

other Pennsylvania residents. Respondent's finding that the Petition did not satisfy the Section 23.2 Criteria meant that the proposed regulation in the Petition did not advance to the EQB for consideration. Respondent's refusal to advance the Petition, despite the uncontested facts cited in the Petition, was contrary to law in that it is based on an interpretation that is inconsistent with statutory and constitutional duties, and was arbitrary and capricious. Petitioner seeks injunctive and declaratory relief to require Respondent to submit the Petition to the EQB so that a regulation to protect Petitioner and the citizens of Pennsylvania by taking the actions sought in the Petition can be issued.

II. JURISDICTION AND VENUE

1. This Court has original jurisdiction pursuant to 42 Pa.C.S.A. § 761 and § 763.
2. Petitioner, Ashley Funk, has standing to bring this Petition.
3. Venue is proper in this Court as this Petition seeks review of an action by an agency of the Commonwealth.
4. Petitioner need not exhaust administrative remedies in this matter. While litigants are generally required to exhaust administrative remedies before seeking judicial review in this Court, there are exceptions to that rule. One exception is where the constitutionality of a statutory scheme or its validity is challenged. *Empire Sanitary Landfill v. Department of Environmental Protection*, 684 A.2d 1047, 1054 (Pa. 1996). Because this Petition concerns the constitutionality of a statutory scheme, Petitioner does not need to exhaust administrative remedies and is entitled to seek immediate judicial review. Nonetheless, to the extent that jurisdiction may be challenged, Petitioner is simultaneously filing a prophylactic appeal with the Environmental Hearing Board.
5. The Environmental Hearing Board has ruled that it does not have the authority to

adjudicate a facial or as applied challenge to the constitutionality of a state statute, but such a challenge has a right to immediate judicial review. *Babich v. Penn. Dept. of Env'tal. Protection*, 1994 EHB 1281, 1 (1994); *see also Goetz v. Penn. Dept. of Env'tal. Protection*, 1998 EHB 955, 4 (1998). Thus, Petitioner has filed this Petition.

III. PARTIES

6. Petitioner Ashley Funk is a resident of Mount Pleasant, in Southwestern Pennsylvania. Ashley, age 18, has been involved in protecting public trust resources since she was 14 years old. She has taken many actions in her community and in the state to protect natural resources and public health. Ashley initiated and implemented a recycling program and an anti-litter campaign in her town. Ashley has also worked to create awareness about the harms of fossil fuel development and the burning of fossil fuels in Pennsylvania and beyond.

7. Ashley grew up being impacted by the waste from fossil fuels. The land behind her house where she played as a child was a coal gob pile. The waters near her home, where she walks, does photography and recreates, are polluted from runoff from the coal industry. Waters around her community, on which she and others rely for drinking water, are also polluted from hydrofracturing operations. The air is polluted from coal-fired power plants burning fossil fuels. That air pollution adversely impacts Ashley as well as her friends and family.

8. Fossil fuel emissions, especially carbon dioxide, adversely impact Ashley because they are causing the surface temperature of earth to warm, which alters the climate system. Living in Southwestern Pennsylvania, the effects of climate change have impacted Ashley and her surrounding community. Extreme weather conditions have increasingly impacted Ashley and her community in the past few years. In the winters, Pennsylvania has experienced extreme blizzards. In recent summers, Ashley and her community have encountered record-high heat

waves as well as a series of storms with high winds and tornadoes. Ashley believes that if climate change continues to progress, areas across the United States, including her hometown, will be forced to handle worsening extreme weather conditions that threaten her and her family's wellbeing and property.

9. Without urgent action to reduce GHG emissions, Ashley will increasingly be harmed by adverse changes to the climate system on which she depends for her survival and wellbeing, as the planet continues to heat. In 2050, when some of the worst effects of climate change are projected to occur, Ashley will be 56.

10. Respondent, Pennsylvania Department of Environmental Protection, is the state administrative agency charged with protecting the state's environment and air quality under the Pennsylvania Air Pollution Control Act, the Pennsylvania Constitution, and Pennsylvania's Public Trust Doctrine. Defendant may be served service of process on its Secretary, Mr. Michael Krancer, at P.O. Box 2063, Harrisburg, PA 17105.

IV. FACTUAL AND LEGAL BACKGROUND

A) Overview of Evidence and Facts Supporting Petitioner's Proposed Rule As Submitted in the Administrative Proceeding Below

11. The Petition was filed on October 2, 2012. A copy of the Petition is attached hereto as Exhibit A.

12. The Petition was supported by comprehensive and credible evidence explaining the causes of global climate change, which confirm the worldwide consensus that global warming is a result of human activity, specifically the unabated burning of fossil fuels. These cited works included reports and studies from both international and federal agencies, as well as peer-reviewed papers from leading experts in their fields.

13. In addition, the Petition highlighted adverse effects that are likely to occur in Pennsylvania if GHG emissions are not reduced significantly. For example, it is expected that by the year 2050, southern and eastern Pennsylvania will receive as many as 50 days per year exceeding 90 degrees, which will pose significant risks to human health.

14. The Petition also cited studies and quoted experts indicating that climate change will likely cause flooding in Pennsylvania, compromise the quality of groundwater and surface waters, increase the occurrence of wildfire and pest outbreaks, decrease agricultural yields and livestock production, and adversely affect plant and wildlife species.

15. Finally, Petitioner submitted a paper by Dr. James Hansen, one of the world's top climatologists. This paper explains the harms of climate change, the primary and secondary effects of global warming, impacts to both the natural environment and human populations and cites to human activity as the cause of the imbalance of CO₂ in the atmosphere.

16. The best evidence indicates that 350 parts per million (ppm) (from 390 ppm currently) is the target level of atmospheric CO₂, by the end of the century, that is needed in order to stabilize the atmosphere and slow the effects of climate change. The Petitioner's proposed rule is consistent with best available science.

17. Petitioner identified the types of persons, businesses and organizations likely to be impacted by the proposed rule. Specifically, Petitioner stated that people across Pennsylvania would be positively impacted by reduced emissions and that businesses willing to transition to renewable energy sources would benefit from the proposed rule. Petitioner also stated that businesses in the fossil-fuel industry would be affected by a reduction in fossil fuel emissions.

18. In light of this overwhelming evidence, the Petition requested the EQB to adopt by January 1, 2013 a carbon dioxide reduction plan that would result in peak CO₂ emissions

from fossil fuels in Pennsylvania in 2013 and beginning in January 2013, reduced fossil fuel CO₂ emission by at least 6% a year. The Petition also requested the regulation include requirements for the Respondent to take the following actions: (1) publish annual progress reports on statewide greenhouse gas (GHG) emissions, which include an accounting and inventory for each source of GHG emissions within the state, verification by an independent third party to be made publicly available on Respondent's website no later than December 31 of each year beginning in 2013; (2) track progress toward meeting the emission reductions, including current and future policies and rules, and report on the progress annually; and (3) by December 31, 2013 and annually thereafter, report to the governor and appropriate House and Senate committees the total emissions of GHG for the preceding year for each major source sector. The annual reporting rules must allow development of a comprehensive inventory of GHG emissions for all sectors of the state economy. Last, where conflicts between the proposed rule and any other rule in effect exist, the more stringent rule, favoring full disclosure of emissions and protection of the atmosphere, would govern.

19. The Petition cited Respondent's legal authority to control air contaminants to protect against the adverse effects of climate changes, including global warming. PA CONST, ART I, § 20. In addition, Petitioner's Petition cited Respondent's legal and permanent duty to protect the environment, *and specifically the atmosphere*, under the Public Trust Doctrine, which is enshrined in Article I, section 27 of Pennsylvania's Constitution.

20. Respondent DEP did not dispute or contest any of the evidence or facts stated in the Petition, including the facts stated above. Nor did Respondent present any other facts or evidence in considering and denying Petitioner's Petition.

B) Pennsylvania DEP's Order Denying Petitioner's Petition

21. Petitioner properly petitioned Respondent pursuant to Pennsylvania State Constitution Article I, Section 20 and 25 Pa. Code 23.1. Under the process set forth in 25 Pa. Code Chapter 23, Petitions for Rulemaking are first reviewed by the DEP to determine if the Section 23.2 Criteria are met.

22. On November 16, 2012, exercising its power of review under 25 Pa. Code 23.2, Respondent wrote a written letter subsequently mailed to Appellant on November 20, 2012 in which Respondent found that the Petition did not meet two of the Section 23.2 Criteria ("the November 20, 2012 Decision"). A copy of the November 20, 2012 Decision is attached hereto as Exhibit B. Respondent's finding rested on the Petition's alleged failure to satisfy the Section 23.2 Criteria that (1) the proposed action can be taken by the EQB, and (2) the Petition was complete in that it contained all the information required by 25 Pa. Code 23.1.

23. In support of its claim that the Petition did not satisfy the Section 23.2 Criteria that the proposed action is one that can be taken by the EQB, Respondent first stated that, under Section 4.2(c) of Pennsylvania's Air Pollution Control Act, 35 P.S. §4004.2(c), the EQB is prohibited from adopting an ambient air quality standard that is more stringent than an air quality standard adopted by the U.S. Environmental Protection Agency (EPA). Because the U.S. EPA has not set ambient air quality standards for carbon dioxide, Respondent asserted that the EQB does not have authority to regulate carbon dioxide.

24. The second failure to satisfy the proposed action can be taken by the EQB criteria asserted by Respondent was that the Petition's proposed annual greenhouse gas inventory is beyond the action that the EQB can take because the proposed inventory program is contrary to

the program set forth in Section 4 of the Pennsylvania Climate Change Act, 71 P.S. §§ 1361.1-1361.8.

25. Last, Respondent asserted that the Petition failed to identify the “types of persons, businesses and organizations likely to be impacted by this proposal,” as required by 25 *Pa. Code* § 23.1(a)(4).

26. The November 20 Decision was mailed on November 20, 2012 and received on or about November 26, 2012.

V. CLAIM FOR RELIEF

27. DEP’s decision to refuse to forward the Petition to the EQB based on an alleged failure to satisfy the Section 23.2 Criteria that the petition request an action that can be taken by the EQB is contrary to law because:

(A) Contrary to the DEP’s assertion in the November 20, 2012 Decision, the Commonwealth possesses the authority to regulate greenhouse gases. Article I, Section 27 of the Pennsylvania Constitution, provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Article I, section 27 guarantees a right to a healthy environment and obligates Pennsylvania’s government with a trusteeship responsibility to protect the environment for future generations.

(B) The Commonwealth, through DEP, regulates air pollution and has the authority to limit pollution, including greenhouse gases, in seeking to “[p]rovide for the control and prevention of air pollution anywhere in this Commonwealth.” 25 Pa. Code §121.2.

(C) DEP defines air pollution as: “The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic, hazardous or radioactive substances, waste or other matter in a place, manner or concentration inimical or which may be inimical to public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.” 25 Pa. Code §121.1.

(D) The EQB has the legal authority to adopt regulations for the prevention, control, reduction and abatement of air pollution. 35 P.S. §4005(a)(1).

(E) Human-caused greenhouse gas emissions, especially carbon dioxide from fossil fuel emissions, are air pollutants in that they:

- (a) are causing global warming and climate change, which is inimical to public health, safety, and welfare;
- (b) are or may be injurious to human, plant, or animal life or property;
- (c) are harming water resources of the Commonwealth and the values of the Pennsylvania environment; and
- (d) threaten and substantially impair the public natural resources of Pennsylvania.

(F) The failure to address climate change means that the Commonwealth is failing to conserve public natural resources for future generations of Pennsylvanians as required by Article I, § 27 of the Pennsylvania Constitution.

(G) To the extent that, as DEP claims in the November 20 Response, current Pennsylvania statutes (specifically, 35 P.S. §4004.2), prevent the regulation of greenhouse gases sought by the Petition, those statutes are inconsistent Article I, § 27 of the Pennsylvania Constitution and are unconstitutional.

(H) The inventory and reporting provisions sought in the Petition are consistent with the Commonwealth's obligation as public trustee under article I, § 27 of the Pennsylvania Constitution. Preparing detailed accountings and inventories for a trust asset is a traditional tool used to and protect trust resources. DEP does not dispute that trust resources are being substantially impaired and are threatened with catastrophic damage from global warming and climate change. Article I, Section 27 affords the Commonwealth with authority to regulate greenhouse gas emissions. The DEP Response's position that Pennsylvania law prohibits EQB from requiring reporting and compiling inventory of greenhouse gases, is unconstitutional.

28. DEP's decision to refuse to forward the Petition to the EQB based on an alleged failure to identify the types of persons affected is arbitrary and capricious and should be reversed in that:

- (1) The Petition identified the types of parties who Petitioner believed would be affected by the proposed rule;
- (2) DEP did not contest the identification of affected parties nor provide any substantial or other evidence demonstrating that Petitioner's list of "types of affected parties" was overbroad, underinclusive, or otherwise insufficient or inaccurate.

VI. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that this Court: 1) reverse DEP's November 20, 2012 decision, 2) Order DEP to send the Petition to the EQB for consideration per the process in 25 Pa. Code Chapter, and3) grant all other relief in law or equity to which Petitioners may be entitled.

Dated: December 19, 2012

Respectfully Submitted,

ASHLEY FUNK, Petitioner

By: _____
Kenneth T. Kristl, P.A. Bar # 207825
James R. May, P.A. Bar # 64951
Claire Gargiulo, P.A. Bar # 311108
Environmental and Natural Resources Law Clinic
Widener School of Law
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2053
ktkristl@widener.edu

Counsel for Ashley Funk