

IN THE SUPREME COURT OF PENNSYLVANIA

No. 111 MAP 2023

BOWFIN KEYCON HOLDINGS, LLC, et. al,
Appellants,

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD,
Appellees.

BRIEF OF *AMICUS CURIAE*
CHESAPEAKE BAY FOUNDATION, INC.
IN SUPPORT OF THE APPELLEES

Appeal from the final Order of the Commonwealth Court of Pennsylvania entered November 1, 2023 under No. 247 M.D. 2022, Granting in part Applications for Summary Relief filed by Bowfin KeyCon Holdings, LLC, et al., and Granting in part and Dismissing in part Cross-applications for Summary Relief filed by the Pennsylvania Department of the Environment and Pennsylvania Environmental Quality Board

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Chesapeake Bay Foundation, Inc. (“CBF”) is a 501(c)(3) nonprofit organization whose mission is to “Save the Bay” and keep it saved. Through a combination of environmental education, restoration, litigation, and advocacy, CBF aims to protect and restore the Chesapeake Bay watershed and ensure a safe and healthy environment for all those who live, work, and recreate within its bounds. CBF has approximately 200,000 total members and e-subscribers, including nearly 18,000 in Pennsylvania. CBF maintains offices in Annapolis and Easton, Maryland; Richmond and Virginia Beach, Virginia; and Harrisburg, Pennsylvania. CBF members enjoy swimming, boating, kayaking, sailing, fishing, crabbing, bird watching, and other aesthetic and recreational pursuits in the waters and tributaries of the Chesapeake Bay, including the multitude of rivers and streams in the Commonwealth. Indeed, Pennsylvania is the keystone to our work.

Amicus focuses this brief on the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution (“ERA”) and urges this Court to reverse the Commonwealth Court decision and find the proceeds received by the Pennsylvania Department of Environmental Protection (“DEP”) from RGGI auctions under the regulatory package referred to as the “RGGI Regulation” and found at 25 Pa. Code §§ 145.301 – 145.409, are lawful fees, consistent with Pennsylvania jurisprudence and the state constitution. Amicus has a specific

interest in restoring and maintaining water quality in Pennsylvania's rivers and streams, and thus, 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. In compliance with Pa. R.A.P. 531(b)(2), no other person or entity other than amicus or its counsel paid for or authored this brief.

STATEMENT OF THE ISSUES ADDRESSED BY AMICUS CURIAE

Did the Commonwealth Court commit an error of law or abuse of discretion in holding that the RGGI Regulation enabling Pennsylvania to participate in the Regional Greenhouse Gas Initiative is a tax and not a fee?

Answered in the affirmative.

INTRODUCTION

The Chesapeake Bay is the nation's largest estuary, spanning 64,000 square miles and six states. As a result, there are a myriad of factors impacting both environmental and public health in the region. Climate change is already harming water quality, wildlife habitat, and human health and safety throughout the Bay watershed, making it harder for the Commonwealth to achieve its Chesapeake Bay restoration goals.¹ More frequent and severe storms increase stormwater runoff and

¹ Chesapeake Bay Program, *Climate Change*, <https://www.chesapeakebay.net/issues/threats-to-the-bay/climate-change>.

nutrient and sediment loads to Pennsylvania’s rivers and streams, and ultimately the Chesapeake Bay; rising temperatures lead to warmer water with less capacity to hold dissolved oxygen; changes in salinity threaten habitat for oysters and aquatic life; and rising sea levels threaten to drown thousands of acres of environmentally critical wetlands.²

In addition to the greenhouse gases fueling climate change, other harmful pollutants from power plants, like nitrogen oxides (“NOx”), sulfur dioxide, and particulate matter, also threaten environmental and human health in the region.³ In the Bay watershed, NOx pollution is of particular concern, with approximately one-third of the Chesapeake Bay’s total yearly nitrogen load contributed by atmospheric deposition.⁴ Accordingly, CBF’s advocacy to reduce pollution from fossil-fuel fired power plants has included actively supporting the Regional Greenhouse Gas Initiative.

The Regional Greenhouse Gas Initiative (“RGGI”) is a coordinated effort between several Northeastern states to cap and reduce carbon pollution from the

² Chesapeake Bay Foundation, *The Issues: Climate Change*, <https://www.cbf.org/issues/climate-change/>.

³ Chesapeake Bay Foundation, *The Issues: Air Pollution*, <https://www.cbf.org/issues/air-pollution/index.html>.

⁴ U.S. Environmental Protection Agency, Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment, at 4-33 (Dec. 29, 2010), *available at* <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document> (hereinafter “Bay TMDL”).

private sector. As a program, RGGI has been an effective tool in combatting both the drivers and impacts of climate change. Since its inception in 2009, the efforts of RGGI states have translated to a 50% reduction in carbon dioxide emissions in the region and has raised close to \$7 billion that is invested in local communities. These results, combined with the potential for successful replication, have resulted in the steady adoption of the RGGI framework throughout the Northeast.⁵

Appellees Department of the Environment and Environmental Quality Board properly enacted the RGGI Regulation as a part of their duties under the federal Clean Air Act and the Pennsylvania Air Pollution Control Act, and consistent with their duties as trustees of the public trust identified in Article I, Section 27 of Pennsylvania’s Constitution (the “Environmental Rights Amendment” or “ERA”), which acknowledges unequivocally that access to clean air, water, and a healthy environment is a critical resource for humanity. PA. CONST. art I, § 27. Like any regulated industry that has an impact on our environment, fossil-fuel fired EGU’s do not have a right to pollute. They derive an economic benefit from the use of public resources such as coal and natural gas, as well as using a public resource to dispose of the by-products of the manufacturing process; namely, our air and

⁵ The Regional Greenhouse Gas Initiative, *About the Regional Greenhouse Gas Initiative*, (Jan. 2024) https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf.

water. They are also subject to limitations on emissions under federal and state law and regulations through a permitting process. The carbon dioxide allowance auction proceeds which benefit the public trust are properly understood as a fee, not a tax.

This Court should reverse the Commonwealth Court's decision finding that the RGGI Regulation is an invalid tax and declaring it void, and should find that it constitutes a fee, consistent with the ERA and the laws and regulations protecting clean air in the Commonwealth.

ARGUMENT

I. Regulation of Greenhouse Gases is a Critical Component of Protecting Pennsylvania's Environmental Health and Natural Resources.

The RGGI Regulation comports with the Pennsylvania Constitution by facilitating the Commonwealth's residents' fundamental right to clean air and pure water. Namely, "[t]he 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. See also, *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017). Promulgating this sort of regulatory package is exactly how the Commonwealth acts as a trustee in accordance with the Constitution. Keeping

the people's interests in mind and acting with prudence and loyalty by proposing and approving regulations that reduce greenhouse gases will help to conserve and maintain Pennsylvania's public resources for generations yet to come as required by the state Constitution.

According to the United States Energy Information Administration, Pennsylvania generates the fifth most carbon dioxide emissions from fossil-fuel fired electric generating units (EGUs) in the country.⁶ Carbon dioxide emissions are a major greenhouse gas that is a catalyst for local, regional, and global climate change-related impacts. The numerous current and projected deleterious impacts to the health and well-being of Pennsylvania's economy, citizens, and environment are well documented. Of core concern to CBF's mission is the projected increases in heavy precipitation. Between 2000 and 2020 the state experienced an increase in annual precipitation of approximately 4.6 inches compared to the 1971–2000 baseline period. By the end of the century, total annual precipitation is projected to increase 12 percent from baseline.⁷

Unless climate change impacts are arrested, along with the implementation of new and retrofitted stormwater management practices and water infrastructure,

⁶ U.S. Energy Information Administration. *State carbon dioxide emissions data*. (May 20, 2020) U.S. Energy Information Administration (EIA). <https://www.eia.gov/environment/emissions/state/>.

⁷ Pennsylvania Department of Environmental Protection. (2021). *Pennsylvania Climate Action Plan 2021*. Revised July 28, 2021

the impact of this precipitation will very likely further stress Pennsylvania's rivers and streams with increased nutrient and pollutant-laden runoff, streambed and bank erosion, and incidences of combined sewer overflows, to cite just a few of the impacts. Furthermore, these impacts will make it even more challenging for Pennsylvania to meet its obligations to help restore the Chesapeake Bay. Recently the Chesapeake Bay Program Water Quality Goal Implementation Team (WQGIT) projected that due to climate change related impacts, by 2025 Pennsylvania's pollution loads to the Chesapeake Bay will increase by 1.8 million pounds of nitrogen and 95,000 pounds of phosphorus annually. By 2035, preliminary estimates suggest these loads could double. As a result, the WQGIT stated that the impacts of climate change on the Bay as “...*a significant and increasing concern.*”⁸ However, according to a 2014 peer reviewed study commissioned by CBF, Pennsylvania successfully implementing the Chesapeake Bay Total Maximum Daily Load and state Watershed Implementation Plans will have a significant, positive benefit for Pennsylvania's economy. Once fully implemented, and the natural benefits (life-supporting processes such as water and air purification and flood protection, and life-enhancing assets such as beautiful places to recreate and live) fully realized, the economic value of these benefits would

⁸ Martin J., & Dunne E. (2020, December 17). *Requesting Final Partnership Decisions on 2025 Climate Change Impacts* [PDF]. Chesapeake Bay Program. https://www.chesapeakebay.net/channel_files/41853/climatechangefinaldecisions_psc.

increase by \$6.2 billion annually, from \$32.6 to \$38.8 billion, in the Commonwealth.⁹

The implementation of the RGGI Regulation advances the objectives of the ERA as it provides resources to conserve the natural environment for the residents of the Commonwealth. Specifically, the RGGI Regulation auction proceeds could be used to provide funding for practices with co-benefits that will simultaneously sequester atmospheric carbon dioxide and improve water quality, such as agricultural systems to enhance soil health, and riparian and upland tree plantings in rural, suburban, and urban landscapes. These projects are all within the scope of the authorized disbursements from the Clean Air Fund. 25 Pa. Code § 143.1(b)(6).

As detailed below, soil health practices and tree plantings are widely recognized as powerful tools in sequestering atmospheric carbon dioxide. They are also critical towards restoring the over 10,200 miles of sediment-impaired and roughly 2,600 miles of nutrient-impaired streams in the state and meeting the majority of Pennsylvania's pollutant load reductions committed to in its Phase III

⁹ Phillips, S., & McGee, B. (2014). *The Economic Benefits of Cleaning Up the Chesapeake--A Valuation of the Natural Benefits Gained by Implementing the Chesapeake Bay Clean Water Blueprint*. Chesapeake Bay Foundation. <https://www.cbf.org/document-library/cbf-reports/the-economic-benefits-of-cleaning-up-the-chesapeake.pdf>.

Watershed Implementation Plan.¹⁰ Namely, the plan includes the implementation of various conservation practices on approximately 2,775,000 acres of cropland, 495,000 acres of pasture, 5,050 acres of tree and shrub establishment, and 85,650 acres of riparian forest buffers in the Chesapeake Bay watershed in Pennsylvania that could sequester approximately 1.2 metric tons of carbon dioxide per year.

Pennsylvania's Phase III Watershed Implementation Plan relies on the approximately 33,500 farms, spanning almost three million acres of farmland in the Chesapeake Bay Watershed, adopting many practices to reduce sediment loss from erosion and nutrient loss from runoff on approximately 40 percent of this farmland. These same practices are widely recognized for their ability to sequester carbon and reduce greenhouse gas emissions. Regenerative agricultural practices keep soil and nutrients on the land and out of our rivers and streams with no-till cultivation, biodiversity, perennial crops, minimal soil disturbance, livestock grazing healthy forages, and soil vegetative coverage and living root systems throughout the year.

These practices also help sequester large amounts of carbon and reduce greenhouse gas emissions, while helping farms to mitigate the problems resulting from climate change with increased resilience to extreme weather events. The

¹⁰ Pennsylvania Department of Environmental Protection, (2020). *2020 Pennsylvania Integrated Water Quality Monitoring and Assessment Report*. https://www.depgis.state.pa.us/2020_Integrated_Report/.

Rodale Institute estimates that global adoption of regenerative practices could sequester more than 100 percent of current anthropogenic emissions of carbon dioxide, and that stable soil carbon can rapidly draw down atmospheric carbon dioxide.¹¹ Soils constitute the largest terrestrial organic carbon pool, which is three times the amount of carbon dioxide currently in the atmosphere and 240 times the current annual fossil fuel emissions. Thus, even slight increases in soil carbon storage represent a substantial carbon sink potential. Because soil carbon sequestration is a strategy that may be applied at a large scale, the French government proposed to increase soil carbon concentration in a substantial portion of agricultural soils globally, by 0.4 percent per year, in conjunction with the Conference of the Parties to the U.N. Framework Convention on Climate Change (UNFCCC) negotiations in December 2015.¹² Trees are also the answer.

It is estimated that forests in the United States store roughly 14 percent of all annual carbon dioxide emissions emitted nationally.¹³ They do this via a complex interrelationship that includes the active sequestering of carbon into the woody

¹¹ Moyer, J., Smith, A., Rui, Y., Hayden, J. 2020. Regenerative agriculture and the soil carbon solution. Rodale Institute. https://rodaleinstitute.org/wp-content/uploads/Rodale-Soil-Carbon-White-Paper_v11-compressed.pdf.

¹² Paustian, K., Lehmann, J., Ogle, S., Reay, D., Robertson, G., and Smith, P. 2016. “Climate-smart soils.” *Nature*. 7 April 2016: 49-57.

¹³ Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: Climate Change Impacts in the United States: The Third National Climate Assessment. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2.

material of trees via photosynthesis and even the root structure and organic soil matrix as part of the forest floor as part of the forest carbon cycle.¹⁴ Although various methodologies exist, utilizing an approach by the U.S. Forest Service suggests that the acreage proposed by Pennsylvania in its Phase III Watershed Implementation Plan of new forested buffers, woods, and tree canopy could sequester roughly 28,000,000 metric tons CO₂e (carbon dioxide equivalent) over the life of the roughly 17 million trees to be planted to meet Pennsylvania's Chesapeake Bay obligations.¹⁵ Planting trees provides co-benefits for the public natural resources of the Commonwealth.

Trees play a vital role in ameliorating a large array of air pollutants to the benefit of human health and the environment. In the atmosphere, NO_x is converted to nitric acid, which trees absorb through their pores, or stomata; thus, reducing the amount of low-level ozone formed.¹⁶ Trees also remove particulate matter from the atmosphere, particularly small particles which are a major health hazard in air

¹⁴ American Forests. (2019, October 3). Forests as carbon sinks. <https://www.americanforests.org/blog/forests-carbon-sinks/>.

¹⁵ Smith, J. E., Heath, L. S., Skog, K. E., & Birdsey, R. A. (2005). Methods for Calculating Forest Ecosystem and Harvested Carbon with Standard Estimates for Forest Types of the United States (General Technical Report NE-343). U.S. Department of Agriculture Forest Service. <https://www.fs.fed.us/ecosystemservices/pdf/estimates-forest-types.pdf>.

¹⁶ U.S. Environmental Protection Agency. (2015). *Nitrogen Dioxide Removed Annually by Tree Cover*. U.S. Environmental Protection Agency EnviroAtlas. <https://enviroatlas.epa.gov/enviroatlas/DataFactSheets/pdf/ESC/NitrogenDioxideremovedannuallybytreecover.pdf>.

pollution.¹⁷ Both contaminants are widely recognized as significant contributors to acute and chronic human health impacts.

Climate Central concludes that the current tree canopy in eight urban/suburban Pennsylvania communities ameliorates 1.3 billion pounds of air pollution a year.¹⁸ Nowak et al. (2013) concluded that trees and forests in the contiguous United States removed 38.4 billion pounds of air pollution in 2010 that resulted in \$6.8 billion in benefits to human health.¹⁹ By adding roughly 15 million new trees as called for in Pennsylvania's Phase III Watershed Implementation Plan, it is more than reasonable to conclude that air pollution will be reduced further and human health improved throughout much of the Commonwealth. Trees provide benefits beyond mitigating the effects of air pollution and climate change.

A 2005 literature review conducted by the U.S. Environmental Protection Agency (USEPA) concluded that based on the over 100 studies reviewed, nitrogen removal from overland surface flows and shallow subsurface groundwater discharges to streams reached peak capacity when the width of the forested buffer

¹⁷ U.S. Environmental Protection Agency. (2015). *Percent Particulate Matter (PM10) Removed Annually by Tree Cover*. U.S. Environmental Protection Agency EnviroAtlas. <https://enviroatlas.epa.gov/enviroatlas/DataFactSheets/pdf/ESC/PercentparticulatematterPM10removedannuallybytreecover.pdf>.

¹⁸ Climate Central. (2019, June 4). *The power of trees*. Climate Matters Media Library | Climate Matters. <https://medialibrary.climatecentral.org/resources/the-power-of-trees>.

¹⁹ Nowak, D. J., Hirabayashi, S., Bodine, A., & Greenfield, E. (2014). Tree and forest effects on air quality and human health in the United States. *Environmental Pollution*, 193, 119-129 <https://doi.org/10.1016/j.envpol.2014.05.028>.

exceeded 328 feet (100 meters). Seventy-five percent removal of nitrogen, however, was found at widths of approximately 92 feet (about 28 meters).²⁰ According to the same USEPA review, forested riparian buffers, when compared to riparian buffers of other vegetation, provided the most effective and consistent removal of nitrogen, whether it is from overland surface flows or shallow subsurface groundwater discharges to adjacent streams.

In addition to capturing and treating pollution from runoff, research by the Stroud Water Research Center on Pennsylvania streams has concluded that forested buffer systems, compared to grassed systems, provide enhanced *in situ* (in-stream) contaminant sequestration and degradation primarily due to increased biological activity. The researchers noted that increased nitrogen attenuation and pesticide degradation were particularly associated with forested stream buffers, with these streams attenuating 200 to 800% more than non-forested streams.²¹ The ability of forested buffers to enhance the in-stream processing of both nonpoint and point source pollutants reduces their impact on downstream rivers and estuaries.

²⁰ Chow, Leeanne. 2012. A literature review of riparian buffer widths for sediments, nutrients and large woody debris. University of British Columbia, Forestry Undergraduate Essays/Theses, 2011 winter session, FRST 497.

²¹ Sweeney, B, T.L. Bott, J. K. Jackson, L. A. Kaplan, J. D. Newbold, L. J. Standley, W. C. Hession, and R. J. Horwitz. 2004. Riparian deforestation, stream narrowing, and loss of stream ecosystem services. PNAS, September 2004; 101: 14132–14137.

Streamside forests also enhance habitat for fish and other aquatic organisms—a vital component for maintaining stream ecological health. Woody debris and decaying leaves add organic food and support biological abundance, diversity, and productivity in streams. In small upland streams, as much as 75 percent of the organic food base in a stream may be supplied by dissolved organic materials or detritus from the adjacent forest canopy.²² Benthic organisms feed on this material, forming the basis of the aquatic food chain, therefore, supporting ecologically important game species like Pennsylvania’s native brook trout.²³ The tree canopy created by a streamside buffer contributes to the health of the stream by maintaining cooler water temperatures and by providing healthier habitats for economically and environmentally important fish species, like brook trout and brown trout, and other important aquatic and game species.

Collectively, the economic contributions generated by outdoor recreational activities (e.g., fishing and hunting) in Pennsylvania annually account for almost \$17 billion in salaries and wages and over \$300 million in federal, state, and local

²² Welsch, D. J. 1991. Riparian Forest Buffers - Function for Protection and Enhancement of Water Resources. NA-PR-07-91. [Broomall, PA:] U.S. Dept. of Agriculture, Forest Service, Northern Area State & Private Forestry.

²³ Semlitsch, R., J. Russell Bodie. 2003. Biological Criteria for Buffer Zones around Wetlands and Riparian Habitats for Amphibians and Reptiles. *Conservation Biology*, Volume 17, Issue 5, pages 1219–1228, October 2003.

tax revenue.²⁴ Forested riparian buffers, by providing fundamental habitat and maintaining cool waters, play a significant role in supporting such economic activity. The warming of a stream reduces the oxygen carrying capacity of the waterway, harming stream life that is temperature sensitive. The enhanced habitat and cool water temperatures that forested buffers provide to streams establish the framework for sustainable, economically productive fisheries as well as a host of other aquatic species, many of which brook trout depend on. Meyer et al. (2005) noted that not only the presence but also the size of forested stream buffers has a profound impact on a stream's ability to support trout populations.²⁵ Researchers found that when forested buffer widths were reduced from 100 feet to 50 feet, stream temperatures increased 2.9°F to 4.2°F while fine sediments increased 11 percent. Although these changes may appear small, they resulted in an 81-88 percent reduction in young trout populations.

Forested buffers also reduce the costs of treating drinking water.²⁶

According to Penn State University, 56 percent of Pennsylvanians get their

²⁴ Southwick Associates. (2018). *The Power of Outdoor Recreation Spending in Pennsylvania: How hunting, fishing, and outdoor activities help support a healthy state economy*. Theodore Roosevelt Conservation Partnership. <https://www.trcp.org/wp-content/uploads/2018/12/TRCP-and-Southwick-PA-Economic-Analysis-12-6-18.pdf>.

²⁵ Meyer, J. M., et al. 2005. Implications of Changes in Riparian Buffer Protection for Georgia's Trout Streams. Institute of Ecology, The University of Georgia, Athens, GA.

²⁶ Pennsylvania Source Water Protection. Role of Forests and Drinking Water. http://www.sourcewaterpa.org/?page_id=3066.

drinking water from surface waters, including 43,000 miles of streams, 2,300 reservoirs, and 76 natural lakes.²⁷ Research has indicated that trees play a vital role in maintaining the quality of the water entering drinking water treatment plants and, therefore, reduce the costs of treatment. In fact, on average for every 10 percent decrease in forest cover in a watershed, treatment costs increase approximately 20 percent.²⁸ The U.S. EPA estimates that the treatment cost to source water protection ratio, which includes forest buffer preservation/restoration, on average, is 27:1. Thus, for every \$1 spent on source water protection, \$27 is saved in treatment costs. An analysis of the Gettysburg source water protection program yielded a ratio of 178:1.²⁹ Protecting forested watersheds is smart economics for water utilities.³⁰ So critical are trees to clean and healthy drinking water sources, that David Cassells, a World Bank forest specialist says, *“Protecting forests around water catchment areas is no longer a luxury but a*

²⁷ Penn State University. Pennsylvania Impact: Cleaner Water for Pennsylvania. Website: <http://paimpact.cas.psu.edu/agr9973.html>.

²⁸ Ernst, C., R. Gullick, K Nixon. .2004. Protecting the Source: Conserving Forests to Protect Drinking Water. American Water Works Association Optflow Vol. 30, No. 5, May 2004.

²⁹ Gartner, Todd & Mehan, G. & Mulligan, James & Roberson, Alan & Stangel, Peter & Qin, Yiyuan. (2014).

³⁰ Journal - American Water Works Association. 106. 54-64. 10.5942/jawwa.2014.106.0132.

necessity. When they are gone, the costs of providing clean and safe drinking water to urban areas will increase dramatically.”³¹

Forested riparian buffers and upland forest soils provide a significant stormwater function because they capture, absorb, and store amounts of rainfall up to 40 times greater than disturbed soils, like construction sites, and 15 times more than turf grass.³² Research has consistently concluded that because of these benefits, those projects which preserve and restore forest buffer systems often require less or smaller-sized stormwater infrastructure.³³ This fact is widely recognized, and many state and local stormwater management programs, including Maryland’s, allow for the “crediting” for the volume and rate of runoff from built areas as long as it is discharged by sheet flow to intact buffer systems. Tree plantings, as defined in the WIP3 and throughout the state, promise to further avoid the creation and enhance the mitigation of polluted stormwater runoff, particularly in urban and suburban communities. Collectively, Pennsylvania’s existing tree canopy in eight urbanized areas (Allentown, Altoona, Erie, Harrisburg,

³¹ Trust for Public Land and American Water Works Association. 2004. Protecting the Source: Land Conservation and the Future of America’s Drinking Water. San Francisco, CA.

³² Palone, R.S. and A.H. Todd (editors.) 1997. Chesapeake Bay riparian handbook: a guide for establishing and maintaining riparian forest buffers. USDA Forest Service. NA-TP-02-97. Radnor, PA.

³³ Miller, A.E. and A. Sutherland. 1999. Reducing the Impacts of Storm Water Runoff through Alternative Development Practices. Office of Public Service & Outreach, Institute of Ecology, University of Georgia, Athens, GA.

Philadelphia, Pittsburgh, State College, and Wilkes-Barre) is estimated to avoid creating 32.3 billion gallons of stormwater runoff a year, according to Climate Central, an independent nonprofit of scientists and communicators.³⁴ This natural capital represents an avoided expense and loss of property that is not borne by taxpayers.

II. The ERA Provides Additional Context For Properly Interpreting the RGGI Regulation as Imposing a Fee and Not a Tax.

This Court has explained that the mandate of the ERA “informs Pennsylvania’s elaborate body of environmental protection statutes and regulations.” *Clean Air Council et al. v. Dep’t of Env’t Prot. & Sunoco Pipeline*, 289 A.3d 928 (Pa. 2023). The ERA “mandates that the Commonwealth, as a trustee, conserve and maintain our public natural resources in furtherance of the people’s specifically enumerated rights.” *Pa. Env’t Def. Found. v. Commonwealth* (“*PEDF II*”), 161 A.3d 911, 934 (Pa. 2017) (internal quotation omitted). Here, because the RGGI Regulation is part of the body of environmental laws and regulations protecting Pennsylvania’s natural resources, the ERA framework must be applied to interpretation of the fees imposed. Application of the ERA demonstrates the absence of the revenue-raising characteristic of a tax in the issue at bar, and further

³⁴ *Runoff avoided by trees*. (2019, October 23). Climate Central: A Science & News Organization. <https://www.climatecentral.org/gallery/maps/runoff-avoided-by-trees-2019#>.

shows why the RGGI Regulation must be a fee. DEP is unquestionably a trustee under the ERA. *See Robinson Twp.v. Commonwealth*, 161 A.3d 901 at 931 (Pa. 2013), n.23 (explaining that “all agencies and entities of the Commonwealth government, both statewide and local” are trustees). It has a duty as trustee to “refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources [including surface and groundwater], 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.” *Robinson Twp.*, 83 A.3d at 957; *PEDF II*, 161 A.3d at 933.

The ERA provides critical context to the interpretation of the RGGI Regulation in the instant case. When evaluating whether a charge is a fee or a tax, Pennsylvania courts have long held that the critical distinction is whether the charge is intended to be a general revenue-producing measure, or if it is a regulatory measure intended to cover the cost of administering a regulatory scheme authorized under the police power of the government. *Pittsburgh Milk Co. v. Pittsburgh*, 62 A.2d 49 at 52 (Pa. 1948); *Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 303 A.2d 247 at 251 (Pa. 1972); *White v. Commonwealth*, 571 A.2d 9 at 11 (Pa. Cmmw. 1990). Such analysis must consider whether the funds raised are directed to the general funds of the government, or whether they should

be held separately and reinvested in furtherance of the regulation. *E.g., White, supra.*

This Court has explained that the ERA requires that where monies are derived from the diminution of trust assets, they must “remain in the trust and must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27.” *PEDF II*, 161 A.3d at 936. This framework helps illuminate the nature of the RGGI Regulation and demonstrates the lack of revenue-raising characteristics of a tax. DEP here imposed the fee consistent with its authority pursuant to the Air Pollution Control Act, 35. P.S. § 4004. Although the charge here does not come from a direct sale or lease of trust resources, as was the case in *PEDF II*, the charge is imposed because an entity burns fossil-fuel and emits greenhouse gases, resulting in the diminution of the public trust. Understood under the light of the ERA, it naturally follows that the funds raised by the RGGI Regulations must be used for purposes of the trust. And indeed, this is the case here: the Pennsylvania Code directs that the “proceeds of the auction will be used in the elimination of air pollution in accordance with the act and Chapter 143 (relating to disbursements from the Clean Air Fund) and for programmatic costs associated with the CO₂ Budget Trading Program.” 25 Pa. Code § 145.343(b). The RGGI Regulation is not, by its own terms, a general revenue measure. It is instead a charge associated with the diminution of trust

assets, which is set aside to fund programs specifically designed to restore that same asset.

CONCLUSION

For the reasons set forth herein, Amicus respectfully requests that this Court reverse the Commonwealth Court's decision finding that the RGGI Regulation auction proceeds are an impermissible tax. This Court should instead hold that the RGGI Regulation auction proceeds are a fee, consistent with the ERA and the laws and regulations protecting clean air and the public natural resources of the Commonwealth.

Respectfully submitted,

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Bay Foundation, Inc.*

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

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

CERTIFICATE OF COMPLIANCE

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

Dated: July 29, 2024

/s/ Paul W. Smail
Paul W. Smail

CERTIFICATE OF SERVICE

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

Dated: July 29, 2024

/s/ Paul W. Smail
Paul W. Smail