

DRAFT

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Amici represent religious and other ethical organizations, each of whom have recognized that the adverse impacts of climate disruption caused by anthropogenic emissions of greenhouse gas pollution create an ethical duty to act to limit those emissions and reduce those emissions. The ethical principles recognized by *amici* inhere in Article I § 27 of the Pennsylvania Constitution, which creates a right to a clean, natural environment and makes all units of Pennsylvania's government trustees for all Pennsylvania residents, including future generations, with a duty to conserve the values of Pennsylvania's public natural resources. This duty includes duty for state government to take action within its powers to limit greenhouse gas pollution to conserve Pennsylvania's natural climate. We write to support the rule to establish a Pennsylvania CO₂ Budget Trading Program and Pennsylvania's participation in the Regional Greenhouse Gas Initiative ("RGGI"). CO₂ Budget Trading Program, 50 Pa. Bull. 6212 (Nov. 7, 2020) ("RGGI Regulation") as a necessary but still insufficient action to satisfy the Commonwealth's ethical and constitutional duty.

Studies by the Intergovernmental Panel on Climate Change and decisions at the Conferences of the Parties ("COPs") under the United Nations Framework Convention on Climate Change ("UNFCCC") have recognized that prevention of

“dangerous anthropogenic interference with the climate system,” UNFCCC, art. 2, within the meaning of the UNFCCC requires action with the goal of limiting temperature increases to 1.5 degrees C. [cite] This, in turn, requires a 45% reduction in emissions from 2005 levels by 2030 and emissions neutrality by 2050. Article I, section 27 should be read consistent with the goal of this treaty, and the Pennsylvania Air Pollution Control Act, the Regulatory Review Act and other statutes should likewise be the UNFCCC and Article I section 27. The Dutch Court has interpreted that nation’s Constitution to require action consistent with these decisions. *Urgenda Foundation v. State of Netherlands*, ECLI:NL:HR:2019:2007 (NE Supreme Ct. 2020), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

Failure to achieve the reductions will have severe adverse results that will be inconsistent with the environmental justice values inherent in Article I, section 27, with particularly severe impacts on future generations and low income people and nations. Although the current RGGI regulation is not sufficient to achieve these reductions, it is a necessary first step. The necessary reductions cannot be achieved if the RGGI regulation is reversed or delayed.

DEP and the EQB have found that the Pennsylvania Air Pollution Control Act authorizes the RGGI regulation and further action to reduce greenhouse gas pollution. Even were authorization ambiguous, which it is not, the ethical principles expressed in Article I, § 27 of the Constitution require that any ambiguity in the Constitution be resolved to find that the RGGI regulation and participation in the RGGI program is authorized and should not be delayed.

II. AMICI.

Amici are religious organization and other organizations whose purpose is the promotion of ethics and ethical action. Each of the organizations has concluded that these ethical and religious principles require action to reduce greenhouse gas pollution to the extent required to avoid “dangerous anthropogenic interference with the climate system” consistent with the objections of the UNFCCC. UNFCCC, art. 2.

Society of Friends: In 2021, the Philadelphia Yearly Meeting of the Religious Society of Friends and twenty Monthly Meetings of PYM (“Quakers”) have adopted the following “Minute to Address the Climate Crisis as a PYM’s Top Corporate Witness”

In 2018, climate scientists told the United Nations that the effects of climate change were occurring much sooner than expected. They warned that, unless carbon emissions are cut by 50% in about ten years, i.e., by 2030, and then to net-zero by 2050, humanity will probably experience a global climate catastrophe of incalculable severity before the end of this century.

We know that while all will suffer, the most vulnerable populations will face certain calamity. Institutional racism has already harmed communities of color, as manifested in part in environmental injustice. Continued exploitation of the earth's resources has already caused mass extinctions and put life as we know it at risk. Conflicts due to rising sea levels, food insecurity, water scarcity, and mass migrations are already causing horrific injustice and threatening world peace.

For these reasons, our historic testimonies for peace, justice, integrity, and stewardship call us to make climate justice a clear and urgent concern for corporate witness, and for all manifestations of our Yearly Meeting to take immediate and resolute action.

<https://www.pym.org/wp-content/uploads/2020/07/climate-change-plenary-minutes.pdf>.

Roman Catholic, Holy Father Pope Francis's Encyclical Letter,
Laudato Si, 2015

“The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development, for we know that things can change. The Creator does not abandon us... I want to recognize, encourage and thank all those striving in countless ways to guarantee the protection of the home which we share. Particular appreciation is owed to those who tirelessly seek to resolve the tragic effects of environmental degradation on the lives of the world's poorest.”

“The climate is a common good, belonging to all and meant for all... Humanity is called to recognize the need for changes of lifestyle, production and consumption, in order to combat this (global) warming...”

Statements/positions by other religious/ethical organization *amici*

Insert quotations from Evangelical, Jewish and Muslim faiths

III. ARTICLE I § 27 OF THE PENNSYLVANIA CONSTITUTION EXPRESSES AN ETHICAL PRINCIPLE REQUIRING THAT EACH DIVISION OF PENNSYLVANIA'S GOVERNMENT TAKE ACTION WITHIN ITS POWER TO ADDRESS THE EXISTENTIAL PROBLEM OF CLIMATE DISRUPTION BY GREENHOUSE GAS POLLUTION.

1. Two elements of Article I section 27.

Trustee obligation creates an ethical duty. That ethical duty requires that the government take action within its power to address climate change.

2. This ethical obligation has been recognized by the religious organization amici and other organizations as noted above.

3. The IPCC and UNFCCC COPs have recognized that this requires action with the goal of limiting temperature increases to 1.5 degrees C. This requires a 45% reduction in emissions from 2005 levels by 2030 and emissions neutrality by 2050. This is necessary to achieve the goal of the UNFCCC to prevent dangerous anthropogenic interference with the climate system. Article I section 27 should be read consistent with the goal of this treaty, which is the Supreme law of the land under Article III of the US Constitution. Likewise, where there is ambiguity, the Pennsylvania Air Pollution Control Act, the Regulatory Review Act and other statutes should be read consistent with the UNFCCC and Article I section 27.

4. In *Urgenda*, the Netherlands Supreme Court interpreted its laws to require the government to take action consistent with the goals of the UNFCCC.

5. Failure to achieve the reductions will have severe adverse results that will be inconsistent with the environmental justice values inherent in Article I, section 27. By way of example: inter generational impacts, greater impacts on low income people and nations in terms of health care, air quality etc

6. Neither the current RGGI regulation nor Governor Wolf's goal are sufficient, but any delay in emissions reduction will make achievement of what is necessary impossible.

There is a rulemaking petition pending that would achieve what is required under the UNFCCC, Article I section 27 and the ethical duties reflected in those authorities. The proposed regulation could be modified to be consistent with RGGI and create a more aggressive RGGI reduction consistent. Invalidation of the RGGI regulation on the grounds stated would prevent implementation of that regulation. Delay of the reductions required by the RGGI Regulation will make the reductions ultimately required to keep temperatures increases below the critical 1.5 degrees C more difficult and if the delay is sufficient, impossible

IV. THE APCA AUTHORIZES BOTH THE RGGI REGULATION AND PARTICIPATION IN THE RGGI PROGRAM.

Under the RGGI program and the RGGI regulation, allowances are auctioned by each state and a portion of the auction revenue (or a portion of the allowances themselves) must be devoted to strategic energy purposes.¹ Although the APCA lacks specific authorization for auctions of emissions rights, a partial allowance auction has been implemented in Pennsylvania in the past, since the Title IV program under the federal Clean Air Act allocates some allowances by auction. 42 U.S.C. § 7651 (2012).

More significantly, the *PEDF* decision suggests that an auction with a reserve price is constitutionally required to allow the beneficiaries of the environmental trust recognized by Article I, § 27, to benefit from investments that further the purposes of the trust. Allowances may be considered to represent ecosystem services in that they represent the limited remaining ability of the atmosphere to absorb additional GHG pollution without disruption. Because the revenues would derive from efforts to preserve the environmental trust, these revenues could be considered the result of the sale of renewable ecosystem services, similar to revenue from timber sales on state forest land. *PEDF* applied the law of trusts to invalidate a distribution of trust principal but recognized that trust income from renewable services that did not deplete the trust presented a different issue.²

The rule of prudence requires that a trustee manage a trust with the prudence that a reasonable person would manage his or her own affairs, considering the needs of beneficiaries, the need to preserve the corpus of the trust, and the amount and regularity of income. Restatement (Third) of Trusts § 90 (2007); *see also Harvard Coll. v. Amory*, 26 Mass (9 Pick) 446 (1830). Although this rule of prudence allows considerable discretion in managing a trust, it does not allow the trustee to give away either the principal or the income with no benefit to the beneficiaries or to favor one beneficiary over the other. Thus, the state auctions timber, minerals and other renewable and non-renewable resources produced by state forests. For this reason, an auction of GHG emissions allowances is not only authorized but arguably required in the absence of another rationale.³

³ If a permit mechanism is used without charging the permittee, the government is surrendering ecoservices for free, which would be inconsistent with the treatment of those services as subject to the trust. Imposing a permit charge could remedy that problem. However, without an auction, the allocation of allowances to a permittee would favor the permittee over other trust beneficiaries, contrary to the trustee's duty of impartiality. [cite Restatement].

DEP's conclusion that auction revenues should be deposited in the Clean Air Fund is consistent with the Commonwealth's duty as a trustee because the uses of the Clean Air Fund will further reduce GHG emissions and contribute to the preservation of the trust corpus.⁴ The RGGI regulation provides at § 145.401(d) that the DEP "will retain control over the proceeds associated with the sale of all of Pennsylvania CO₂ allowances, whether sold in a multistate or Pennsylvania CO₂ allowance auction and will credit the proceeds to the Clean Air Fund." The Clean Air Fund was established in 1974 pursuant to the APCA, which grants the DEP authority to implement the provisions of the Clean Air Act in Pennsylvania. 25 Pa. Code § 143; 35 Pa. Cons. Stat. § 4001. The Fund is to "be administered by the department for use in the elimination of air pollution." 35 Pa. Cons. Stat. § 4009.2(a). The APCA's specific policy goals include protecting "the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; (iv) development, attraction and expansion of industry, commerce and agriculture." *Id.* § 4002(a).

V. CONCLUSION.

Thus, a stable climate is among the attributes of the environment to which the citizens of Pennsylvania, including future generations, have a right under Article I, § 27 of the Constitution. This triggers the Commonwealth's duty to act as a trustee to conserve a stable climate to the extent authorized by law. The APCA and the Interstate Act authorize adoption of the RGGI regulation. Article I, § 27 arguably mandates action to limit GHG emissions and requires that existing laws be interpreted in a way that will allow limitation of GHG emissions. Thus, even if there is ambiguity, that ambiguity should be resolved in favor of finding authorization to adopt the RGGI regulation. The fact that the RGGI regulation does not, in and of itself, conserve a stable climate is not grounds for invalidating the regulation.

Respectfully Submitted,

Central Philadelphia Monthly Meeting
15th and Cherry Streets
Philadelphia, PA

⁴ Richard Marcil, *Allocations of Funds Under Pennsylvania's Regional Greenhouse Gas Initiative Program* (2020). This paper also contains a detailed description of how each of the other RGGI states allocates its auction revenues.