BEFORE THE COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County Is Reasonably Necessary for the Convenience and Welfare of the Public	))))))	Docket No. P-2021-3024328 (On Remand)

BRIEF OF AMICI CURIAE CITIZENS FOR PENNSYLVANIA'S FUTURE, CLEAN AIR COUNCIL, DELAWARE RIVERKEEPER NETWORK, AND GREEN AMENDMENTS FOR THE GENERATIONS IN SUPPORT OF INTERVENORS JULIA M. BAKER AND THEODORE R. UHLMAN

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Citizens for Pennsylvania's Future ("PennFuture"), Clean Air Council, Delaware Riverkeeper Network, and Green Amendments for the Generations (collectively, "Amici") jointly file this brief pursuant to Pa. Code § 5.502(e), which provides that anyone interested in the issues involved in a Commission proceeding may, without applying for leave to do so, file amicus curiae briefs in regard to those issues.

PennFuture is Pennsylvania non-profit organization whose mission includes protecting our air, water, and land, and empowering citizens to build sustainable communities for future generations. Members of PennFuture regularly use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania's environment.

Clean Air Council is a member-supported, non-profit environmental organization dedicated to protecting everyone's right to a healthy environment. The Council works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws. The Council has many members in Delaware County, including those who live near the proposed PECO Gas facility.

Delaware Riverkeeper Network is a nonprofit organization established in 1988 to protect, preserve and enhance the Delaware River, its tributaries, and

habitats. Delaware Riverkeeper Network has over 27,000 members, who live, work, and recreate within the Delaware River Basin.

Green Amendments For The Generations is Delaware Riverkeeper Network's sister organization. It is a nonprofit whose mission is to pursue and secure constitutional protection of environmental rights in states across the nation and ultimately at the federal level.

Amici have a long-standing interest in the health and wellbeing of Pennsylvania residents and are committed to preserving and protecting Pennsylvania's natural resources. Amici have a specific interest in ensuring that the ERA be interpreted in a manner that vindicates the constitutional environmental rights of Pennsylvania residents and preserves the constitutional trust protecting Pennsylvania's natural resources. No other person or entity other than amici or their counsel paid for or authored this brief.

STATEMENT OF THE CASE

This case concerns the contested attempt by PECO Energy Company, Inc. ("PECO Gas") to build additional gas infrastructure in the Township of Marple. The Township denied zoning approval, and PECO Gas sought to use Section 619 of the Municipalities Planning Code to exempt its expansion station from the Township's zoning. On its initial review, this Public Utilities Commission ("Commission" or "PUC") granted PECO Gas's petition. In so doing, the PUC adopted PECO Gas's position that environmental considerations are not part of the PUC's task in a Section 619 proceeding. On appeal, the Commonwealth Court disagreed, finding that the exclusion of environmental considerations violated the Commission's obligations as a Commonwealth trustee of public natural resources under Article 1 Section 27 of the Pennsylvania Constitution. As a result, it remanded the case for the PUC to conduct a "constitutionally sound environmental impact review" and incorporate such a review into its decision. On remand, the Commission held additional proceedings and took additional testimony, and now must render a new decision on the Section 619 petition that meets its constitutional trust obligations.

SUMMARY OF ARGUMENT

The Pennsylvania Constitution's Environmental Rights Amendment ("ERA"), Article I, Section 27, was ratified in 1971 amid a broader cultural acknowledgement that the basic underpinnings of a thriving society were threatened

by environmental exploitation. Pennsylvania's irreplaceable natural resources had been consumed and depleted with abandon, often for the benefit of private interests at the expense of the public as a whole.[1] Critical to the approach embodied in the ERA is the principle that the Commonwealth be well-informed of the environmental effects of its actions in advance, and use that knowledge to prevent blind infringement of the rights protected. The requirement to consider environmental impacts in advance is both common sense and deeply rooted in Pennsylvania's constitutional environmental jurisprudence.

In order to put these ERA principles in effect, the PUC has been tasked on remand by the Commonwealth Court with completing an "appropriately thorough environmental review of a building siting proposal" and factoring "the results into its ultimate determination regarding the reasonable necessity of the proposed siting." *Township of Marple v. Pa. Pub. Util. Comm'n,* 294 A.3d 965, 974 (Pa. Cmwlth 2023) ("*Twp. of Marple*"). Amici write to provide guidance to the PUC regarding the contours of that review and to suggest how to factor the outcome of the review into the PUC's determination as to reasonable necessity.

[1] See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 976 (Pa. 2013 ("The lessons learned from that history led directly to the Environmental Rights Amendment.").

ARGUMENT

I. The ERA requires Commonwealth agencies and entities to obtain and consider information relevant to the environmental effects of their actions.

As the Pennsylvania courts have made clear, the ERA declares certain rights to the people of the Commonwealth, and the state's power to act contrary to these rights is limited. As part of this limitation, the Commonwealth has a public trust duty under Section 27 to conserve and maintain public natural resources for the benefit of present and future generations. The PUC is unquestionably a trustee under the ERA. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 931 n.23 (Pa. 2013) (explaining that "all agencies and entities of the Commonwealth government, both statewide and local" are trustees).

Thus, the PUC, like all agencies of the Commonwealth, has a duty as a trustee to "refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties." *Id.* at 957; *Pa. Env't Def. Found. v. Commonwealth* ("*PEDF II*"), 161 A.3d 911, 933 (Pa. 2017).

The PUC's inability to act contrary to the rights enumerated implies a corollary responsibility intended to ensure that these rights are actually protected: the responsibility to consider impacts on those rights and values prior to making a

decision. *Robinson Twp.*, 83 A.3d at 952. This understanding has been part of the ERA from the outset. Before the ERA's adoption, then-Representative Kury explained it 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.

1970 Pa. Legislative Journal–House 2269, 2272 (April 14, 1970).[2]

The Pennsylvania Supreme Court made this requirement clear in *PEDF II*, when it faulted the General Assembly's adoption of the Fiscal Code amendments allocating public trust proceeds to the general fund without considering the impact of this decision on the trust corpus: "there is no indication that the General Assembly

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[2] *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 law suit.

Dernbach & Sonnenberg, Legislative History, at 66. The Question and Answer Sheet was cited with approval in *Robinson Township*, 83 A.3d at 954.

considered the *purposes of the public trust* . . . consistent with its Section 27 trustee duties." 161 A.3d at 938 (emphasis added).

A. The Commonwealth has multiple trustee obligations related to the corpus of the public natural resources trust.

For the public trust clause of the ERA, this duty to consider impacts grows out of the fiduciary duties of prudence, loyalty, and impartiality, which the Supreme Court has held should be used to interpret Section 27's public trust clause. 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 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 a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956–57).[3]

The duty of prudence, the Supreme Court said, involves "considering the purposes" of the trust and exercising "reasonable care, skill, and caution" in

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[3] See also *Pa. Env't Def. Found. v. Commw.* ("*PEDF V*"), 255 A.3d 289, 317 (Pa. 2021) (Baer, J., dissenting) (maintaining that the ERA's language is "more befitting general trust concepts, such as prudence, loyalty, and impartiality, rather than the intricate aspects of private trust law and precedent.").

managing the trust corpus. *Id*. at 938 (citing 20 Pa. C.S. § 7780). It is impossible for a trustee to be prudent without carrying out some advance investigation of the effect of its decisions.[4]

The duty of loyalty requires the trustee to manage the trust corpus "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries." *PEDF II*, 161 A.3d at 932. This means that the trustee cannot appropriate the trust's corpus for purposes other than those defined in the ERA. As a fiduciary, the Commonwealth must "measur[e] its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law." *Robinson Twp*., 83 A.3d at 956 (quoting 1970 Pa. Legislative Journal-House at 2273).

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." *PEDF II*, 161 A.3d at 932. A Commonwealth agency, including the PUC, cannot give any beneficiaries "due regard" without considering in advance the impact of its permitting decisions on those beneficiaries.

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

As the Supreme Court made clear in *PEDF V*, trustees have a duty to consider both present and future generations at the same time. 255 A.3d at 310. Thus, the trustee cannot be "shortsighted" and must instead "*consider* an incredibly long timeline." *Id*. (emphasis added) (quoting *Robinson Twp.*, 83 A.3d at 959). The duty to consider a long timeline necessarily requires advance consideration of impacts of agency decisions.

B. A pre-decision environmental evaluation is necessary to protect the rights and resources secured by the ERA.

An agency complies with its ERA obligations by conducting a pre-decisional environmental review. First, by requiring Commonwealth entities to consider protected resources and values in advance, the ERA ensures that the trustees understand the likely effect of their decisions and gives them the opportunity to be more protective.

Second, pre-decision environmental evaluation reduces the likelihood of adverse environmental impacts that may violate the constitution. During the application or planning process, the identification of potential impacts gives the agency, the applicant, and interested citizens and municipalities the opportunity to determine ways to prevent or reduce them.

Third, a pre-decision evaluation creates a record that permits a reviewing court to assess whether the decision-making body even considered these impacts. This record, of course, makes it easier for a reviewing tribunal to decide whether the

Commonwealth complied with its constitutional duties. A constitutionally sound environmental review is not merely an exercise in generating information, however. The information generated by the review forms the basis of the Commonwealth's determination whether the proposed action unreasonably impairs environmental rights or degrades, diminishes, or depletes the public natural resources. *See PEDF II*, 161 A.3d at 931-932. When an agency lacks enough information to make such a determination, its decision to take action in the face of this uncertainty is constitutionally suspect.

C. Narrow View of Environmental Analysis Reverts to Payne v Kassab and Must Be Rejected

The Commonwealth Court remanded this matter to the PUC for a "constitutionally sound environmental impact review." *Twp. of Marple*, 294 A.3d at 975. To conduct such a review, the agency must obtain and consider all information relevant to a proposed action's environmental impacts. To pass constitutional muster, this review must be holistic, must include reasonably foreseeable consequences of the action, and should take into account, where applicable, the determinations of other Commonwealth agencies and entities.

PECO Gas essentially asks the agency to revert to the overruled *Payne v. Kassab* framework for analyzing the ERA. That ignores Pennsylvania's ERA precedent and should be rejected. *See* 312 A.2d 86, 94 (Pa. Cmwlth. 1973) (generally limiting the court's ERA analysis to whether there was "compliance with all

applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources"). The *Payne* framework treated statutes and regulations as a substitute for, rather than subject to, Article I, Section 27. PECO Gas's contentions at the remand hearing in this matter asks for exactly that: "PECO believes that a constitutionally sound environmental review requires the Commission to identify the determinations of agencies with primary jurisdiction that are relevant to the siting of the buildings and to ensure that all necessary permits and approvals have been obtained." (Tr. 1844:16-21). The Supreme Court explicitly overruled this framework in *PEDF II*, and neither *Payne,* its progeny, or its reasoning can be relied upon. *PEDF II*, 161 A.3d at 930 ("[W]e reject the [*Payne*] test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.").

A constitutionally sound environmental review ensures that when the Commonwealth takes action, it is not unconstitutionally infringing upon the rights identified in the ERA. The agency must look to the applicable statute as well as to its trustee obligations under the ERA.

II. A constitutionally sound environmental impact review must be based on the text of the ERA and use current best practices to ensure protection of environmental rights and to meet constitutional obligations.

In order for an agency's environmental impact review to be constitutionally sound, it cannot just merely look at the immediate impacts to resources from the

requested activity. Instead, to comply with the trustee's duties of prudence, loyalty, and impartiality, and to ensure that its actions do not infringe on environmental rights, the agency must look at environmental impacts that are not only immediately apparent or disclosed by the applicant but also those that are reasonably foreseeable.

This scope of the environmental review is naturally set by the terms of the ERA. Environmental effects that implicate the Constitution include those that affect the right to clean air, pure water, and the natural, scenic, historic and esthetic values of the environment, as well as those that impact public natural resources. *See, e.g.*, *PEDF II*, 161 A.3d at 931 (discussing legislative history demonstrating intent to discourage courts from limiting the scope of natural resources covered by the ERA). Because, as explained above, the ERA sets forth a duty to maintain and conserve the trust corpus for present and future generations, the agency must look not to only the immediate impacts of the decision but those that flow into the future. An agency's public trust duties extend simultaneously to present and future generations. As a result, an agency may not act, nor remain inactive, where environmental harm would fall disproportionately upon future generations, because that would favor current beneficiaries over those too young to participate in the political system or those yet to be born. *See PEDF V*, 255 A.3d at 310 ("The explicit inclusion as simultaneous beneficiaries of the future generations of Pennsylvanians creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to

‘the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.’” (quoting *Robinson Twp.*, 83 A.3d at 959 n.46)).

The text of the ERA provides a foundation for the environmental review requirement, and makes clear both the purpose of the information-gathering and the way in which the information must be used. In the absence of a statutory, regulatory, or policy-based framework for the environmental review process**,** Commonwealth agencies and entities such as the PUC must look to current best practices.

A. Common elements of modern environmental review processes provide a pathway to constitutional compliance.

There are various methodologies that Commonwealth agencies could look to as models to determine the reasonably foreseeable consequences of an activity and therefore define the parameters of the required environmental review. Among these, certain core elements appear in most environmental reviews that would satisfy constitutional requirements of the ERA. These include (1) a clear definition of the proposed action, (2) determination of the scope of the environmental review, (3) an alternatives analysis and consideration of mitigation, (4) consideration of direct, indirect, and cumulative environmental effects, and (5) measuring the environmental effects.

i. Defining the proposed action.

One of the most crucial elements of an environmental review is defining the proposed action. *See, e.g.*, 40 C.F.R. § 1502.63; Mont. Admin. R. 4.2.320(1). In other words—what exactly is the applicant proposing? A definition that is too narrow will obfuscate the environmental effects of a decision, whereas a definition that is too broad will become administratively and conceptually burdensome. When deciding whether to approve an applicant's proposal, the Commonwealth agency must ensure that the proposal is not "segmented" or "piecemealed"—that the proposal is a good-faith description of the *entirety* of a project or development.

Segmentation or piecemealing is the process by which an applicant breaks down a much larger project into smaller pieces and submits those smaller pieces for review, so that the small pieces appear to have limited environmental impacts. Piecemealing deprives a reviewing agency of a comprehensive understanding of an applicant's true plan, and deprives the agency of the opportunity to prevent the environmental harm associated with the larger project, because it has already approved a portion of the harm. *See, e.g.*, 6 NYCRR §§ 617.2(ah), 617.3(g)(1). When a project is piecemealed, there is "danger that in considering related actions separately, a decision involving review of an earlier action may be practically determinative of a subsequent action . . . ." *Forman v. Trs. Of State Univ. Of N.Y.*, 757 N.Y.S.2d 180, 181–82 (N.Y. App. Div. 2003). *See also* 321 Mass. Code Regs.

10.66(2) ("In conducting permit review, the entirety of a proposed project, including likely future expansions, shall be considered, and not separate phases or segments thereof.")

ii. Determining the scope of environmental review.

Scoping is a process by which an agency receives input on a proposal's environmental effects. That input may come from other Commonwealth agencies with expertise or jurisdiction over parts of the proposal, as well as members of the public—in the ERA context, the public are the trust beneficiaries. While the burden remains on the applicant to provide environmental information, scoping ensures that the full universe of effects is accounted for. This open and public process is used in environmental reviews nationally and in other states.

For example, the National Environmental Policy Act ("NEPA") and its implementing regulations require that federal agencies undergo a scoping process to determine the contours of their environmental review. *See* 40 C.F.R. § 1501.9. Similarly, New York's State Environmental Quality Review Act ("SEQR") requires agencies to determine the issues to be addressed in environmental reviews through a multi-step scoping process. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.8. Other statutes have similar requirements for agencies in reviewing applications and proposed actions. *See, e.g.*, Mont. Admin. R. 4.2.318; Cal. Code Regs. tit. 14 § 15082.

iii. Evaluating the environmental baseline, alternatives, and mitigation measures.

In evaluating a proposal or application, Commonwealth agencies and entities should identify a range of alternatives to help drive an ultimately constitutionally sound decision. Identification of alternatives, including the baseline "no-action" alternative, allows the agency to consider different means of constitutional compliance. For example, a proposal to site a polluting facility in an overburdened environmental justice community may be unconstitutional because it violates the environmental rights of those community members, but an alternative sited elsewhere in the Commonwealth would not be unconstitutional. Or a certain pollution control technology proposed by an applicant may not be stringent enough to protect the public natural resources, and an alternative technology would be.

Significantly, an evaluation of alternative versions of a project—as well as an evaluation of baseline conditions without the project—both prevents a violation of rights and fosters prudent management of the public natural resources. An alternatives assessment is also a key part of other state and federal environmental reviews, and often requires consideration of mitigation. NEPA and its implementing regulations require federal agencies to consider a reasonable range of alternatives. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b). The NEPA alternatives assessment must include a "no action alternative" and include "appropriate mitigation measures." 40 C.F.R. § 1502.14. Similarly, New York's SEQR and Montana's

Environmental Policy Act ("MEPA") require both an alternatives assessment and consideration of mitigation measures. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(b)(5); Mont. Admin. R. 4.2.320(5), (6).

iv. Considering direct, indirect, and cumulative effects.

Because the duties of prudence and impartiality require the Commonwealth to consider reasonably foreseeable environmental effects of its actions, an acting agency must consider effects beyond those that will immediately manifest as a result of the action. Effects that occur at a later date, even a much later date, or effects that are felt in a location far away from the proposed action are still reasonably foreseeable. As stated above, the Commonwealth is required to consider an incredibly long timeline in order to treat the beneficiaries of the trust equitably. Equitable treatment of beneficiaries, i.e. impartiality, also requires the identification of impacts felt in areas outside the immediate vicinity of an action.

It is also reasonably foreseeable that the direct and indirect environmental effects of an action will be experienced by an individual or a resource cumulatively, in combination with other impacts. Because the ERA focuses on individual rights and the preservation of the public natural resources, environmental effects cannot be considered in a theoretical sense, or in a vacuum. From the perspective of an individual living, working, or recreating in a polluted area, or from the perspective

of a public natural resource currently at risk from degradation, the harm inflicted by a project need not be great to result in a constitutional violation.

Existing environmental review frameworks require the consideration of indirect and cumulative impacts. Under NEPA regulations, federal agencies must consider cumulative impacts as well as reasonably foreseeable indirect impacts. 40 C.F.R. § 1508.7; *id. at*. §§ 1508.8, 1508.9. Montana's MEPA requires environmental assessments to include an analysis of cumulative and secondary impacts on both the physical environment *and* human population. Mont. Admin. R. 4.2.316(3)(d–e); *see also id*. at 4.2.320(4)(c). New York's SEQR requires agencies to consider cumulative impacts in environmental reviews and look at indirect impacts in determining whether an action is significant. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(b)(5)(iii)(a) ; *id.* at § 617.7(c)(2).

v. Measuring the environmental impacts.

A fundamental aspect of existing environmental review standards is the measurement of environmental impacts associated with the project. Whether this measurement is described as significance, intensity, or degree, the purpose of engaging in the analysis is to determine whether an impact crosses the threshold of unconstitutional harm, and to determine whether a proposed action is a prudent or reasonable use of the public natural resources. NEPA requires federal agencies to assess the environmental impacts of the project and alternatives, and the federal

government has clarified that this includes climate impacts. 40 C.F.R. § 1502.16; National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change ("NEPA Guidelines"), 88 Fed. Reg. 1,197 (Jan. 9, 2023) (NEPA reviews should "quantify proposed actions' GHG emissions, place GHG emissions in appropriate context and disclose relevant GHG emissions and relevant climate impacts."). Similarly, New York's SEQR requires both an evaluation of potential significant adverse environmental impacts and measures to avoid or reduce "an action's impacts on climate change." N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(b)(5)(iii)(i).

B. The ERA requires the Commission understand and holistically account for the impacts of the entire Project as a whole, and not only the station that is a sub part of that project.

Where, as here, the record establishes that the station is part of a larger project to increase gas delivery capacity, the PUC must consider this information both in defining the action and in considering its direct, indirect, and cumulative effects.[5] A definition of the action that is too narrow could result in piecemealing of a larger

[5] PECO St 1-RD D Oliver Remand Direct Testimony at 2–3 ("The Reliability Project includes (1) upgrading the capacity of PECO's existing West Conshohocken liquified natural gas ("LNG") facility in Montgomery County; (2) installing 11.5 miles of high-pressure gas main to deliver gas from the West Conshohocken facility to the Township, in Delaware County; and (3) installing the Station to reduce the pressure of the gas delivered from Montgomery County to feed into a trunk line at the intersection of Lawrence Avenue and Sproul Road in the Township for delivery to customers in Delaware County."

project, or unconstitutionally foreclose the consideration of the authorization's reasonably foreseeable environmental effects. Even if the action is appropriately defined, a curtailed view of subsequent actions in the causal chain could also result in a constitutionally inadequate analysis of environmental impacts. The PUC should consider other agency determinations on environmental issues as part of its ERA trustee duties.

As discussed above, the PUC must require that applicants provide complete, fulsome information upon which the PUC can conduct a holistic analysis of the application and its impacts. As part of this information, the PUC may require applicants to provide relevant environmental assessments or determinations completed by other agencies, if they are available. The Commonwealth Court noted that in proceedings of this nature, the Commission is "obligated" to consider "the environmental impacts of placing [a building] at [a] proposed location," and may defer to environmental determinations made by other agencies if they have primary regulatory jurisdiction. *Twp. of Marple*, 294 A.3d at 973–74 (citing *Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986)).

As the exclusive regulatory authority over public utility facilities, and in this case, buildings, the Commission must be prepared to conduct its own analysis. *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252, 256 (Pa. 1972) ("This Court has consistently held…that the Public Utility Commission has exclusive

regulatory jurisdiction over the implementation of public utility facilities.”). If another agency with primary regulatory jurisdiction had made an environmental determination, it may have been appropriate for the PUC to rely upon it. However, this is only appropriate when that agency both has primary regulatory jurisdiction, and its environmental assessment is itself constitutionally sound. The Commission—or any other agency—cannot rely on clearly inadequate assessments simply because they exist. The trustee duties require that the Commission review and ensure that information it relies upon is fulsome. And indeed, in the case at bar, nothing in the record or in the legal process indicates any role for the Department of Environmental Protection or any Commonwealth agency or entity other than the Commission. Moreover, if Marple Township is deprived of its ability to review and control the project because of the Commission’s Section 619 determination, then no holistic environmental review will be conducted at the local level either. The Commission must therefore conduct its own holistic environmental analysis.

C. The ERA requires that the Commission consider the climate impacts of its decision.

Importantly, the ERA has a substantive mandate. The ERA requires agency trustees to not only collect information about impacts on environmental rights and public natural resources but also to protect those rights and conserve and maintain those resources through both its own actions and the actions it authorizes private actors to undertake.

The PUC must consider the impacts of authorizing the Expansion Project on the people's rights to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment—all of which are impacted by climate change. Greenlighting activities that result in greenhouse gas ("GHG") emissions cumulatively contributes to climate change, a phenomenon that is increasingly disturbing each of the rights enumerated in the first clause of the ERA.

The second and third clauses of the ERA also require the PUC to address climate impacts. In the instant case, acting with prudence requires that the Commission consider the implications of climate change on the management of the trust corpus. Prudence requires that a trustee exercise "reasonable care, skill, and caution." The Commission's primary duty as ERA trustee is to "conserve and maintain" the corpus of the public trust. Pa. Const. art. I, § 27; *see also Estate of Pew*, 655 A.2d 521, 542 (Pa. 1994) ("The primary duty of a trustee is the preservation of the assets of the trust and the safety of the trust principal.") (citing *In re Flagg's Estate*, 73 A.2d 411, 416 (Pa. 1950)).

The record establishes that there is a causal link between greenhouse gas emissions from fossil fuels and global climate change. Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 4-6 ("Najjar Direct"). The record further establishes that climate change and its poses a grave threat not only to current and future Pennsylvanians, but to the form and function of the natural resources of

the Commonwealth. *Id.* at 6-12. These impacts include damages to Pennsylvania's plants and wildlife, increased precipitation and flooding, and the movement northward of the salt line in the Delaware River. *Id.* An ordinary, reasonable, and cautious person who knows that certain actions will lead to a meaningful loss of the corpus of a trust should not disregard this knowledge. Failure to acknowledge and consider these impacts would constitute a breach of the Commission's fiduciary duty.

It should be noted that the duty of prudence here does not mean that every application for a fossil-fuel related project the Commission considers must be rejected. The Commission must balance a number of factors in its decisionmaking. Moreover, not every fossil-fuel related project will be related to a significant expansion. The Commission may, in the course of its determinations and regulatory scope, ultimately reach a conclusion that a given project is permissible. *See Robinson Twp.*, 83 A.3d at 980 ("[W]e do not quarrel with the fact that competing constitutional commands may exist, that sustainable development may require some degradation of the corpus of the trust, and that the distribution of valuable resources may mean that reasonable distinctions are appropriate."). The key point remains—that to act with prudence here, the Commission must give due consideration to the causes and effects of climate change, and its impact on the public trust.

The duty of impartiality also requires the PUC to consider the rights of future generations on equal footing with the rights of current generations. *See PEDF V*, 255 A.3d at 309–10. The scientific consensus is clear that future generations will experience more cataclysmic results of today's and tomorrow's fossil fuel combustion. IPCC, *Sections. In: Climate Change 2023: Synthesis Report*, *Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H. Lee & J. Romero eds. 2023). The ERA's explicit guarantee of rights to "generations yet to come" means that the lag time between climate pollution today and its effects tomorrow must have no bearing on the PUC's consideration of these effects. The *Robinson Township* court noted that the ERA was drafted with the fresh knowledge that "Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance." *Robinson Twp.,* 83 A.3d at 963. As a trustee, the Commission must execute its duties impartially, which means it cannot favor the interests of one group of beneficiaries over another. *Id*. at 959.

Another impact associated with the approval of natural gas infrastructure is the reasonably foreseeable cumulative impact of carbon (and methane) lock-in. The concept of lock-in means "the tendency for fossil fuel infrastructure to persist and

create new path dependencies that could extend its use and lock out renewable resources." *See* Melissa Powers, *Natural Gas Lock-in*, 69 U. Kan. L. Rev. 889, 891 (2021). Especially where the PUC is considering natural gas infrastructure, which may serve several purposes and thus increase path dependency in multiple sectors, the environmental effects of lock-in must be acknowledged and factored into the PUC's determination whether the proposed building is "reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619.

The PECO Gas Expansion Project is intended to expand the use of fossil fuels in PECO Gas's service area for decades. Just this Wednesday, nearly 200 nations across the globe agreed at a climate conference to a pact calling for "[t]ransitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade . . . ." United Nations Framework Convention on Global Climate Change, *First Global Stocktake* (December 13, 2023) (https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf). Future generations, as beneficiaries of the constitutional trust, are entitled to equal access to public natural resources, including the atmosphere and a stable climate capable of supporting the public natural resources. *PEDF V*, 255 A.3d at 310. "Dealing impartially with all beneficiaries means that the trustee must treat all equitably in light of the purposes of the trust." *Id.* at 311 (quoting *Robinson Twp.*, 83 A.3d at 959). Because the purpose of the trust is "the conservation and maintenance of

Pennsylvania's public natural resources . . . in furtherance of the people's specifically enumerated rights," *PEDF V*, 255 A.3d at 311–12 (citing and quoting *PEDF II*, 161 A.3d at 934–35), Commonwealth agencies and entities must consider whether their actions today will deprive future generations of their constitutional rights in the future, and make decisions that impact trust resources accordingly.

D. The PUC must consider environmental justice and the distribution of burdens as part of its ERA trustee duties.

Pennsylvania courts have made it clear that ERA trustees must do more than merely identify an action's environmental impacts. Trustees must also consider how the environmental impacts affect the environmental rights of the people and how those impacts affect the distribution of Pennsylvania's public natural resources among beneficiaries.

By examining the current and ongoing environmental burdens borne by a community prior to making a decision that will increase those burdens, the PUC has an opportunity to avoid infringing upon the individual environmental rights of the community members. "Meaningful informed decision-making includes an understanding of the burdens a community already bears, and whether the new or cumulative impacts of proposed government action will exacerbate an existing constitutional infringement or increase burdens to a level that results in infringement." Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, 36 Nat. Res. & Envt. 2

(2021). The duty to understand the existing ability of a community to enjoy its environmental rights is a corollary to the prohibition on infringing upon those rights.

As an ERA trustee, the PUC is subject to fiduciary duties of loyalty and impartiality that require the PUC to consider the impact their decisions will have on trust beneficiaries. The duty of loyalty requires the PUC to manage the trust corpus "so as to give all the beneficiaries due regard for their respective interests in light of the purposes of the trust." *PEDF II*, 161 A.3d at 932. The duty of impartiality "implicates questions of access to and distribution of public natural resources," such as clean air and water. *Robinson Twp*., 83 A.3d at 959. This "means that the trustee must treat all equitably in light of the purposes of the trust." *Id.* Decisions under which "some properties and communities will carry much heavier environmental and habitability burdens than others" violate the trustee's obligation to act for the benefit of "all the people." *Id.* at 1007.

Although the ERA grants environmental rights to "the people" and despite the fact that ERA trustees must act for the benefit of "all the people," environmental justice communities experience a disproportionate burden of environmental harms. The Commonwealth has repeatedly recognized this. For example, Governor Wolf's Executive Order 2021-07 declared that "historically and currently, low-income communities and communities of color bear a disproportionate share of adverse climate and environmental health impacts with accompanying adverse health

impacts." Environmental Justice, Exec. Order 2021-07, Commw. of Pa. Governor's Off. (Oct. 28, 2021). Countless books, studies, and articles have also documented the widespread environmental injustices that communities of color and low-income communities experience. *See, e.g.*, DORCETA E. TAYLOR, TOXIC COMMUNITIES (2014), Robert J. Brulee and David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REV. PUBL HEALTH 103 (Apr. 2006).

Because the duty of impartiality prohibits trustees from imposing greater environmental burdens on some communities than others, ERA trustees must consider cumulative impacts on the surrounding communities. In assessing whether or not decisions create disproportionate burdens, the PUC must look at the existing environmental burdens a community experiences. If a decision would further burden a community that already experiences a disproportionate amount of pollution—or if the decision itself would cause a community to experience a disproportionate burden—the decision likely violates the ERA.

Thus, a constitutionally sound review under the ERA is a site-specific endeavor that requires consideration of the burdened community. Trustee decisions must "reasonably account for environmental features of the affected locale . . . if it is to pass constitutional muster." *Robinson Twp.*, 83 A.3d at 953; *Frederick v. Allegheny Twp. Zoning Hrg. Bd.*, 196 A.3d 677, 694–95 (Pa. Cmwlth. 2018). And

local environmental features include whether there is a disproportionate share of environmental impacts making it an environmental justice community. Projects that might be appropriate under the ERA in some locations may not be constitutionally sound in areas that "carry much heavier environmental and habitability burdens than others." *Robinson Twp.*, 83 A.3d at 1007.

III. A constitutionally-sound environmental impact review must be followed by a substantive determination that complies with both the ERA and Section 619.

Section 619 of the Municipalities Planning Code exempts from local zoning requirements buildings "used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619. Accordingly, the 619 inquiry in tandem with a constitutionally-sound environmental review requires the PUC to answer the question of whether, despite the reasonably foreseeable environmental effects of a decision in favor of PECO Gas, the siting of the building is reasonably necessary for the convenience or welfare of the public. Importantly, a lack of information about the project's environmental impact prevents the PUC from reaching a constitutionally-sound conclusion. *See Marple Twp.*, 294 A.3d at 974 ("[A] Section 619 proceeding is constitutionally inadequate unless the Commission completes an *appropriately thorough*

environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting." (emphasis added)).

The scope of a section 619 inquiry, properly viewed through the lens of the ERA, is not narrowly restricted to consideration only of the site itself, but must include consideration of the site in the context of the surrounding environment and resources. "[W]hen government acts, the action must, on balance, reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster." *Robinson Twp.*, 83 A.3d at 953; *Frederick v. Allegheny Twp. Zoning Hrg. Bd.*, 196 A.3d 677, 694–95 (Pa. Cmwlth. 2018. Thus, the Commission's decision-making must be tailored to the specific environmental rights and public natural resources that would be affected by the action.

The Environmental Hearing Board's decision in *New Hanover Township v. Dep't. of. Env't Prot.* provides guidance here. 2020 EHB 124 (April 24, 2020), *aff'd*, *Gibraltar Rock Inc. v. Dep't. of. Env't Prot.*, 286 A.3d 713 (Pa. 2022)). In *New Hanover Twp.*, the EHB sustained an appeal of a noncoal mining permit renewal and an NPDES permit issued by DEP for a proposed quarry sited adjacent to both residential buildings and a hazardous site containing contaminants dangerous to human and environmental health in the soil and groundwater. Quarry operations would influence and potentially accelerate pre-existing flow of contaminated

groundwater towards the quarry and thus towards the residences and their wells. *Id.* at 32–33.

After hearing expert testimony and reviewing the record, the EHB concluded that DEP had failed to "give . . . any serious thought" to how the hazardous site cleanup activity and the proposed quarry interacted, in violation of its ERA trustee duties. *Id.* at 71. In addition, the EHB concluded the Department's grant of the noncoal permit was premised "from the very beginning" by "unduly, if not exclusively" focusing on whether the quarry would pollute surface waters, and failed to integrate an analysis of groundwater pollution. *Id*. at 47.

The ERA plays a gap-filling function when compliance with statutes and regulations are insufficient to protect against a constitutional violation or when government decision making is fragmented among different programs or agencies. The Commission, like DEP, makes decisions under the authorization of statutes and their attendant regulations. As in *New Hanover Township*, applicants in a Section 619 proceeding are required to provide certain limited information about the environmental impacts of their proposed project. And indeed, these statutory and regulatory requirements provide the agencies with much of the information they need. However, the information required by a statute may not alone be sufficient for the agency to holistically analyze the environmental impacts.

Because the obligation to consider impacts on rights and resources is constitutional in nature, however, it exists independent of these statutory and regulatory requirements, and cannot be limited by them. While a permit applicant such as PECO Gas is required by statute and regulation to provide some information, these requirements do not absolve the Commonwealth of its responsibility under the ERA to ensure it has considered—and that it understands—all necessary information prior to making a decision. In *New Hanover Township*, by not considering the site of the quarry in relation to the surrounding area and environment, the EHB wrote that the "Department has authorized a life-size experiment in the field with real world consequences with virtually no understanding of the risks involved or how those risks will be managed." *Id.* at 64. Here, the Commission must similarly understand the Expansion Station in relation to the surrounding area, environment, and in context of PECO Gas's whole project as but one piece.

Granting an application without due consideration violates the Commonwealth's fiduciary trustee duties. Issuance of the permit in *New Hanover Township*:

> exhibits partiality to one party, Gibraltar, at the as yet unknown expense of other interested parties . . . 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.

Id. at 72.[6] By accepting the risk of increased contamination for the benefit of Gibraltar's operations, the Department burdened the public and future generations with a risk that was not fully appreciated.[7] The ERA prohibits such a result. Business development and opportunities cannot occur at the expense of public trust beneficiaries now and in the future.

The ERA does not inherently prohibit all actions that have documented negative environmental impacts. However, the substantive requirement of the ERA does require that the wider environmental effects be considered in an agency's ultimate decision. In some cases, this may mean that some projects ultimately must be denied, even if they ostensibly comply with regulatory requirements. While on its face, this may seem like a radical result or infringement on property rights, it is not.

The existence of zoning ordinances, and the Section 619 exemption, is itself a recognition that property rights may be limited to specific uses. *In re Realen Valley*

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[6] Language referring to the financial interests of potentially responsible parties in the context of beneficiary interests has been omitted due to Amici's reservations about whether these interests are protected by the ERA.

[7] The EHB wrote: "In performing its permit review, the Department acknowledged the risk of allowing a quarry to pump groundwater next to an active HSCA site with contaminated groundwater and continuing sources of contamination. The Department ultimately determined, however, that the risk was tolerable based upon several findings and assumptions. The record shows that virtually all of those findings and assumptions were wrong. Therefore, the permits cannot remain in place, at least until the risk is better understood and perhaps more manageable." EHB Op. at 78.

Forge Greenes Associates, 838 A.2d 718, 728 (Pa. 2003) ("A property owner is obliged to utilize his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm.") A zoning ordinance must balance public interests, including public health, environmental, and esthetic interests of the community with the rights of private property owners. A township's zoning ordinance is thus generally presumed constitutionally valid, although it may be challenged. *See C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 150–51 (Pa. 2002). The ERA therefore does not lead to a fundamentally unfamiliar result, in which some uses are deemed inappropriate for certain sites.

The law has long recognized that a private property owner does not have unfettered rights to develop their land without regard to the effect on neighboring property or the environment. *Anderson v. City of Philadelphia*, 112 A.2d 92 (Pa. 1955). Furthermore, the Commonwealth lacks the power to authorize activity that infringes upon environmental rights or degrades, diminishes, or depletes public natural resources. *See* Pa. Const. art. I § 25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.")

CONCLUSION

For the reasons set forth herein, amici curiae respectfully request that the PUC conduct a constitutionally sound environmental review that includes the elements and issues described above, find that the information contained in PECO Gas's application is insufficient to support their application, and to therefore DENY the application.

Respectfully submitted,

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