94. Liberty Twp. v. Commonwealth, Dep't of Env't Prot., EHB Docket No. 2021-007-I, slip. op. at 105 (Jan. 8, 2024) (citations to four previous decisions omitted).

95. *Cf.* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (proposing a framework for public trust law for natural resources that blends public trust law with relevant statutes and regulations).

96. Noncoal Surface Mining Conservation and Reclamation Act, 52 PA. STAT. ANN. § 3308(a)(3) (West 2024).

> environmental management. It also exhibits partiality to one party, Gibraltar [the permit applicant], at the as yet unknown expense of other interested parties, including but not limited to PRPs [potentially responsible parties] who may be required to fund the cleanup. We do not mean to suggest that the Department has deliberately favored Gibraltar at the purposeful expense of other beneficiaries. Rather, we simply find that the Department did not give the matter any thought. This does not represent compliance with the Department's fiduciary responsibilities.[97]

In practice, the duties of prudence, loyalty, and impartiality apply to every agency decision involving potential impacts on public natural resources. For adjudications, where a substantial evidence standard applies to the evidence used by an agency, these fiduciary duties supplement and reinforce that standard.

II. THE ENRA AS A MEANS OF SUPPORTING AND STRENGTHENING EXISTING AGENCY AUTHORITY

An administrative agency must have statutory authority to adopt a regulation,[98] approve or deny a permit application,[99] or carry out an enforcement action.[100] The Commonwealth Court has stated that "[t]o determine whether a regulation is adopted within an agency's granted power, [it] look[s] for statutory language authorizing the agency to promulgate the legislative rule and examine[s] that language to determine whether the rule falls within the grant of authority."[101] In making that decision, courts consider the text of the statutory delegation, the purpose of the statute, the principles of statutory interpretation set forth in the Statutory Construction Act, the reasonable effect of the regulation, and its

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97. *New Hanover Twp.*, 2020 EHB at 72.

98. To be properly enacted, a "rule must be '(a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable.'" Tire Jockey Serv., Inc. v. Commonwealth, Dep't of Env't Prot., 915 A.2d 1165, 1186 (Pa. 2007); Hous. Auth. of Cnty. of Chester v. Pa. State Civ. Serv. Comm'n, 730 A.2d 935, 942 (Pa. 1999). The second prong is not tethered to the agency's statutory authority so long as the statute authorizes the agency to adopt the administrative rules in question. Marcellus Shale Coal v. Dep't of Env't Prot., 292 A.3d 921, 927 (explaining that the administrative rulemaking process is based on the Commonwealth Documents Law, Regulatory Review Act, and the Commonwealth Attorneys Act). To fail the third prong, a regulation "must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment." Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev., 983 A.2d 1231, 1242 (Pa. 2009) (quoting Pa. Human Rel. Comm'n v. Uniontown Area Sch. Dist., 313 A.2d 156, 169 (Pa. 1973)). Because the focus of this Article is on statutory authority, the analysis here focuses primarily on the first prong.

99. Eagle Env't II, L.P. v. Commonwealth, Dep't of Env't Prot. 884 A.2d 867 (Pa. 2005) (upholding regulation used in permitting for municipal and residual waste management facilities in context of DEP's otherwise unchallenged authority to approve or deny permits for such facilities).

100. Commonwealth v. Parker White Metal Co., 515 A.2d 1358 (Pa. 1986) (upholding statutory authority of the Department of Environmental Resources to carry out criminal prosecution under Solid Waste Management Act).

101. *Marcellus Shale Coal.*, 216 A.3d 448, 459 (Pa. Commw. Ct. 2019).

consistency with the statute.[102] "Properly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high measure of deference . . . by reviewing courts."[103]

Moreover, a basic rule of statutory construction requires that laws be construed so as not to render them unconstitutional.[104] The Pennsylvania Supreme Court has instructed, "[u]nder 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."[105] The same court has also recognized that courts are among the commonwealth entities bound to implement the ENRA.[106] Thus, the Pennsylvania Supreme Court and the Commonwealth Court have repeatedly held that the ENRA should guide statutory interpretation as well as interpretation of an agency's regulations. The ENRA's mandate, the court has stated, "informs Pennsylvania's elaborate body of environmental protection statutes and regulations."[107]

The Pennsylvania Supreme Court has held that the ENRA must be read into laws even where its limitations are not expressed. It has also repeatedly upheld an agency's claimed exercise of statutory authority by using the ENRA in support of that claim. DEP has been inconsistent in considering or invoking the ENRA, as exemplified in two case studies. In the far more significant case, discussed at length below, DEP failed to invoke the ENRA to support its most important effort to date to reduce greenhouse gas emissions—the RGGI Regulation. As a result,

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102. *Id.* (citing Eagle Env't II, L.P. v. Dep't of Env't Prot., 884 A.2d 867, 877 (Pa. 2005) *and Slippery Rock Sch. Dist.*, 983 A.2d at 1241).

103. Marcellus Shale Coal. v. Dep't of Env't Prot., 292 A.3d 921, 927 (Pa. 2023) (quoting Nw. Youth Servs., Inc. v. Commonwealth, Dep't of Pub. Welfare, 66 A.3d 301, 311 (Pa. 2013).

The "particularly high measure of deference" to which the court referred is "often denominated as *Chevron* deference." *Id.* In Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), the U.S. Supreme Court stated a two-part rule for considering agency interpretation of its statutory authority. When the legislature has "directly spoken to the precise question at issue[,]" the court stated, both the agency and a reviewing court must adhere to the statutory language. *Id.* If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Although the Pennsylvania Supreme Court has "has never expressly adopted the federal *Chevron* approach," it has said that *Chevron* "'is indistinguishable from our own approach to agency interpretations of Commonwealth statutes.'" *Marcellus Shale Coal.*, 292 A.3d at 928-29 (citing Crown Castle NG E., LLC v. Pa. Pub. Util. Comm'n, 234 A.3d 665, 679 n.11 (Pa. 2020) (quoting Seeton v. Pa. Game Comm'n, 937 A.2d 1028, 1037 n.12 (Pa. 2007)). The U.S. Supreme Court overruled the *Chevron* decision in Loper Bright Enterprises v. Raimondo, 144 S.Ct. 2244 (2024), indicating that courts should use traditional judicial tools for statutory interpretation. Given the Pennsylvania Court's articulation of its approach, *Loper Bright* should not have a significant impact in Pennsylvania.

104. Commonwealth v. Herman, 161 A.3d 194, 212 (Pa. 2017) (internal citation omitted). *See also* 1 PA. CONS. STAT. § 1922(3) (2024) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used . . . That the General Assembly does not intend to violate the Constitution . . . of this Commonwealth.").

105. Commonwealth v. Herman, 161 A.3d 194, 212 (Pa. 2017) (internal citation omitted).

106. Commonwealth v. Parker White Metal Co., 515 A.2d at 1370 (Pa. 1986).

107. Clean Air Council v. Dep't of Env't Prot., 289 A.3d 928, 932 (Pa. 2023).

the Supreme Court permitted environmental groups to intervene to assert the ENRA. By contrast, in a case of far less significance (requiring far less discussion here), DEP used the ENRA to support noise control conditions in an air plan approval that authorized construction of an air pollution source. It is difficult to conceive of a coherent policy supporting DEP's different approach in these two case studies.

A. PRECEDENTS

The Pennsylvania Supreme Court has laid down three basic principles for interpreting and applying legislation (and sometimes regulation) that affects ENRA-protected resources and values. First, statutes should be interpreted with the understanding that they carry out the General Assembly's mandated responsibility to implement Article I, Section 27. Second, because these statutory provisions implement Article I, Section 27, these statutes and the regulations adopted under them should be read plainly—to mean what they say. Third, a limited reading of the statutory provision relating to environmental protection frustrates the General Assembly's intent in enacting it and weakens protection of the people's rights under Article I, Section 27. In these three ways, the ENRA supports an agency's statutory authority to protect the public's constitutional rights, even if it does not always support the agency's position.

In its 2022 decision, *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF VI*),[108] the Pennsylvania Supreme Court held that legislation must be interpreted in light of the ENRA's limitations on governmental authority, even if the legislation does not express those limitations. It based this decision on a rebuttable presumption that the legislation is consistent with the ENRA. The relevant part of the case involved a challenge to the legislature's repeal of the 1955 Oil and Gas Lease Fund Act. Under the 1955 Act, the Pennsylvania Environmental Defense Foundation claimed that the Department of Conservation and Natural Resources (DCNR) "had the statutory authority both to lease State forest and park lands for oil and gas exploration and extraction and to dispense funds to remedy any harm resulting from those leases."[109] The legislature replaced the 1955 Act with legislation that created a new lease fund and required that money from oil and gas leasing be spent annually as directed by the legislature. The new legislation also stated that "the General Assembly shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania" when appropriating lease fund money.[110]

The Pennsylvania Environmental Defense Foundation challenged the new discretionary language as violative of Article I, Section 27 on its face. Under Pennsylvania law, "[a] statute is facially unconstitutional only where there are no

108. 279 A.3d 1194 (Pa. 2022) (*PEDF VI*).
109. *Id.* at 1209.
110. *Id.* at 1208-09.

circumstances under which the statute would be valid."[111] For the Pennsylvania Environmental Defense Foundation, the "consider" language meant that the General Assembly could spend the ENRA trust fund money however it wanted.[112] In two earlier cases, it pointed out, the Pennsylvania Supreme Court held legislation facially unconstitutional for allowing trust fund money to be spent for purposes unrelated to conservation and maintenance of public natural resources.[113]

The *PEDF VI* court rejected this argument. The majority began its analysis by repeating what the court had said in prior opinions—that the General Assembly is also bound by the ENRA obligation to conserve and maintain public natural resources.[114] This responsibility exists independent of the legislation itself. "[W]e view this language as an express reminder to the General Assembly of its mandatory duties imposed by the Constitution . . . The statute's arguably inarticulate use of the verb 'consider' does not negate the mandatory nature of the General Assembly's Section 27 duties."[115] The court thus held the legislation to be "facially constitutional as it requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes . . . ."[116] This constitutional limitation exists, the court said, even though it is not contained in the legislation.[117]

The presumption that the General Assembly acts in furtherance of its ENRA responsibilities has a corollary. When agency actions are challenged as contrary to the agency's statutory or regulatory authority, the Pennsylvania Supreme Court has repeatedly used Article I, Section 27 to hold that a statute or regulation means what it says. Four decisions are illustrative.[118] In each of the following cases, the court rejected arguments that an otherwise applicable regulation or statute should not be applied to a particular situation for various policy reasons, and

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111. *Id.* at 1202 (citing Germantown Cab Co. v. Phila. Parking Auth., 206 A.3d 1030, 1041 (Pa. 2019).

112. *Id.* at 1209.

113. *See, e.g.*, *PEDF II*, *supra* note 37.

114. *PEDF VI* at 1210.

115. *Id.* at 1211 n.21. *See also id.* at 1218 n.3 (Donohue & Todd, JJ., concurring) (explaining that, after the Pennsylvania Supreme Court's 2017 decision in *PEDF II*, "as a matter of law, Article I, Section 27 fiduciary duties are incorporated into all legislative and executive action at all levels of the Commonwealth's governance," thus making it "unnecessary to pronounce the existence of mandatory constitutional fiduciary duties in legislation or orders relating to Article I, Section 27 trust assets.").

116. *Id.* at 1211 (adding that this holding "does not negate the potential of an as-applied challenge to the General Assembly's ultimate appropriation of the Lease Fund."),

117. Justice Dougherty dissented from this part of the holding. For Justice Dougherty, the use of "consider" made this legislative provision facially unconstitutional because it does not require "the money be spent only to further trust purposes." *Id.* at 1225-26 n.4.

118. *See also* Eagle Env't II, L.P., v. Commonwealth, Dep't of Env't Prot., 884 A.2d 867 (Pa. 2005) (using ENRA to uphold statutory authority for regulations requiring a "Harms/Benefits Test" as part of the permit application for municipal and residual waste disposal facilities).

it held that the ENRA supported the agency's interpretation of the regulation or statute.

The first such case was *Commonwealth, Department of Environmental Resources v. Locust Point Quarries, Inc.,* decided by the Pennsylvania Supreme Court in 1979.[119] In this case, the court recognized that the ENRA provided crucial support for the Department of Environmental Resources' (DER) effective implementation of the Air Pollution Control Act. DER charged Locust Point with violating a regulation prohibiting fugitive emissions (emissions that are not from a flue or stack; in this case the dust coming from the company's limestone processing facilities).[120] Among other things, Locust Point argued that the regulation required DER to prove not only that Locust Point generated fugitive emissions, but also that these emissions "caused or contributed to a condition of air pollution."[121] The regulation did not contain this additional element, but the Locust Point argument nonetheless has a certain plausibility. The Act, after all, is structured to control air pollution—not just air emissions, but air emissions that are harmful to public health, the environment, and property.[122] If accepted, Locust Point's argument would have required DER to prove that these specific emissions were or may be harmful—a task that goes far beyond showing the existence of emissions, and that would have made proof of violation nearly impossible.

The court held this construction is "unacceptable, once the regulation is considered in the proper context."[123] The court explained,

> The Commonwealth is committed to the conservation and maintenance of clean air by Art. I, § 27 of the Pennsylvania Constitution. To that effect, through Section 4002 of the Air Pollution Control Act, the legislature has declared as policy the protection of air resources to the degree necessary for the protection of the health, safety and well-being of the citizens; the prevention of injury to plant and animal life and property; the protection of public comfort and convenience and Commonwealth recreational resources; and the development, attraction and expansion of industry, commerce, and agriculture.

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119. 396 A.2d 1205 (Pa. 1979). Before a statutory reorganization, the functions now carried out by DEP were performed by DER. Conservation and Natural Resources Act, 1995 Pa. Laws 89, codified at 71 PA. CONS. STAT. ANN. §§ 1340.101-1340.1103 (West 2024).

120. The regulation, 25 PA. CODE § 123.1 (2024), prohibited fugitive emissions from all sources, subject to exceptions not relevant here. Under the Act, fugitive emissions are defined as emissions that are not from a flue. 35 PA. CONS. STAT. § 4003.

121. *Locust Point*, 396 A.2d at 1209.

122. The regulation was issued under Section 5(a)(1) of the Air Pollution Control Act, which authorizes the adoption of regulations "for the prevention, control, reduction and abatement of air pollution." 35 PA. CONS. STAT. § 4005(a)(1) (2024). Air pollution, in turn, is defined as: "The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, . . . dust . . . or any other matter in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property." 35 PA. STAT. AND CONS. STAT. § 4003 (2024).

123. *Locust Point*, 396 A.2d at 1209.

> In sum, protection of air resources is a matter of highest priority in the Commonwealth.[124]

The court noted that under the ENRA, "[t]he people have the right to clean air," and the Commonwealth is obliged to "conserve and maintain" public natural resources "for the benefit of all the people."[125]

The court then explained that, under the federal Clean Air Act,[126] the federal government is required to adopt national ambient air quality standards, which represent the maximum permissible concentration of particular pollutants in the atmosphere from all sources. These standards are required to protect human health, the environment, and property. To achieve these standards, the states, including Pennsylvania, are obliged to adopt state implementation plans that include legally enforceable emission limits or standards.[127] These standards or emission limits (for example, the fugitive dust regulation) apply to particular sources. Reducing emissions from these sources is intended to reduce the overall concentration of these pollutants in the atmosphere, and thus meet the national ambient air quality standards.

DER, the Court explained, is charged with the complex task of devising and implementing the necessary plan. DER's rulemaking board, the Environmental Quality Board (EQB), is authorized to adopt regulations "for the prevention, control, reduction and abatement of air pollution," including emission limits from air contamination sources.[128] In promulgating the fugitive emissions regulation, the Court said, the EQB "made a determination that such emissions cause or contribute to a condition of air pollution."[129] Through the rulemaking process, in other words, the EQB made the determination concerning harm, and thus DER did not need to prove harm in this case. In so reasoning, the court interpreted the regulation in a way that is consistent with the people's right to "clean air" as well as their right to have public natural resources such as the atmosphere conserved and maintained. To be sure, as the court explained, the result is also consistent with the federal Clean Air Act. But the court began its analysis with the ENRA.

In three separate cases, the Pennsylvania Supreme Court and the Commonwealth Court have interpreted Section 316 of the Clean Streams Law to mean what it says, relying on the ENRA, and rejecting a variety of claims that Section 316 should not be applied as written. Section 316 of the Clean Streams Law provides, in part, that "[w]henever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may

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124. *Id.* at 1209 (citing Commonwealth v. Bethlehem Steel Corp., 367 A.2d 222 (Pa. 1976), *cert. denied*, 430 U.S. 955 (1977)).

125. *Id.* at 1209 n.15 (quoting parts of Article I, Section 27).

126. 42 U.S.C. §§ 7401-7671q.

127. *Locust Point*, 396 A.2d at 1209.

128. 35 PA. STAT. AND CONS. STAT. § 4005(a)(1) (2024).

129. *Locust Point*, 396 A.2d at 1210.

order the landowner or occupier to correct the condition in a manner satisfactory to the department. . . ."[130] In each of these cases, the landowner or occupier was not directly responsible for the pollution, and in each, the court used the ENRA to determine that the landowner or occupier was or could be liable anyway. Article I, Section 27 imposes a duty on the legislature to reduce or eliminate water pollution, the courts held in each of these cases, and a contrary reading of Section 316 would frustrate the legislature's fulfillment of that duty.

In *National Wood Preservers, Inc. v. Commonwealth, Department of Environmental Resources*,[131] National Wood Preservers leased a property for 16 years. During that time, it "disposed of waste liquids containing pentachlorophenol by discharging them into a well which drained into the groundwaters running beneath the premises."[132] After DER found pentachlorophenol and fuel oil in a nearby stream and determined that these pollutants had come from groundwater on the tract, it issued a Section 316 cleanup order to the landowners and to the new owner of National Wood Preservers.[133] The landowners and the company's new owner challenged DER's construction of Section 316, arguing that it applied only if mining operations caused the condition. The court rejected that argument.

The text of Section 316, the court reasoned, "clearly and unambiguously authorized DER to require the correction of water pollution-causing conditions without regard to the source of the pollution."[134] The Statutory Construction Act supports this conclusion, the court explained: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[135] This conclusion is consistent with the legislature's declaration of policy in adopting the Clean Streams Law, which includes the objectives of reducing and eliminating water pollution and reclaiming and restoring every polluted stream.[136] The court then turned to the ENRA:

> From this "Declaration of Policy," enacted in 1970 along with the portion of Section 316 relevant here, it is clear that the Legislature seeks to eliminate all water pollution, not only water pollution emanating from mines, and to "reclaim and restore" every polluted stream. Thus any contrary or narrower reading of Section 316 would fundamentally undermine the efforts of DER to achieve these legislative objectives, as well as frustrate the Legislature's

130. 35 PA. STAT. AND CONS. STAT. § 691.316 (2024).

131. 414 A.2d 37, 39 (Pa. 1980).

132. *Id.*

133. Between 1947 and 1963, when pentachlorophenol was being discharged by National Wood Preservers, Samuel T. Jacoby owned 100% of the stock of the company. In 1963, Jacoby sold all of his stock in the company to the Goldsteins. *Id.*

134. *Id.* at 40.

135. *Id.* (*citing* 1 PA. CONS. STAT. § 1921(b)).

136. *Id.* at 40-41 (*citing* 35 PA. STAT. § 691.4).

> fulfillment of its obligation under Article I, section 27 of the Pennsylvania Constitution . . . [137]

Eight years later, in *Adams Sanitation Co. v. Commonwealth, Department of Environmental Protection*, the Pennsylvania Supreme Court used the ENRA to construe Section 316 and another statute to hold that DEP (the successor agency to DER) could order a lessee of contaminated land to clean up groundwater contamination "regardless of fault or knowledge, as long as pollution exists under the land and removal of the pollution is feasible."[138] The Court rejected the appellant's argument that "a party is only liable for the water pollution it either caused or knew to exist before leasing or operating the property."[139] After quoting the same declaration of policy on which it relied in *National Wood Preservers*, the Court explained:

> [National Wood Preservers'] position would effectively undermine the DEP's efforts in achieving the legislature's mandate set forth under 35 P.S. § 691.4 [declaration of policy] because it would require the DEP to conduct an extensive investigation into the cause of the pollution before ordering that the polluted site be remedied. This extensive investigation would in turn delay the clean-up of the water and, in some cases, actually cause the polluted condition to worsen while the DEP searched for the party which caused the pollution.[140]

The court added that "[National Wood Preservers'] position runs counter to the legislative mandate contained in Article I, Section 27 of the Pennsylvania Constitution."[141]

Finally, in one case, the ENRA was used to support the conclusion that Section 316 meant what it said, even in the face of a contrary view by DER. Although these cases generally support agency assertion of statutory authority, *Dresser Industries v. Commonwealth, Department of Environmental Resources* is an exception.[142] In this case, the Commonwealth Court held that Section 316 could even make DER liable for cleanup of contaminated property, and it used the ENRA in support of that result. In that case, DER bought a parcel of previously mined land on which there were acid water seeps draining into waters of the Commonwealth. After DER ordered the company that caused the seeps to clean them up, the company sued DER under the citizen suit provision of the Clean Streams Law, which authorizes any person to sue any other person alleged to be in violation of the Law, seeking abatement of pollution.[143] The court refused

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137. *Id.* at 41. The court then analyzed the history of the Clean Streams Law, and explained how that history similarly supported DER's construction of Section 316. *Id.* at 41-42.

138. 715 A.2d 390, 391 (Pa. 1998).

139. *Id.* at 394.

140. *Id.*

141. *Id.*

142. 604 A.2d 1177 (Pa. Commw. Ct. 1992).

143. 35 PA. STAT. AND CONS. STAT. § 691.601(c) (2024).

to dismiss the lawsuit. The Commonwealth Court relied in part on Article I, Section 27 to conclude that an action could be brought against DER to compel it, as a landowner, to clean up a contaminated mine site under Section 316 of the Clean Streams Law. "[I]t makes good sense from the point of environmental necessity and from the Legislature's objective when it enacted the Clean Streams Law to treat the Commonwealth and all its agencies like any other landowner."[144] Quoting *National Wood Preservers*, the Court reasoned that "any contrary or narrower reading of Section 316 would fundamentally undermine the efforts of DER to achieve the[] legislative objectives [stated in the Clean Streams Law], as well as frustrate the Legislature's fulfillment of its obligation under Article I, Section 27 of the Pennsylvania Constitution."[145]

B. CASE SUDIES IN HOW AGENCIES HAVE APPLIED AND FAILED TO APPLY THE ENRA

1. The RGGI Rulemaking and Subsequent Litigation

The Statutory Construction Act and cases summarized above provide a fairly straightforward approach for agency development of regulations and judicial review of their statutory authority when the ENRA is involved. Essentially, the agency must identify the statutory authority for the regulation and draft it in a manner that is consistent with the statute, that protects the public's rights under both clauses of the ENRA, and that carries out the agency's duties as trustee. To strengthen its claim that it is properly exercising its statutory authority, the agency should explain how the regulation furthers Article I, Section 27. If the statutory authority for the regulation is challenged, courts should review the challenge based on the legal authority described above and should reject challenges based on statutory construction that would impair or reduce protection of the ENRA trust resources.

In the RGGI litigation described below, DEP cited two provisions of the Air Pollution Control Act as authority in the final rulemaking's preamble but did not invoke Article I, Section 27 as supportive authority in the preamble, its briefs, or in oral argument. Further, the Commonwealth Court failed to discuss the claimed statutory authority for the RGGI Regulation or Article I, Section 27. After recognizing that the environmental groups had properly asserted rights under the ENRA, the Commonwealth Court denied their motion to intervene on the grounds that DEP adequately represented their interests.[146] Having denied party status to these groups, the court then declined to consider arguments based on the

144. *Dresser Indus.*, 604 A.2d at 1181.

145. *Id.* at 1180 (quoting *Nat'l Wood Preservers*, 414 A.2d at 40-41). The court also held that the legislature intended to waive sovereign immunity because it included state agencies when it defined persons who can be sued under Section 601(a). *Id.* at 1181.

146. This litigation is being played out in the Pennsylvania Supreme Court. As discussed *infra*, Section B.1.d, and in *Shirley*, *supra* note 20, the Pennsylvania Supreme Court reversed the Commonwealth Court's denial of the environmental groups' motion to intervene, holding that the Commonwealth's failure to cite Article I, Section 27 established that the Commonwealth was not adequately representing the interests of these groups and their members.

ENRA that they and other amici raised—even though neither DEP nor any other party had asserted these arguments. Because both DEP and the Commonwealth Court are trustees under the ENRA, both had an obligation to apply the ENRA.

a. The RGGI Regulation

In 2022, the EQB adopted a regulation enabling Pennsylvania to participate in the RGGI. The regulation placed a declining cap on carbon dioxide emissions from fossil fuel-fired electric power plants (electric generating units or EGUs). The regulation also provided for an auction of tradable "allowances," each of which could be surrendered to allow the emission of one ton of carbon dioxide, "with the total number of annual allowances equaling the cap."[147] Rather than prescribing how much each plant should reduce emissions, the RGGI Regulation allows operators to choose the cheapest mix of emissions reduction and "allowance" purchases through an auction and trading. Operators can reduce their emissions as much as they like, and they are required to purchase allowances for the remainder of their emissions. As originally modeled, auction proceeds would bring $443 million to the state's Clean Air Fund for the 2022-23 fiscal year.[148] The auction proceeds would be spent for energy efficiency, renewable energy, and other means of reducing greenhouse gas emissions.[149] This cost-effective approach is intended to enable Pennsylvania's participation in the RGGI.[150]

This is the most significant climate change regulation ever adopted in Pennsylvania. It would help ensure a stable climate by reducing Pennsylvania's carbon dioxide emissions from fossil fuel-fired electric power plants by 31%

147. Environmental Quality Board, CO_2 Budget Trading Program, 52 Pa. Bull. 2471 (Apr. 23, 2022) (codified at 25 PA. CODE §§ 145.301–.409). In literature regarding market-based regulatory programs (now commonly referred to as "cap-and-trade"), these tradable instruments authorizing the emission of one ton of pollutants are frequently referred to as "permits." The term "allowances" was used in the 1990 Clean Air Act Amendments and all later trading programs to distinguish these instruments from permits, which are the enforcement mechanism through which the requirements for allowance measurement and surrender and other regulatory measures are imposed on individual facilities. *See, e.g.*, Robert B. McKinstry, Adam Rose, & Coreen Ripp, *Incentive-Based Approaches to Greenhouse Gas Mitigation in Pennsylvania; Protecting the Environment and Promoting Fiscal Reform,* 14 WIDENER L. J. 205, 215 (2004) ("A second incentive-based policy instrument [in addition to a tax] that can generate revenues for government is a system of tradable pollution emission permits."), *citing* Ronald H. Coase, *The Problem of Social Cost* 3 J. L. & ECON. 1, 43-44 (1961), and BRUCE A. ACKERMAN ET AL., THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY: A CASE STUDY IN THE FAILURE OF MODERN POLICY MAKING, 223-27 & n.6, 260-81 (1974).

148. Bowfin KeyCon Holdings, LLC v. Dep't of Env't Prot., 2023 WL 7171547, at *3 (Pa. Commw. Ct. Nov. 1, 2023).

149. 52 Pa. Bull. at 2508-09. Economic modeling conducted by DEP showed that the "Commonwealth's participation in RGGI will lead to a net increase of more than 30,000 jobs and add $1.9 billion to the Gross State Product." *Id.* at 2493. An independent Penn State Study showed that the "Commonwealth's participation in RGGI will yield $2.6 billion in net economic benefits to the power sector within this Commonwealth." *Id.*

150. *Id.* at 2497 ("[T]his final-form rulemaking provides for this Commonwealth's participation in RGGI by establishing a corresponding regulation . . . .").

from 2019 levels by 2030—reductions equivalent to 20 million tons per year.[151] By the time of the regulation's adoption, the states already in RGGI had cut their covered carbon dioxide emissions in half.[152]

The preamble to the Pennsylvania Bulletin notice promulgating the final RGGI Regulation cited, as authority for the regulation, two separate provisions of the Pennsylvania Air Pollution Control Act (APCA). The discussion of statutory authority for the regulation rested in large part upon Section 5(a)(1) of the APCA,[153] the Act's general authority for rulemaking, which is the same statutory authority under which the regulation at issue in *Locust Point* was promulgated:

> This proposed rulemaking is authorized under Section 5(a)(1) of the Air Pollution Control Act (APCA), which grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth.[154]

As an additional source of authority, the notice cited Section 6.3(a) of the APCA: "Section 6.3(a) of the APCA . . . *also* authorizes the Board by regulation to establish fees to support the air pollution control program authorized by this act . . . ."[155] The preamble made it clear that the RGGI Regulation's descending cap and its auction of allowances were *both* measures to control and reduce greenhouse gas emissions:

> RGGI is a "cap and trade" program that sets a regulatory limit on CO_2 [carbon dioxide] emissions from fossil fuel-fired EGUs and permits trading of CO_2 allowances to effect cost efficient compliance with the regulatory limit. RGGI is also referred to as a "cap and invest" program, because unlike traditional cap and trade programs, RGGI provides a "two-prong" approach to reducing CO_2 emissions from fossil fuel-fired EGUs. The first prong is a declining CO_2 emissions budget and the second prong involves investment of the proceeds resulting from the auction of CO_2 allowances to further reduce CO_2 emissions.[156]

The preamble also explained that two other interstate cap-and-trade regulations adopted by the EQB to comply with the federal Clean Air Act were adopted under

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151. *Id.* at 2476.

152. REGIONAL GREENHOUSE GAS INITIATIVE, THE REGIONAL GREENHOUSE GAS INITIATIVE: AN INITIATIVE OF EASTERN STATES OF THE U.S. (2024), https://perma.cc/E4XC-C4YW.

153. 35 PA. STAT. AND CONS. STAT. § 4005(a)(1) (2024) (authorizing the EQB to adopt regulations "for the prevention, control, reduction and abatement of air pollution . . . .").

154. 52 Pa. Bull. at 2471. The preamble explained that this rulemaking authority and relevant terms in the act were written expansively because, "[w]hen the APCA was enacted, the General Assembly was concerned with air pollution generally and that it be remedied no matter what the source." *Id.* at 2476. It added that "[t]hrough the APCA, the Legislature granted the Department and the Board the authority to protect the air resources of this Commonwealth, which is inclusive of controlling CO_2 pollution." *Id.*

155. *Id.* at 2471 (emphasis added); 35 PA. STAT. AND CONS. STAT. § 4006.3(a) (2024).

156. *Id.* at 2476.

the authority of Section 5(a)(1).[157] Under Section 9.2 of the APCA, fees collected under the Act are to be deposited in a special Treasury Department fund called the Clean Air Fund and used only for the purpose of "the elimination of air pollution."[158] To ensure Section 9.2 compliance, the RGGI Regulation expressly requires that auction proceeds be so deposited.[159]

As explained above, both DEP and its predecessor, DER, have sometimes successfully invoked the ENRA as support for the exercise of its statutory authority. Because of the obvious importance of the RGGI Regulation and the virtual certainty of a legal challenge, the Commonwealth should have included the ENRA in the preamble as supporting its exercise of statutory authority under the APCA. It did not. Still, this failure should not prevent the state from later claiming that Article I, Section 27 supports the statutory authority it invoked for the RGGI Regulation. The ENRA is self-executing.[160] The Pennsylvania Supreme Court has made it clear that Section 27 applies, whether the Commonwealth invokes it or not.[161] A constitutional provision can hardly be self-executing if the legislature or a state agency can decide in any given situation whether it applies or not or by simply neglecting to invoke it. More pointedly, a constitutional provision can hardly be considered constitutional in any meaningful sense if state agencies can decide on a case-by-case basis whether to apply it.

b. Challenge to the RGGI Regulation in Commonwealth Court

A handful of fossil fuel interests and Republican legislators appealed the RGGI Regulation to the Commonwealth Court.[162] One of their many arguments challenged the statutory authority for the auction, arguing that it was a tax rather than a fee, and that a tax cannot constitutionally be imposed without legislative

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157. "[T]his Commonwealth has and continues to participate in cap and trade programs. Specifically, the Board promulgated the NOx Budget Trading Program in Chapter 145, Subchapter A (relating to NOx Budget Trading Program) and the CAIR NOx and SO2 Trading Programs in Chapter 145, Subchapter D (relating to CAIR NOx and SO2 Trading Programs). See 30 Pa. B. 4899 (September 23, 2000) and 38 Pa. B. 1705 (April 12, 2008). Although those cap and trade program regulations were promulgated in response to initiatives at the Federal level, both subchapters were promulgated under the broad authority of section 5(a)(1) of the APCA, as is this final-form rulemaking." *Id.* at 2477.

158. 35 PA. STAT. AND CONS. STAT. § 4009.2 (2024).

159. 25 PA. CODE § 145.401(d) (2024); 52 Pa. Bull. at 2545.

160. *PEDF II*, 161 A.3d at 937 ("re-affirm[ing] our prior pronouncements that the public trust provisions of Section 27 are self-executing"); *Robinson Twp.*, 83 A.3d at 951 (stating that the first clause of Article I, Section 27 "affirms a limitation on the state's power to act contrary to this right," and "laws of the Commonwealth that unreasonably impair the right are unconstitutional.").

161. *See* discussion of *PEDF VI*, *supra* notes 108-17, and accompanying text.

162. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *1 (identifying parties); Ziadeh v. Pa. Leg. Reference Bureau, 2023 WL 7170737, at *1 & n.1 (Pa. Commw. Ct. Nov. 1, 2023) (identifying parties). A third case challenging the RGGI Regulation is Calpine Corp. v. Pa. Dep't of Env't Prot., 2023 WL 7319323, at *4 (Pa. Commw. Ct. Nov. 7, 2023) (dismissing case as moot in light of decisions in the two other cases declaring the challenged regulation void).

authorization.[163] On that basis, they argued that there was no express legislative authority for the auction.[164] The state argued that the auction was the kind of emissions reducing mechanism expressly allowed by the Air Pollution Control Act, and that receipt of the revenues was authorized as a "fee."[165] But the state did not use the ENRA as support for the regulation. Environmental groups who had unsuccessfully sought to intervene in the litigation argued, along with other amici, that the state had a constitutional duty to act to reduce emissions of climate-altering substances and that an auction was constitutionally required under the ENRA because the sale of a permit to emit carbon dioxide amounted to the sale of a public natural resource. They said the entire regulation, including the auction, should be read in light of that duty under the ENRA.

In 2022, the Commonwealth Court denied the intervention motion of the environmental groups asserting the ENRA on the grounds that the Commonwealth adequately represented their interests, despite the Commonwealth's failure to even mention the ENRA.[166] Separately, and without referring to the ENRA, the Commonwealth Court also issued a preliminary injunction against the regulation, holding that the auction constituted an unlawful tax.[167]

Pennsylvania appealed the issuance of the preliminary injunction, and again its brief was silent on the ENRA. The environmental groups appealed the denial of their motion to intervene as well as the preliminary injunction. They argued that their motion to intervene should be granted to allow them to assert arguments under the ENRA in light of the Commonwealth's failure to do so. Again, both they and amici argued that the ENRA created a duty for the state to act and a duty to use an auction or sale to distribute allowances.

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163. PA. CONST. art. II, § 1; Thompson v. City of Altoona Code Appeals Bd., 934 A.2d 130, 133 (Pa. 2007).

164. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *2; *Ziadeh*, 2023 WL 7170737, at *3.

165. Confusion about this issue appears to have been generated by comments on the rulemaking by members of the General Assembly, who argued that the auction was an illegal tax not authorized by the General Assembly. In responding to these comments, the preamble stated that "Section 5(a)(1) of the APCA provides the Board with broad authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth." 52 Pa. Bull. at 2492. The preamble also discussed Marcellus Shale Coal. v. Dep't of Env't Prot., 216 A.3d 448 (Pa. Commw. Ct. 2019) as setting forth the correct test for addressing statutory authority. 52 Pa. Bull. at 2492. It then went on to discuss the fact that the "auction *proceeds* are a fee authorized under section 6.3(a) and not an illegal tax." *Id*. (emphasis added).

166. Ziadeh v. Pa. Legis. Reference Bureau., No. 41 M.D. 2022, 2022 Pa Commw Unpub Lexis 581. (Pa. Commw. Ct., filed July 8, 2022), rev'd for environmental groups, *Shirley, supra* note 20. (memorandum opinion in support of court's June 28, 2022, order denying motions to intervene, including motion by environmental groups) [hereinafter "Ziadeh Memorandum Opinion on Motions to Intervene"]. As part of its explanation, the court said: "While the Environmental Rights Amendment sets forth the public's right to natural resources, it imposes upon the Commonwealth the duty to conserve and maintain these resources. The Rulemaking represents the Commonwealth's most recent attempt to comply with its constitutional duty and the DEP and the EQB adequately represent the interests of the public herein." *Id*. at 20.

167. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *2-4; *Ziadeh,* 2023 WL 7170737, at *4-5.

While the multiple appeals were proceeding before the Pennsylvania Supreme Court, petitioners' motions for summary relief were briefed before the Commonwealth Court. The environmental groups and other amici submitted briefs making the same arguments based on the ENRA. After the Pennsylvania Supreme Court arguments, in November 2023, the Commonwealth Court granted petitioners summary relief against the RGGI Regulation and declared the regulation void.[168] The court quoted from its earlier preliminary injunction opinion and again failed to address the statutory authority for the regulation as an emissions control measure.[169] Instead, the Court jumped immediately to the issue of whether the auction was a fee or a tax, concluded that it was a tax that required legislative authorization, and held that it did not have that authorization.[170] Although the environmental groups that had sought to intervene and other parties filed amicus briefs arguing the centrality of the ENRA to the questions of statutory interpretation, the Court affirmatively refused to address the ENRA, stating that "any claims raised by amici that are not raised by the parties will not be addressed by this Court in this matter."[171] Those seeking to invoke the ENRA were caught in a perfect Catch-22.[172]

c. The Commonwealth Court's Failure to Consider Statutory Authority and the ENRA

The Commonwealth Court erred by failing to consider Sections 5(a)(1) and 6.3 of the APCA, and by failing to consider the many ways that the ENRA supports the exercise of authority under these provisions to adopt the RGGI Regulation. First, with respect to authorization for the overall regulation, including the auction, Section 5(a)(1) authorizes regulations for the "prevention, control, reduction and abatement of air pollution."[173] The state's claim that the regulation would reduce carbon dioxide emissions was not disputed.

A lesson from *Locust Point* is that the APCA must be read in light of the federal Clean Air Act, and that lesson applies to consideration of challenges to the RGGI Regulation. The federal Clean Air Act requires each state to develop an

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168. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *2-5; *Ziadeh,* 2023 WL 7170737, at *2-5.

169. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *2-5; *Ziadeh*, 2023 WL 7170737, at *2-5.

170. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *2-5; *Ziadeh*, 2023 WL 7170737, at *2-5.

171. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *5 n.10; *Ziadeh*, 2023 WL 7170737, at *6 n.17. The environmental intervenors (PennFuture, Clean Air Council, and Sierra Club) filed an amicus brief with additional amici, Natural Resources Defense Council and the Environmental Defense Fund, making these arguments. The Widener University Commonwealth Law School Environmental Law and Sustainability Center and Robert B. McKinstry, Jr. filed an amicus brief also making these arguments, as did the Pennsylvania Environmental Council. Constellation Energy Corporation and Constellation Energy Generation, LLC, whose motion to intervene was denied, submitted an amicus brief arguing that the auction was a control measure.

172. JOSEPH HELLER, CATCH-22 (1961).

173. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *5 n.10; *Ziadeh,* 2023 WL 7170737, at *6 n.17.

implementation plan that includes "enforceable emission limitations and other control measures, means or techniques."[174] In order to authorize and encourage the use of market-based mechanisms, the 1990 Amendments to the Clean Air Act added the following parenthetical after the phrase "other control measures, means or techniques": "(including economic incentives such as fees, marketable permits, and auctions of emissions rights)."[175] Thus, under the federal Clean Air Act, "control measures, means, or techniques" under the APCA should be read to include "fees, marketable permits, and auctions of emissions rights." The 1990 Amendments also added a definition of a "Federal implementation plan," authorizing EPA to "correct all or a portion of an inadequacy in a State implementation plan" by imposing a plan "which includes enforceable emission limitation or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances)."[176] This is significant because auctions were clearly authorized as "control measures" under Section 5(a)(1) of the APCA. In addition, although EPA could impose an auction under a federal implementation plan, it has no authority to impose a tax. It is therefore improper to conflate an auction with a tax.

The ENRA rationale in *Locust Point* is also relevant to DEP's statutory authority because the express purpose of the regulation was to limit greenhouse gas emissions, which present a profound threat to the environmental values and resources protected under the ENRA.[177] The right to a natural climate unaffected by climate disruption is included within Section 27's first clause, which protects the people's right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[178] Greenhouse gas emissions interfere with the public's right to clean air. In the preamble to the final RGGI Regulation, the EQB found that greenhouse gas emissions adversely affect air quality.[179] A warming climate will also likely lead to greater water pollution, increased flooding, and sea level rise, thus compromising the people's right to clean water.[180]

The *Robinson Township* plurality "recognize[d] that, as a practical matter, air and water quality have relative rather than absolute attributes."[181] As is the case with most 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 natural

174. 42 U.S.C. § 7410(a)(2)(A).
175. *Id.*
176. 42 U.S.C. § 7602(y).
177. When the Commonwealth Court denied the motion of environmental groups to intervene, it quoted from *Locust Point* in describing the Commonwealth's duty to implement Article I, Section 27. *Ziadeh* Memorandum Opinion on Motions to Intervene at 21-22.
178. PA. CONST. art. I, § 27, cl. 1.
179. 52 Pa. Bull. at 2472-74.
180. *Id.*
181. *Robinson Twp.*, 83 A.3d at 953.

processes are disrupted. When Section 27 recognizes a right to "clean air," it means, as applied to carbon dioxide, levels necessary to support plant life and ecosystems, among other things, but not so high as to disrupt ecosystems. The RGGI Regulation's preamble determined that disruption of ecosystems will occur as a result of the impacts on climate caused by carbon dioxide emissions.[182] Similarly, "pure water" means water with levels of carbon dioxide that support the normal functioning of aquatic ecosystems, and that conserve and maintain public natural resources, but not so high as to acidify the water and disrupt those natural systems.

A stable climate provides critical natural and historic values of the environment. The relatively stable climate that persisted since the end of the last Ice Age facilitated the rise of civilization.[183] A stable climate prevents the increasing incidence of vector-borne diseases and adverse effects from air pollution and protects winter recreation.[184] Climate disruption will impair scenic and esthetic values of the environment by causing dramatic changes in forests and agriculture and by reducing or eliminating key species like trout.[185] Significantly, the right to a "clean and healthful environment" under Article XI, Section 9 of the Hawaii constitution and Article IX, Section 1 of the Montana constitution—provisions similar to Section 27's first clause—include a right to be protected against human-caused climate change.[186]

Similarly, the right to a natural climate not unduly compromised by human-caused climate disruption is also included in the second clause of Article I, Section 27, which protects the public's right to the conservation and maintenance of "public natural resources."[187] The use of that term, instead of a list of protected resources, was intended to "discourage courts from limiting the scope of natural resources covered."[188] Still, many of the public natural resources identified by the *Robinson Township* plurality would be impaired and possibly eliminated by catastrophic climate disruption, such as many "wild flora, and fauna (including fish)," public forests and their ecosystems, and game and wildlife.[189]

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182. Pa. Bull. at 2472-73.

183. *See* RICHARD ALLEY, THE TWO-MILE TIME MACHINE: ICE CORES, ABRUPT CLIMATE CHANGE, AND OUR FUTURE (Princeton Univ. Press 2000).

184. Pa. Bull at 2473-74.

185. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA CLIMATE IMPACTS ASSESSMENT 2021 at 45-48 (2021), https://perma.cc/39LU-5GTT.

186. In re Maui Elec. Co., 408 P.3d. 1, 5, 22 (Haw. 2017) (holding that Haw. Const. art. XI, § 9, includes the right to be protected "from the effect of greenhouse gas emissions"); In re Maui Electric Co., 506 P.3d 192, 202-03 n.15 (Haw. 2022) ("Article XI, § 9's 'clean and healthful environment' right . . . subsumes a right to a life-sustaining climate system."); Held v. Montana, 560 P.3d 1235, 1248–49 (Mont. 2024) ("right to a clean and healthful environment [under MONT. CONST. art. II, § 3] . . . includes a stable climate system. . . .").

187. PA. CONST. art. I, § 27, cl. 2.

188. *PEDF II*, 161 A.3d at 931; *Robinson Twp*., 83 A.3d at 954-55.

189. *Robinson Twp*., 83 A.3d at 955; *accord PEDF II*, 161 A.3d at 931; Raymond B. Huey & Peter D. Ward, *Hypoxia, Global Warming and Terrestrial Late Permian Extinctions*, 308 SCIENCE 398 (2005);

Climate is not a private resource. Climate represents the seasonal average ranges of temperature, precipitation, and other atmospheric conditions in a particular area over a long period of time.[190] Climate determines the nature of vegetation, fish, wildlife and other organisms, the amount and quality of ground and surface water; the characteristics of soils; the flow and extent of streams, rivers, and wetlands; air quality; and most other characteristics of naturally occurring ecosystems and natural communities. A stable climate, not disrupted by the changes caused by human emissions of greenhouse gases, should be understood as a public natural resource to which the people have a right and which the Commonwealth has a trustee's duty to conserve and maintain.

Adoption of the RGGI Regulation was consistent with the Commonwealth's constitutional fiduciary duties of prudence, loyalty, and impartiality. Prudence requires good judgment and caution, particularly when trust resources are being threatened.[191] Participating in a well-established, effective program like RGGI is a prudent approach to protecting the public trust resources being adversely affected by greenhouse gas pollution. Loyalty requires the trustee to manage public natural resources for the trust's beneficiaries and not for others.[192] The RGGI Regulation is intended to help protect the people of Pennsylvania, including future generations—the beneficiaries of the trust—from the adverse effects of climate disruption. Finally, the duty of impartiality requires equitable treatment of all beneficiaries, including both present and future generations, in conservation and maintenance of public natural resources.[193] The RGGI Regulation is designed to protect present and future generations—both in its requirement to reduce greenhouse emissions and in the distribution of proceeds from auction revenues to measures that reduce air pollution and further conserve the trust corpus. Public trust rights under Article I, Section 27 inhere in "all the people including generations yet to come."[194] The virtual certainty that effects of climate disruption will be inequitably distributed with greater impacts on future generations[195] implicates

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Alley, *supra* NOTE 183; RACHEL WARREN ET AL., *THE PROJECTED EFFECTS ON INSECTS, VERTEBRATES, AND PLANTS OF LIMITING GLOBAL WARMING TO 1.5 ℃ RATHER THAN 2 ℃*, 360 SCIENCE 791, 791 (MAY 18, 2018).

190. *Climate*, MERRIAM-WEBSTER, https://perma.cc/QWL9-83TT; TIM FLANNERY, THE WEATHER MAKERS 19-26 (2005).

191. *PEDF II*, 161 A.3d at 938.

192. *See supra* section I.(C).(2).

193. *See PEDF II*, 161 A.3d at 932.

194. PA. CONST. art. I, § 27, cl. 2.

195. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 17 (2014). "Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (high confidence). Mitigation involves some level of co-benefits and of risks due to adverse side effects, but these risks do not involve the same possibility of severe, widespread and irreversible impacts as risks from climate change, increasing the benefits from near-term mitigation efforts." *Id.*; *see also* Richard L. Revesz & Matthrew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097 (2011);

Article I, Section 27 even if only some people are adversely affected. Such disparate effects are "irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.'"[196]

By adopting the RGGI Regulation, the Commonwealth acted to conserve and maintain these public natural resources. Because the legislature is also a trustee and is assumed to have adopted Section 5(a)(1) in furtherance of Article I, Section 27, Section 5(a)(1) provides ample support for the adoption of the RGGI Regulation.

This conclusion is supported by the Clean Streams Law Section 316 cases cited above, in which the Pennsylvania Supreme Court repeatedly used the ENRA to hold that Section 316 should be read to mean what it says in the face of contrary policy and factual arguments. Section 316 of the Clean Streams Law, which imposes liability on landowners for water pollution on their land, is broadly crafted. The same is true for the Air Pollution Control Act's Section 5(a)(1), which authorizes regulations for the "prevention, control, reduction and abatement of air pollution."[197] Both protect the constitutional environmental rights of Pennsylvania citizens, and accordingly should be read plainly and in a way that supports protection of those rights. Just as the liability language in Section 316 applies to all sources of water pollution,[198] does not require fault,[199] and is not limited to private parties,[200] Section 5(a)(1)'s authorization for emissions control measures does not exclude emissions control measures that are based in part on auctions. All of this is supported by the Statutory Construction Act's requirement that a statute must be interpreted as written when its words "are clear and free from all ambiguity."[201] The Commonwealth Court's decision invalidating the regulation effectively created an exception to Section 5(a)(1) for auctions, which is inconsistent with its text and "fundamentally undermine[s]" the protection afforded to Pennsylvania citizens under the APCA and the ENRA.[202]

In addition, because of the nature of greenhouse gas pollutants, an auction or other sale and the deposit of proceeds in the Clean Air Fund under APCA Section 6.3(a) is not only authorized but constitutionally required for at least a portion of the allowances. Carbon dioxide differs from other air pollutants in that it will persist for 300 to 1,000 years after being released into the atmosphere,

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Kevin Clarke, *How Will Climate Change Affect the Next Generation?*, U.S. CATHOLIC, Oct. 2013, at 39, https://perma.cc/YDF8-SHHC.

196. *Robinson Twp.*, 83 A.3d at 980.

197. 35 PA. STAT. AND CONS. STAT. § 4005(a)(1) (2024).

198. Nat'l Wood Preservers, Inc., 414 A.2d 37 (Pa. 1980).

199. Adams Sanitation Co., Inc. v. Commonwealth, Dept. of Env't Prot., 715 A.2d 390, 391 (Pa. 1998).

200. *Dresser Indus.*, 604 A.2d at 1184.

201. 1 PA. CONS. STAT. § 1921(b) (2024).

202. *Dresser Indus.*, 604 A.2d at 1180 (quoting *Nat'l Wood Preservers*, 414 A.2d at 40-41).

whereas other air pollutants will dissipate in hours, days, weeks, or months.[203] Again, as a trustee, the Commonwealth must "consider [this] incredibly long timeline" and cannot be "shortsighted," putting the current generation ahead of future generations.[204] The permanent release of carbon dioxide into the atmosphere—with all of its attendant costs to humans and natural resources—is not something the Commonwealth may constitutionally allow for free in all cases. Thus, for greenhouse gases, unlike other pollutants, an auction or sale is the most appropriate constitutional mechanism for the initial allowance distribution.[205]

The RGGI auction proceeds are therefore part of the public trust corpus under Article I, Section 27, and are subject to the requirement that they be used to "conserve and maintain" public natural resources. As *PEDF II* made clear, proceeds from the sale or use of public natural resources cannot be used for general governmental purposes.[206] The RGGI auction proceeds are generated from the use of public natural resources—particularly the atmosphere—for disposal of carbon dioxide. They are like the revenues received from oil and gas drilling on public lands—which also involve public natural resources. The constitutional obligation to use the auction proceeds to conserve and maintain public natural resources is consistent with, and underscores, the APCA Section 6.3 duty to use these proceeds to reduce air pollution.

But the constitutional obligation does more than that. It also provides support for the state's claim that the auction proceeds cannot be a tax. A tax is used to

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203. Alan Buis, *The Atmosphere: Getting a Handle on Carbon Dioxide*, NAT'L AERONAUTICS & SPACE ADMIN. (Oct. 19, 2019), https://perma.cc/8WUP-RV7F.

204. *PEDF V*, 255 A.3d at 310 (quoting *Robinson Twp.*, 83 A.3d at 959).

205. This does not require auctions or sales for most other types of environmental permits. Most environmental permits involve short-lived pollutants that will not cause a permanent loss of environmental trust resources. In cases where there is a permanent loss, such as occupation of a river bed or filling a wetland, mitigation is generally required so that there is no net loss. 25 Pa. Admin. Code § 105.20a.

In order to satisfy the requirement that payments for loss of trust resources be returned to the trust to be utilized for conservation of the natural resources protected by the ENRA, Section 6.3(a) of the APCA must be applied to construe auction proceeds as fees to be deposited in the Clean Air Fund. Section 6.3 (a) authorizes DEP to "establish fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act," 35 PA. STAT. AND CONS. STAT. § 4006.3(a), and Section 6.3(l) requires that those fees be deposited into the Clean Air Fund. *Id.* § 4006.3(l) (2024). Amici argued that this provision should be construed in light of Article I, Section 27 to separately authorize the auction as a "fee." They further argued that if the auction were not authorized as a fee under Section 6.3(a) but as a control measure under Section 5(a)(1) (as provided in the preamble), the court could still conclude that allowance auction revenues must be deposited in the Clean Air Fund. In doing so, they relied on the U.S. Supreme Court's reasoning in Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302 (2014), in which the Court construed the word "pollutant" to have different meanings in different sections of the Clean Air Act in order to effect the legislative intent. Thus, even if Section 6.3(a) were not read to provide authorization to create an auction of allowances, a court could still conclude that the proceeds from the auction of allowances must be deposited into the Clean Air Fund under Section 6.3(l). 35 PA. STAT. AND CONS. STAT. § 4006.3(l) (2024). That would effectuate the constitutional requirement that the revenues from the auction be applied to conserve and maintain the corpus of the Article I, Section 27 trust.

206. *PEDF II*, 161 A.3d at 933-35.

support general governmental purposes, not for specific purposes.[207] Because the auction proceeds are to be deposited in the Clean Air Fund, where they can only be used for air pollution control purposes, the state appropriately argues the auction proceeds are not a tax.[208] But the Article I, Section 27 prohibition against the use of the auction proceeds for general governmental purposes provides a constitutional firewall in support of that result. As the Pennsylvania Supreme Court held in *PEDF VI*, this ENRA limitation on the expenditure of auction proceeds is present in the RGGI Regulation whether it is stated there or not.

This constitutional firewall is buttressed by the Commonwealth's constitutional responsibility for money received from the use of the public trust corpus: the Commonwealth must also account for the use of this money to ensure that it is expended to conserve and maintain public natural resources. In *PEDF VI*, the court also held that DCNR, as a trustee, must separately account for money the legislature appropriates to it from the general fund (non-trust resources) and money the legislature appropriates to it from oil and gas drilling receipts on state lands (trust resources). The Commonwealth, the court said, "has a duty to maintain 'adequate records of the administration of the trust' and to 'keep trust property separate from the trustee's own property.'"[209] It drew this conclusion based on traditional trust law, which prohibits the commingling of trust and non-trust

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207. *See, e.g.*, Woodward v. City of Phila., 3 A.2d 167, 170 (Pa. 1938) (defining taxes as "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and to defray the necessary expenses of government."). A tax "raises money, contributed to a general fund, and spent for the benefit of the entire community." San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R., 967 F.2d 683, 685 (1st Cir. 1992). The Pennsylvania Supreme Court has held or declared at least six times that a tax is "*solely* for the purpose of raising revenue." Pa. Liquor Control Bd. v. Publicker Com. Alcohol Co., 32 A.2d 914, 917 (Pa. 1943) (emphasis added); Pittsburgh Milk Co. v. City of Pittsburgh, 62 A.2d 49, 52 (Pa. 1948); Dufour v. Maize, 56 A.2d 675, 681 (Pa. 1948); Nat'l Biscuit Co. v. City of Phila., 98 A.2d 182, 187 (Pa. 1953); Honorbilt Prod. v. City of Phila., 112 A.2d 108, 112 (Pa. 1955); Phila. Coca-Cola Bottling Co. v. City of Phila., 115 A.2d 207, 209 (Pa. 1955).

208. Other courts have decided that carbon dioxide and other pollution emission charges are fees and not taxes because of their pollution-reduction purpose. Accokeek, Mattawoman, Piscataway Creeks Cmty. Council, Inc. v. Pub. Serv. Comm'n of Md., 150 A.3d 856 (Md. 2016) ($20.38 million greenhouse gas emission charge to electric generating station not a tax); GenOn Mid-Atlantic, LLC v. Montgomery Cnty., 650 F.3d 1021 (4th Cir. 2011) (county's imposition of a charge on CO2 emissions from large emitting facilities to reduce their greenhouse gas emissions and fund other reduction efforts is not a tax under the Tax Injunction Act); San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist., 250 Cal. Rptr. 420, 428-29 (Cal. Ct. App. 1988) (emission charge as part of permit fee not a tax). *See also* Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350 (Cal. 1997) (lead fee); Norfolk S. Ry. Co. v. City of Roanoke, 916 F.3d 315 (4th Cir. 2019) (stormwater management charge); Equilon Enterprises, LLC v. Bd. of Equalization, 117 Cal. Rptr. 3d. 223, 235 (Cal. Ct. App. 2010) (lead fee); *contra* Borough of W. Chester v. Pa. State Sys. of Higher Educ., 291 A.3d 455 (Pa. Commw. Ct. 2023), *appeal granted*, No. 9 MAP 2023 (filed Feb. 1, 2023).

The Commonwealth Court also failed to address a decision of the California Court of Appeal rejecting a challenge to its auction of allowances in a cap-and-trade program based on the contention that an auction constituted a tax. Cal. Chamber of Com. v. State Air Res. Bd., 216 Cal. Rptr. 3d 694 (Cal. Ct. App. 2017).

209. *PEDF VI*, 279 A.3d at 1213 n.25, 1219 n.5.

resources.[210] Under this line of reasoning, the state must separately account for the RGGI auction proceeds and cannot commingle that money with general fund money. This further ensures that the auction proceeds will be expended for air pollution control purposes under the APCA and for the conservation and maintenance of public natural resources under Article I, Section 27, and not for general governmental purposes as tax revenues. This all supports the preamble's conclusion that Section 6.3(a) should be construed to require that the auction proceeds be deposited in the Clean Air Fund.

In many substantial ways, then, the ENRA supports the statutory authority of the EQB to adopt the RGGI Regulation and the intervention of parties to make those arguments. The ENRA is not just an additional cosmetic argument for the lawfulness of this regulation; it is essential.

d. Pennsylvania Supreme Court Decision Based on Failure of DEP to Invoke the ENRA in Support of the RGGI Regulation

In July 2024, in *Shirley v. Pennsylvania Legislative Reference Bureau*, the Pennsylvania Supreme Court reversed the Commonwealth Court's decision denying the motion of the environmental groups to intervene.[211] These groups argued that the RGGI auction proceeds were moneys received for disposal of carbon dioxide in the atmosphere, a public trust resource, and were therefore like the money the state receives from oil and gas leasing on state lands. Because *PEDF II* only permits this money to be used to "conserve and maintain" public natural resources, they argued that the auction proceeds cannot be an unlawful tax.[212] This is "a salient and nonfrivolous argument regarding the central question in this litigation of whether the RGGI Regulation is an unconstitutional tax," the court explained.[213] "The argument could benefit Nonprofits and DEP alike. Yet, DEP has never raised it."[214] In fact, the court said, "DEP has never once invoked the [ENRA] in support of the RGGI Regulation."[215] "[W]e find it telling that DEP has never actually offered a rationale for ignoring" the ENRA.[216] For these reasons, the court held that DEP did not adequately represent the environmental groups' interests, and it permitted them to intervene.[217] Justices Donohue and Todd, in a concurring opinion, argued that the environmental groups had the right

210. *Id.*
211. 318 A.3d 832 (Pa. 2024).
212. *Id.* at 855.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 857.
217. *Id.* at 855.

to intervene as beneficiaries of the constitutional public trust that they claim is being damaged by the Commonwealth Court's decision.[218]

This decision supports in unambiguous terms the key point in this Article—that Commonwealth agencies need to incorporate Article I, Section 27 into their statutory and regulatory decision-making processes affecting constitutionally protected values and resources, as well as their public explanation and defense of their decisions. While a Pennsylvania Supreme Court decision on the merits of the RGGI litigation is pending as this Article goes to press, agencies should seriously consider what *Shirley* means for their decision-making.

2. DEP's Imposition of a Permit Condition to Control Noise

In at least one case, DEP has applied the duty to interpret regulations in light of its trust responsibility under the ENRA to impose permit conditions requiring monitoring for noise and imposing limits on noise levels. Diversified Production LLC filed an application to DEP for an air plan approval for construction and initial operation of a well pad and natural gas fired power plant in Elk County that would be used to generate electricity for an accompanying cryptocurrency mining operation adjacent to state Game Lands.[219] Cryptocurrency mining is an energy-intensive computer processing technology for producing digital currency.[220] The construction and operation of the well pad would generate considerable noise and emit nitrogen oxides, methane, hazardous air pollutants, and other air pollutants; the production of electricity from the power plant would emit further nitrogen oxides, methane, and carbon dioxide.[221] During the public comment period for the air plan approval, the state Game Commission and local citizens expressed concern about the impact of noise on hunting and bird nesting habitat in the vicinity of the operation.[222]

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218. *Id.* at 858-60 (Donohue & Todd, JJ., concurring). "Pursuant to their status as beneficiaries of the public trust established by the [ENRA], Nonprofits' members possess a legally enforceable interest in the trust res: the natural resources of our Commonwealth. In my view, this legally enforceable interest in the existing natural resources which, according to Nonprofits, stand to be altered, if not diminished or destroyed, as a result of the efforts to enjoin the RGGI Regulation, suffices to establish a right to intervene . . . ." *Id.* at 858-60.

219. Letter to Eric A. Gustafson & David G. Balog from Joseph Otis Minott (July 31, 2023) [hereinafter Minott et al. letter] (electronic copy on file with authors). State Game Lands are public lands that are managed by the state Game Commission primarily for "habitat for wildlife and [to] provide opportunities for lawful hunting and trapping." *State Game Lands*, PA. GAME COMM'N, https://perma.cc/4NZ8-TBYP.

220. *Id.*

221. Minott et al. Letter, *supra* note 219, at 1-2.

222. Memorandum from David G. Balog, New Source Review Section Chief, Air Quality Program, Northwest Regional Office, DEP through Eric A. Gustafson, Regional Program Manager, Air Quality Program, Northwest Regional Office, DEP at 3 (Dec. 28, 2023) (Comment Response Document 24-00197A - Diversified Production LLC, Longhorn Pad A, Horton Township, Elk County) [hereinafter Comment Response Document].

In response, when DEP issued the air plan approval, it imposed various noise monitoring and control measures, including a condition limiting noise from the well supporting the cryptocurrency mining operation.[223] DEP did so even though no such cryptocurrency mining regulation exists and DEP's air quality regulations are silent on the issue of noise. DEP cited its public trust responsibility under the ENRA. DEP concluded that the state Game Land in question is "a public natural resource and determined that DEP has an Article I, Section 27 trustee obligation to conserve and maintain the primary use of the [state Game Land] for hunting and wildlife conservation."[224] The noise control conditions, DEP said in its approval, were authorized by a general regulation providing that a "plan approval may contain terms and conditions the Department deems necessary to assure the proper operation of the source . . . ."[225] In other words, DEP interpreted this regulation in light of its public trust duty under the ENRA.[226]

III. THE ENRA AS CREATING A DUTY FOR AGENCIES AND THE LEGISLATURE TO ACT

As previously explained, the ENRA's trustee duties concerning public natural resources constrain an agency's authority to act contrary to those duties and strengthen existing agency authority. These same duties also require agencies to act when necessary to conserve and maintain public natural resources and when authorized by the agency's underlying statutes. The ENRA is not alone among state constitutional rights in imposing affirmative duties on the Commonwealth. This understanding is consistent with Hawaii's experience with its constitutional public trust for public natural resources. Because the courts also are trustees, they have a duty to enforce this public trust duty. Whatever else this duty may mean, it includes the duty of agencies to adopt regulations that protect the public trust rights of present and future generations. It likely also includes the duty of the legislature in appropriate cases to adopt legislation protecting constitutional environmental rights.

A. THE ENRA RECOGNIZES A PUBLIC TRUST WITH AFFIRMATIVE DUTIES

The ENRA differs from many other rights recognized under the Pennsylvania constitution, including other Article I rights. As Part II above demonstrates, rights limit governmental authority; the ENRA, including its public trust clause, shares

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223. *Id.*; Pa. Dep't of Env't Prot., Air Quality Program, Plan Approval No. 24-00197A, Permit Condition # 015, at 17-18 (Dec. 28, 2023) (issued to Diversified Production, LLC for Longhorn Pad A, Elk County (SIC Code: 1311 Mining - Crude Petroleum and Natural Gas)), [hereinafter Plan Approval] (electronic copy on file with authors).

224. Comment Response Document, *supra* note 222, at 3. *See also id.* at 4 and App. B (PA. GAME COMM'N, NOISE CONSIDERATIONS FOR STATE GAME LANDS (Mar. 2023)).

225. 25 PA. CODE § 127.12b(a) (2024), *cited in* Plan Approval, *supra* note 223, Permit Condition # 015, at 17. The Plan Approval cites 25 PA. CODE § 127.12b, not just subsection (a), but subsection (a) is the source of authority that most closely fits noise control.

226. The noise control conditions were not appealed.

that characteristic. But the public trust clause of the ENRA, like classic expressions of the public trust doctrine and trust law generally, also imposes an affirmative duty to protect the trust corpus; Commonwealth entities are thus obliged to conserve and maintain public natural resources for the benefit of present and future generations.[227] Because this duty is constitutional and self-executing, it is not necessarily coextensive with the various statutory responsibilities that any given agency may possess. Indeed, as the Pennsylvania Supreme Court has held, Commonwealth entities must read this duty into statutes that do not state it.[228] The public trust clause is thus different from the "fundamental political rights" of which then-Representative Kury spoke when he introduced the ENRA in 1969—"freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy."[229] These rights, for the most part, function primarily as limits on governmental authority rather than as affirmative duties. Similarly, the first clause of the ENRA does not create an affirmative duty for the government.[230]

The imposition of affirmative duties on governmental actors, however, is not unusual for constitutional rights. One example is the Pennsylvania Constitution's public education clause.[231] In *William Penn School District v. Pennsylvania Department of Education*, petitioners, "a collection of Pennsylvania school districts, parents, students/former students, and organizations," challenged the education funding provided by the state to public schools as violative of this clause.[232] They claimed—and proved after a lengthy hearing—that schools in wealthier school districts were better funded than schools in poorer school districts, and that this adversely affected student learning in poorer districts.[233] The court held that "[e]ducation is a fundamental right guaranteed by the Pennsylvania

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227. PA. CONST. art. I, §27, cl. 2. *See supra* note 80 and accompanying text. *See also* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d at 724 ("[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the *duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands*, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust") (emphasis added); State v. Zimring, 566 P.2d 725, 735 (Haw. 1977) ("The State as trustee has the duty to protect and maintain the trust [resource] and regulate its use."). *Cf.* Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 426 (Cl. Ct. 1991), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (stating, in a case involving Indian water rights, "[w]here a trust relationship exists, 'the trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust'") (citation omitted).

228. *See supra* note 160 and accompanying text.

229. *See supra* note 39 and accompanying text.

230. *PEDF II*, 161 A.3d at 931 ("This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.").

231. PA. CONST. art. III, §14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.").

232. 294 A.3d 537, 545–46 (Pa. Commw. Ct. 2023).

233. *Id.* at 964–65.

Constitution to all school-age children residing in the Commonwealth."[234] The public education clause "requires that every student receive a meaningful opportunity to succeed academically, socially, and civically, which requires that all students have access to a comprehensive, effective, and contemporary system of public education."[235] This right creates a corresponding "obligation of the Legislature, Executive Branch and educators, to make this constitutional promise a reality."[236] The Commonwealth Court ordered "respondents, comprised of the Executive and Legislative branches of government and administrative agencies with expertise in the field of education . . . in conjunction with petitioners, to devise a plan to address the constitutional deficiencies" that the court found.[237]

The public education clause is not the only example of a constitutional provision that imposes affirmative duties on the Commonwealth. The constitutional right to "free and equal" elections requires the Commonwealth, including local governments, to continuously fund, maintain, and operate an elections system that protects this right.[238] Similarly, the various rights afforded to criminal defendants—including but not limited to the right to trial by jury,[239] the right against unreasonable and warrantless searches and seizures,[240] and the right to bail and habeas corpus[241]—require the Commonwealth, on an ongoing basis, to finance and administer a criminal justice system that is capable of protecting these rights.

Like these other constitutional provisions, the public trust clause of the ENRA recognizes an individual right and corresponding duties of Commonwealth entities to protect that right on an ongoing basis. For the ENRA, the right inheres in members of present and future generations, who are beneficiaries of the public trust. As public trustee, the Commonwealth has the affirmative duty to "prohibit the degradation, diminution, and depletion of our public natural resources" and to "act affirmatively via legislative action to protect the environment."[242] The Pennsylvania Supreme Court has also made it clear that all Commonwealth entities have these public trust duties: "Trustee 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."[243]

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234. *Id.* at 964.
235. *Id.*
236. *Id.*
237. *Id.* at 963.
238. PA. CONST. art. I, § 5.
239. *Id.* art. I, § 6.
240. *Id.* art. I, § 8.
241. *Id.* art. I, § 14.
242. *PEDF II*, 161 A.3d at 933.
243. *Id.* at 931 n.23.

Among other states, Hawaii alone has an express constitutional public trust for public natural resources like that in Pennsylvania.[244] Under the 1978 amendments to the Hawaii Constitution (Article XI, Section 1), "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources," for "the benefit of present and future generations."[245] These amendments further provide that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[246]

The Hawaii public trust provision and the Pennsylvania public trust clause are similar in many ways. They both recognize a public trust in public natural resources, impose trust responsibilities on the state and its subdivisions, and expressly identify present and future generations as beneficiaries. Hawaii requires the trustees to "conserve and protect" public natural resources, much like the Pennsylvania requirement that trustees "conserve and maintain" public natural resources.

In Hawaii, as in Pennsylvania, the trustee duty is not simply a limitation on governmental action; it is also an affirmative and continuing responsibility. Hawaii state agencies and local governments have considerable experience in administering the state's constitutional public trust in a wide variety of contexts, including water diversions, use of public lands, and public natural resource impacts from energy projects.[247] The Hawaii Supreme Court has explained that "[a]n agency's constitutional public trust obligations are independent of its statutory mandates."[248] Still, the court has stated, they "operate in tandem" because an agency must conform to both its statutory authority and its constitutional responsibilities.[249] For example, the constitutional public trust is built into permitting requirements for water use. Those seeking to use water resources for public or private purposes, including those that involve diversion of water, have the burden of demonstrating that the proposed use is consistent with, and will not impair, the state's constitutional obligation to protect water resources for the benefit of present and future generations.[250] The Hawaii Supreme Court has also used traditional

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244. Dernbach, *supra* note 5, at 155-56.

245. HAW. CONST. art. XI, § 1. In addition, the state and its political subdivisions "shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." *Id.*

246. *Id.* A separate but similar obligation exists for water resources: "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." *Id.* art. XI, § 7.

247. Dernbach, *supra* note 5, at 185-93.

248. *In re* Maui Elec. Co., Ltd., 506 P.3d at 202.

249. *Id.*

250. *In re* Water Use Permit Applications (Waiāhole), 9 P.3d 409, 453–55, 473 (Haw. 2000). In deciding whether to issue permits for water uses or diversions, the state must "consider the cumulative impact of existing and proposed diversions on trust purposes and . . . implement reasonable measures to mitigate this impact, including the use of alternative sources." *Id.* at 455. "In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness,

trust law to require the state to monitor and inspect leased land to ensure that the land is conserved and protected in accordance with the constitution.[251] In cases challenging agency action as violative of the constitutional public trust, courts are obliged to give the action a "close look."[252]

These affirmative duties have the same overall meaning in Pennsylvania as they do in Hawaii. For the public trust, public education, free and equal elections, and criminal justice, these affirmative duties mean that the Commonwealth has a continuing administrative responsibility to take actions needed to ensure that these rights are realized, including but not limited to ensuring that sufficient funds are available, hiring personnel, and performing other necessary administrative tasks. To be sure, many Pennsylvania state agencies are already doing much of this work, including but not limited to DEP, DCNR, the Fish and Boat Commission, and the Game Commission. Still, the jurisprudence of how these affirmative duties play out is evolving. The case law and principles underlying the ENRA suggest that these duties may differ according to the branch of government and type of action under consideration.

B. THE DUTY OF THE COURTS AS TRUSTEES

Although this Article is about executive branch agencies, the trustee duties of the judicial branch need to be addressed, because the courts deeply influence the extent to which the trustee duties of agencies are enforced and applied. The judiciary, as the "least dangerous branch," is necessarily limited in what it can do affirmatively.[253] Nevertheless, the Pennsylvania Supreme Court has recognized itself as an ENRA trustee: "As one of the trustees of the public estate and this Commonwealth's natural resources, we share the duty and obligation to protect and foster the environmental well-being of the Commonwealth of Pennsylvania."[254] As previously explained, the Pennsylvania Supreme Court has, among other things, held legislation to be in violation of Article I, Section 27 and has used the ENRA to interpret legislation and regulations. The most significant appellate cases since the Pennsylvania Supreme Court revitalized the ENRA have involved legislative funding rather than agency action.

The Pennsylvania Supreme Court's recognition of its "duty and obligation" to protect the ENRA's public trust suggests that the duty should apply in all cases, not just sometimes. In the RGGI litigation, the Commonwealth Court refused to consider the ENRA as supporting authority because no *party* had raised it, even though environmental groups raised the ENRA in their motion to intervene as

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diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.*

251. Ching v. Case, 449 P.3d 1146, 1174 (Haw. 2019).

252. Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kauai, 324 P.3d 951, 975 (Haw. 2014).

253. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

254. Commonwealth v. Parker White Metal Co., 515 A.2d at 1370 (Pa. 1986).

parties.[255] This decision is deeply inconsistent with the "duty and obligation" of judicial trustees stated by the Pennsylvania Supreme Court.[256]

The court's duty as a trustee for beneficiaries, particularly future generations, also suggests that the court should ensure that those interests are adequately represented. As the Pennsylvania Supreme Court held in *Shirley*, a court cannot automatically assume that if the Commonwealth is a party, it will adequately protect the interests of all beneficiaries. In orphans' court proceedings, courts will appoint guardians *ad litem* to provide independent recommendations to the court about the client's best interests, even in cases where the state is involved.[257] Thus, if parties petition to intervene to assert rights and trustee duties under the ENRA in cases where the rights of future generations are at stake and the petitioners can competently represent those rights, the courts should treat their petition as they would the appointment of a guardian *ad litem*.[258]

Similarly, the courts should limit the waiver of beneficiary rights under the ENRA to only those cases where it can be sure that all of the relevant beneficiaries have waived their rights. This will be difficult at best, particularly given the challenges of representing people not yet born. A waiver is a form of issue preclusion, because waiver of a particular constitutional right precludes that right as an issue.[259] Certainly, constitutional rights may be waived if certain conditions are met.[260] A critical starting point is that the Commonwealth trustee cannot, intentionally or unintentionally, waive an ENRA public trust right. Only beneficiaries have public trust rights, and only beneficiaries can waive them.[261] Similarly,

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255. *Bowfin KeyCon Holdings, LLC*, 2023 WL 7171547, at *5 n.10; *Ziadeh*, 2023 WL 7170737, at *6 n.17.

256. *Cf.* Sprague v. Casey, 550 A.2d 184, 188–89 (Pa. 1988), where the Pennsylvania Supreme Court held that the equitable principles of laches and prejudice could not be applied to preclude a challenge to a statute premised on Constitutional grounds. The same rule should require that a court consider the assertion of constitutional rights and duties that have been raised, but not by a party.

257. 23 PA. CONS. STAT. § 5334 (2024).

258. For this reason, as the Pennsylvania Supreme Court held in *Shirley*, the denial of the environmental groups' petition to intervene in the RGGI litigation was an abuse of discretion. At oral argument, Justice Dougherty asked what distinguished this case from a case where jobs might be at issue and labor unions sought to intervene. Pa. Sup. Ct., Dep't of Env't Prot. v. Pa. Legis. Reference Bureau, Oral Recording of Argument, *supra* note 19. Even assuming that jobs were the subject of a constitutional right (which did not appear to be the case), the duty of the courts as trustees under the ENRA and the duty to future generations who will clearly be adversely affected by climate change clearly distinguish the situation presented by Justice Dougherty's hypothetical concern.

259. Other issue preclusion or avoidance rules that have the effect of a waiver are laches and failure to identify an issue in a notice of appeal.

260. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (stating that, in context of right to counsel in a criminal proceeding, a defendant's waiver must be "voluntary, knowing, and intelligent."); Commonwealth v. Monica, 597 A.2d 600, 603 (Pa. 1991) ("While an accused may waive his constitutional right, such a waiver must be the 'free and unconstrained choice of its maker' and also must be made knowingly and intelligently.").

261. This result also pertains to the first clause of the ENRA. The government cannot waive the people's "right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic

courts, as trustees, cannot waive, or authorize the waiver of, public trust rights on their own without appropriate consent from beneficiaries.[262]

C. THE DUTY OF ADMINISTRATIVE AGENCIES AS TRUSTEES TO ADOPT REGULATIONS

Because the Commonwealth has an affirmative duty to act under the ENRA trust clause, administrative agencies have a duty to adopt appropriate regulations to protect trust resources. An agency can only perform that duty lawfully when the General Assembly has afforded it plausible statutory authority and the regulation is necessary to conserve and maintain public natural resources.

This duty of the EQB and Commonwealth trustees to adopt regulations or policies arises from a trustee's duty to manage the trust corpus for the beneficiaries of the trust. The fundamental point of the trust is to conserve and maintain public natural resources for the benefit of present and future generations.[263] The trustee's fiduciary duties of prudence, impartiality, and loyalty all indicate that under certain circumstances, it may be appropriate for an agency to adopt and implement a regulation to conserve and maintain public natural resources. The "reasonable care, skill, and caution" required by the duty of prudence for managing the trust corpus requires the trustee to take such actions as are necessary to conserve and maintain the condition of resources under its control.[264] A reasonably prudent trustee would not allow public natural resources under its authority to deteriorate if this could be prevented with the resources and powers provided the trustee under the trust.[265] The duty of loyalty, which requires the trustee to manage the trust "to accomplish the trust's purposes for the benefit of the trust's beneficiaries,"[266] suggests that a Commonwealth trustee should consider and adopt regulations when that is necessary to accomplish the trust's purposes. Finally, the duty

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values of the environment." PA. CONST. art. I, § 27, cl. 1. Likewise, equitable principles such as waiver cannot preclude the assertion of Constitutional rights. Sprague v. Casey, 550 A.2d at 188–89.

262. It is nonetheless possible that issue preclusion mechanisms may apply when the ENRA is invoked. This will depend upon the circumstances, including who invokes the ENRA and the nature of the damage to the trust resources at issue. If the issue is obvious and the damage to the trust corpus limited, the court's duty as a trustee ought not prevent the application of normal issue preclusion principles. For example, if the alleged damage arises from emissions of short-lived criteria pollutants in an appeal from an air quality permit, application of issue preclusion would not violate the court's duty. On the other hand, if the question relates to emissions of greenhouse gases that will remain in the atmosphere for centuries, causing very substantial damages in the future and harming future beneficiaries who are not and cannot be present, the court, as a trustee, cannot ignore the ENRA once it is raised using these issue preclusion principles.

263. *Cf.* Ching v. Case, 449 P.3d at 1168 (quoting State ex rel. Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977)) ("The most basic aspect of the State's [constitutional] trust duties," is the "duty to protect and maintain" public trust property.).

264. *PEDF II*, 161 A.3d at 938 (citing 20 PA. CONS. STAT. § 7780).

265. Ching v. Case, 449 P.3d at 1175.

266. *PEDF II*, 161 A.3d at 932. *See also* Yaw v. Del. River Basin Comm'n, 49 F.4th 302, 322 (3d Cir. 2022) ("[T]he duty of loyalty requires trustees to 'manage the corpus of the trust so as to accomplish the trust's purposes,' which here is the conservation and maintenance of Pennsylvania's public natural resources.").

of impartiality, which requires the trustee to manage the trust with due regard for all of the beneficiaries,[267] including present and future generations, points toward the desirability of regulations to provide more permanent and precisely stated protection of public natural resources, for future generations as well as those living now.

Thus, under Article I, Section 27, the Commonwealth trustees have a duty to use their delegated powers to conserve the corpus of the environmental trust—public natural resources, including air, water, flora, fauna, and the climate on which they depend.[268] Climate change is a particularly important example. Given the potentially devastating impacts of climate disruption caused by greenhouse gas emissions, a trustee's failure to limit greenhouse gas emissions under its properly delegated authority and, hence, the disruption caused by climate change to public natural resources, would constitute a breach of the ENRA public trust. If the trustee is authorized to adopt regulations for this purpose, and such regulations would help conserve and maintain public natural resources, an Article I, Section 27 trustee should adopt them.

If the agency does not act, can a beneficiary successfully sue to force the agency to act? The case law governing the circumstances where a beneficiary can invoke this duty to compel a government trustee to act is limited. Still, the principles of law set forth in the Commonwealth Court's decisions in *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*[269] and *Funk v. Wolf*[270] define a path whereby ENRA trust beneficiaries can compel the EQB's adoption of regulations authorized under environmental statutes applying to most resources that are the subject of the ENRA trust.

Under Pennsylvania law, "[a]ny person may petition the Environmental Quality Board to initiate a rulemaking proceeding for the issuance, amendment or repeal of a regulation administered and enforced by the department."[271] Petitions must include a specific proposed regulation in the form prescribed by the EQB.[272] The EQB must first decide whether to accept the petition for study.[273] Once accepted for study, DEP must submit a report to the EQB after a specified period, recommending dismissal of the petition or the initiation of a rulemaking process.[274]

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267. *PEDF II*, 161 A.3d at 932.

268. McKinstry & Dernbach, *supra* note 22, at 72-74.

269. Del. Riverkeeper Network v. Pa. Dep't of Env't Prot., 247 A.3d 1188 (Table) at *8-10 (Pa. Commw. Ct. 2021).

270. *Funk II*, *supra* note 13.

271. 71 PA. CONS. STAT. ANN. § 510-20(h) (West 2024).

272. 25 PA. CODE Ch. 23 (2024).

273. *Id.*

274. The petition regulations provide: "The Department will prepare a report evaluating the petition within 60 days. If the report cannot be completed within the 60-day period, at the next EQB meeting the Department will state how much additional time is necessary to complete the report. The Department's report will include a recommendation on whether the EQB should approve the action requested in the

An example of how trust beneficiaries can use this process to compel agency action is presented by the unreported opinion in *Delaware Riverkeeper Network*. The Delaware Riverkeeper Network submitted a rulemaking petition to the EQB and DEP under the Pennsylvania Safe Drinking Water Act[275] to establish a maximum contaminant level (MCL or drinking water standard) for perfluorooctanoic acid (PFOA) of between 1 and 6 parts per trillion.[276] The petition satisfied the regulatory requirements for a rulemaking petition because, among other things, it included a proposed regulation.[277] The EQB accepted the petition in 2017 with the understanding that DEP would submit a report with recommendations on a proposed response to the petition no later than June 2018. In response to DEP's failure to submit a report meeting that deadline, the Delaware Riverkeeper Network filed a three-count complaint in Commonwealth Court in 2019. Two of these counts are relevant here. Count II alleged that the ENRA "imposes an affirmative fiduciary duty on DEP to preserve, *inter alia*, safe drinking water within the Commonwealth" and that this required action on the petition and the maximum contaminant level.[278] Count II, the court said, "essentially seeks an injunction requiring DEP to evaluate the Rulemaking Petition and/or propose an MCL in response."[279] In Count III, the Delaware Riverkeeper Network sought "a declaration that DEP, by its inaction, is violating its duty to respond to the Rulemaking Petition, which duty, in the Delaware Riverkeeper Network's view, is found in the Act and the Environmental Rights Amendment."

In response to the Commonwealth's preliminary objections, the court refused to dismiss Count III and required DEP and the EQB to respond to the rulemaking petition. The court granted the Commonwealth's request to dismiss Count II, holding that the ENRA did not, in and of itself, create a mandatory duty to act on the petition. However, the court qualified its holding on the ENRA in a footnote, as follows:

> Our disposition of Count II should not be understood to foreclose the possibility that a claim under the Environmental Rights Amendment might ripen once the Agencies take further action on the Rulemaking Petition . . . Only then can we determine whether the Agencies' actions were an *abuse* of that discretion under the Act (and under the Environmental Rights Amendment, to the extent its duties are not coextensive with those under the Act). This is particularly important given our analysis of Count III, below, where we hold that the Agencies are obligated by statute to respond to the Rulemaking Petition, as outlined in the EQB policy. Once the Agencies undertake the necessary

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petition. If the recommendation is to change a regulation, the report will also specify the anticipated date that the EQB will consider a proposed rulemaking." 25 PA. CODE § 23.6(1) (2024).

275. 35 PA. STAT. AND CONS. STAT. §§ 721.1 -.17 (2024).

276. *Del. Riverkeeper Network*, 247 A.3d at *2.

277. 25 PA. CODE §§ 23.1-.8 (2024).

278. *Del. Riverkeeper Network*, 247 A.3d at *3.

279. *Id.*

> response and complete the rulemaking petition process, we can evaluate the constitutional (as well as the statutory) merits of that response and the exercises of discretion it involves.[280]

From this it appears clear that DEP and the EQB have a duty to file a report and take action on the petition. Once they have done so, their action will be subject to judicial review, and their adherence to their duties under the statute and the ENRA can be properly evaluated.

The other case, *Funk v. Wolf*, is understood by many practitioners to mean that the ENRA does not create a duty to act. In fact, *Funk* held only that the equitable prerogative writ of mandamus is unavailable to compel action under the ENRA unless it is tied to a specific legal requirement. A close analysis of this decision shows it could allow a citizen trust beneficiary to compel the Administration to adopt regulations limiting greenhouse gas emissions or adopt other regulations to conserve and maintain public natural resources using the approach taken in *Delaware Riverkeeper*.

Ashley Funk, a minor, initially filed a rulemaking petition with the EQB, requesting that the EQB promulgate a regulation that would have the effect of reducing greenhouse gas emissions by six percent each year.[281] Because the regulation would reduce emissions of greenhouse gases, which are pollutants, it would have been authorized by Section 5(a)(1) of the APCA.[282] It does not appear that the petition contained the text of the proposed regulation. The EQB refused to accept the petition, citing alleged legal deficiencies and technical deficiencies in the form of the petition.[283] Rather than reformulating her petition to address the legal issues and technical defects cited by DEP in recommending rejection, Funk appealed that decision to both the EHB and to the Commonwealth Court. The Commonwealth Court ruled against Funk, holding that Funk had failed to exhaust her administrative remedies in the pending appeal of the denial in the EHB.[284]

Instead of pursuing her appeal before the EHB or reformulating the petition to address the technical and alleged legal deficiencies, Funk (and other minors) then brought a direct action in Commonwealth Court against the Governor and a wide range of Commonwealth agencies, including the PUC, seeking mandamus and declaratory relief. They alleged that climate change from greenhouse gas emissions is causing substantial damage to Pennsylvania's natural resources, and that

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280. *Id.* at *8 n.10. The footnote is consistent with the court's ruling that mandamus did not apply. It reflected the difference between the equitable prerogative writ of certiorari, which governs appeals, and the writ of mandamus, which applies only where there is a mandatory duty. The writ of certiorari applies in review of administrative actions and uses the familiar standard that courts will reverse actions that are contrary to law, arbitrary and capricious or an abuse of discretion.

281. Funk v. Commw., Dep't of Env't Prot., 71 A.3d 1097 (Pa. Commw. Ct. 2013) [hereinafter Funk I]. The case, like those identified in the Introduction, was inspired by Our Children's Trust.

282. 35 PA. STAT. AND CONS. STAT. § 4005(a)(1) (2024).

283. *Funk II*, 144 A.3d at 239.

284. *Funk I*, 71 A.3d at 1103.

"the Commonwealth owes to them a fiduciary duty as public trustee to conserve and maintain 'clean air and safe levels of CO_2 and [other greenhouse gases] in accordance with current climate science.'"[285] For mandamus relief, they requested that the Commonwealth be directed to conduct necessary studies and adopt such regulations as are needed to reduce greenhouse gas emissions to levels that comport with the ENRA.[286] For declaratory relief, they requested that the court declare that the Commonwealth has a duty under the ENRA to reduce greenhouse gas concentrations to levels that protect the resources and values identified in the ENRA, and that the Commonwealth had failed to comply with that duty.[287] Petitioners emphasized that they were not seeking a court order to have the Commonwealth "implement any particular set of regulations," but rather to require the Commonwealth to determine what needed to be done to protect their Article I, Section 27 rights, and adopt regulations appropriate for that purpose.[288]

The Governor and the PUC filed preliminary objections, challenging standing and jurisdiction as well as the petitioners' right to mandamus and declaratory relief. After deciding that it had jurisdiction and that the petitioners had standing to bring such an action in light of their rights under the ENRA,[289] the court turned to the issue of whether petitioners had a "clear right" to the requested actions, as required to support a mandamus petition. It found that they did not: "Petitioners point to no legislative enactments or regulatory provisions, and we have found none, that mandate Respondents to do any of the actions sought in the writ."[290] The Court then rejected petitioners' request for declaratory relief "because doing so would require us to enter an advisory opinion."[291]

Ashley Funk and the other petitioners lost in this litigation, but *Funk* may no longer be good law. *Funk* was decided before the Pennsylvania Supreme Court recognized the primacy of Article I, Section 27's text in *PEDF II*—text that should be enforceable through injunctive or declaratory relief.[292] Moreover, prior to the Commonwealth Court decision in *William Penn School District*, the Pennsylvania Supreme Court held the petitioners' action for declaratory and injunctive relief in that case to be justiciable.[293] This holding set the stage for the Commonwealth Court's holding that the State, including the legislature, failed to protect the right stated in the constitution's public education clause. The Court's decision in *William Penn School District* applies with at least as much force to the rights recognized under Article I, Section 27.

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285. *Funk II*, 144 A.3d at 237.
286. *Id*. at 237-38.
287. *Id*. at 238-39.
288. *Id*. at 239.
289. *Id*. at 241-48.
290. *Id*. at 250.
291. *Id*. at 251.
292. *PEDF II*, 161 A.3d. at 916.
293. William Penn Sch. Dist. v. Pa. Dept. of Ed., 170 A.3d 414 (Pa. 2017).

Even so, *Funk*, when read together with *Delaware Riverkeeper,* shows a way to successfully petition for adoption of regulations to fulfill the Commonwealth's trustee duties under the ENRA, including regulations for the reduction of greenhouse gas emissions. The Commonwealth Court in *Funk* found that citizens' ENRA rights can give them standing to bring an action for review of the EQB's denial of a properly framed rulemaking petition grounded upon statutory authority. The *Funk* court rejected the petitioners' attempt to utilize mandamus to seek broad relief untethered to any specific regulation or statutory authorization. But it did not address whether the EQB's refusal to initiate a rulemaking proceeding to enact a properly framed and authorized regulation contained in a rulemaking petition could be appealed (either to the EHB or the Commonwealth Court).

Funk's initial petition to the EQB failed to include all the information required for a rulemaking petition and was rejected for legal reasons that could have been addressed by revising and resubmitting the petition. If the EQB then rejected the petition, petitioners could file an appeal with the EHB. If the EQB accepted the petition and DEP failed to submit a report with recommendations, petitioners could seek declaratory relief from the Commonwealth Court.[294] If the DEP submitted a report recommending denial of the petition, the petitioners could appeal that action either to the EHB or the Commonwealth Court.

A rulemaking petition to regulate greenhouse gas emissions that corrects the defects in the *Funk* effort was filed with the EQB in 2019,[295] was accepted, and is awaiting action.[296] The petition requested the EQB to adopt an economy-wide cap-and-trade regulation for greenhouse gas emissions that would reduce emissions to net zero or below by 2050, and the petition included a complete proposed regulation.[297] The RGGI Regulation discussed above was proposed and adopted after the filing and acceptance of this petition. Unlike the proposal in the petition, the RGGI Regulation applies only to certain electric generating facilities over a certain capacity; it does not apply across the economy to transportation, industry, heating and cooling in buildings, smaller electricity generating units, and other sources of greenhouse gases.

Because of this petition process and similarly broad powers and duties under other environmental statutes to adopt protective regulations, there is a path to compel regulatory action consistent with the ENRA for many resources,[298]

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294. *Del. Riverkeeper Network*, 247 A.3d at *8-10.

295. In fact, the original petition was filed in 2018 and then refiled in 2019 to address technical deficiencies identified by DEP.

296. Letter from Robert B. McKinstry, Jr. et al. to Patrick McDonnell, Sec'y, Dep't of Env't Prot., & Laura Edinger, Regul. Coordinator, Env't Quality Bd. (Feb. 28, 2019) (with attached petition for rulemaking), https://perma.cc/4XGR-J34P.

297. Robert B. McKinstry, Jr., EQB Petition to Create Economy-Wide GHG Auction-Cap-and-Trade Program (2019), https://perma.cc/L8PY-B98R.

298. The Clean Streams Law, 35 PA. STAT. AND CONS. STAT. §§ 691.4 (Declaration of policy), 691.5 (b) (Powers and duties) (2024); Safe Drinking Water Act, 35 PA. STAT. AND CONS. STAT. § 721.4 (Powers and duties) (2024); Solid Waste Management Act, 35 PA. STAT. AND CONS. STAT. §§ 6018.102

including those managed by the Department of Conservation and Natural Resources.[299] Yet this approach is available only to compel actions involving the EQB, where duties to consider and respond to petitions and procedures are laid out in a statute and regulations.

Thus, there is currently no express regulatory mechanism with enforceable deadlines to petition to establish regulations implementing the Commonwealth ENRA trustee duties with respect to the Governor or executive agencies such as the Department of Transportation, the Department of Agriculture, and commissions—including the Fish and Boat Commission, the Game Commission, and the PUC. The need for a remedy is particularly acute with respect to the Fish and Boat Commission and the Game Commission. The Fish and Boat Commission manages state waters and is responsible for protection of wild fish, which are defined to include reptiles, amphibians, aquatic invertebrates, and aquatic plants.[300] The Game Commission manages wild birds and mammals and administers State Game Lands. Neither was a part of DER when the EQB and the provision for petitioning were established, nor are they now. But they are responsible for administering and protecting significant public natural resources. These public natural resources do not fall expressly within the EQB's jurisdiction in cases where the resources are mismanaged. Well-established equitable principles require that some remedy be provided trust beneficiaries.

D. THE DUTY OF THE GENERAL ASSEMBLY AS TRUSTEE TO ADOPT LEGISLATION

Other important public natural resources do not fall expressly within the jurisdiction of any agency or commission. These include "[t]errestrial invertebrates [which are] essential to functioning ecosystems," as well as fungi and lichens.[301] These "orphan" species, all of which are essential to the functioning of ecosystems, are as much a part of the ENRA trust as the fish, wildlife, and forests that are expressly recognized in legislation. The Commonwealth's duty as a trustee requires that *some* agency take responsibility for the protection of these orphan species (in the case of fungi, an orphan kingdom). Indeed, the Pennsylvania Supreme Court in *PEDF II* stated that, as a trustee under Article I, Section 27,

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(Declarations of policy, including a policy to implement the ENRA), 6018.105 (Powers and duties of EQB) (2024); Hazardous Sites Cleanup Act, 35 PA. STAT. AND CONS. STAT. §§ 6020.102 (Declaration of policy), 6020.303 (Powers and duties of EQB) (2024); Dam Safety & Encroachments Act, 32 PA. CONS. STAT. § 693.5(a) (2024) (powers and duties of EQB).

299. Wild Resource Conservation Act, 32 PA. CONS. STAT. §§ 5302, 5307 (2024). At the time 71 PA. CONS. STAT. §§ 510–20 (2024) was adopted and the petition policy was enacted, DEP and DCNR were combined in one Department of Environmental Resources, and that section, in fact, refers to DER. DCNR administers the plant species governed by the Wild Resources Conservation Act, as well as State Parks and State Forests, all of which are public natural resources under the ENRA.

300. 30 PA. CONS. STAT. § 102 (2024) ("Fish: when used as a noun, includes all game fish, fish bait, bait fish, amphibians, reptiles and aquatic organisms").

301. PA. BIOLOGICAL SURV., PENNSYLVANIA BIOLOGICAL SURVEY HANDBOOK, ch. 3, at 15-16 (E. Crisfield et al. eds., 2021), https://perma.cc/SRB3-CSB7.

"the Commonwealth must act affirmatively via legislative action to protect the environment."[302] Here, of course, "the Commonwealth" means the General Assembly or legislature.

The rights and duties recognized by the ENRA, which are enshrined in Article I of the Pennsylvania Constitution, are as fundamental as the right to a public education recognized in *William Penn School District v. Pennsylvania Department of Education*.[303] Like the right to public education, environmental rights under ENRA create a corresponding "obligation of the Legislature [and] Executive Branch . . . to make this constitutional promise a reality."[304] In a case claiming that the state has not enacted legislation to carry out its obligation to protect public rights, particularly environmental values or public natural resources like those identified above, that obligation should be judicially enforceable either by way of declaratory judgment or injunctive relief. Actions seeking declaratory or injunctive relief, whether through administrative or legislative action to redress a constitutional wrong, have succeeded in the case of the education clause of the Pennsylvania Constitution in the W*illiam Penn School District* decision, the federal Equal Protection clause in *Brown v. Board of Education*,[305] and in other states.[306] Environmental rights under Article I, Section 27 should receive similar protection.

CONCLUSION

Pennsylvania's ENRA provides a powerful environmental protection tool because it recognizes broad environmental rights for all the people and couples those rights with public trust duties on the Commonwealth to conserve and maintain public natural resources for the benefit of present and future generations. This tool also applies to state agencies as they implement their statutes and regulations. In this concluding section, we summarize the key principles that agencies should follow to implement their statutory authority in a manner that is consistent with the ENRA.

First, Article I, Section 27 is a constraint on agency statutory authority because, whatever their authorizing statutes say, agencies do not have the authority to violate the people's constitutional rights. The ENRA is superior in authority to statutes; thus, statutes that violate the ENRA are invalid. Because the ENRA has two clauses, a clause recognizing the people's right to clean air, pure water, and the preservation of certain values in the environment, and a clause recognizing the people's rights as beneficiaries of a public trust in conservation and maintenance

302. *PEDF II*, 161 A.3d at 933.
303. 294 A.3d at 964.
304. *Id.*
305. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955).
306. *See, e.g.*, S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 336 A.2d 713 (1975).

of public natural resources, an agency's statutes must be consistent with both clauses.

Several additional principles derive from these clauses, each of which is applicable to state agencies. Under either or both clauses, state agencies must ensure that information about the likely effects of a decision on protected environmental resources and values is available to themselves and to trust beneficiaries prior to making a decision, and that they make a decision based on that knowledge. In addition, when making decisions involving public natural resources, including permitting and enforcement decisions, state agencies must exercise their fiduciary responsibilities of prudence, loyalty, and impartiality.

Second, the ENRA supports and strengthens existing agency statutory and regulatory authority to the extent that authority is consistent with the ENRA. As the Pennsylvania Supreme Court has made clear, agencies must interpret and apply statutes in a manner that is consistent with Article I, Section 27, even if the statute or regulation does not contain language that is consistent with the ENRA. When the constitutional validity of an agency's statutes or regulations protecting environmental values or public natural resources is not contested under Article I, Section 27, agencies must interpret these statutes or regulations to mean what they say, particularly if they are broadly written. When agencies read these statutes or regulations narrowly, they frustrate protection of public rights under Article I, Section 27 and frustrate the General Assembly's presumed intent to implement the ENRA. Among other things, that means agencies should explain the legal basis for their decisions not only under applicable statutes or regulations, but also under Article I, Section 27.

Third, the public trust clause of Article I, Section 27 is not only a limitation on agency authority; it also imposes an affirmative duty to conserve and maintain public natural resources. Thus, when existing statutes or regulations do not conserve and maintain public natural resources, the Commonwealth as a trustee has a duty to act. Courts, which are also trustees, have a responsibility to support this duty. Agencies with inadequate regulations need to adopt new or modified regulations. In addition, to provide an administrative mechanism to implement the public rights contained in the ENRA, agencies or the legislature should create petition processes for the adoption of regulations. When an agency is unable or unwilling to adopt regulations after submission of an appropriate petition, courts should be prepared to award declaratory or equitable relief. Where statutes are inadequate to conserve and maintain public natural resources, the General Assembly should adopt new or modified legislation. When the legislature does not do so, courts should be prepared to award declaratory or equitable relief to protect the rights of beneficiaries under Article I, Section 27.

The record of Pennsylvania agencies, courts, and the General Assembly in exercising these duties has been far from uniform, and enforcement has all too often been left to litigation by those claiming rights under Article I, Section 27. The Pennsylvania Supreme Court's July 2024 decision in *Shirley* makes clear that

state agencies ignore the ENRA at their peril. It is essential that all levels of government, and particularly state agencies, recognize and invoke the ENRA when protected environmental values and resources are at issue, particularly in response to the existential threat of climate disruption caused by greenhouse gas emissions.