Green Amendment Victories
How Green Amendments Are Recognizing & Protecting Environmental Rights

GREEN AMENDMENTS FOR THE GENERATIONS
Pure Water. Clean Air. Healthy Environment.

Pennsylvania, Montana, New York, are the only three states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate, inherent, indefeasible and inalienable rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in the states where they exist, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

Commonwealth v. Monsanto Co.

Commonwealth Court of Pennsylvania
Decided December 30, 2021
269 A.3d 623

Defendants in this case are companies named Solutia and Pharmacia who are the successors to the liability for their predecessor company Monsanto. Plaintiffs in the case included the Commonwealth of Pennsylvania and multiple state agencies, including the Pennsylvania Department of Environmental Protection (PADEP), the Pennsylvania Department of Conservation and Natural Resources (PADCNR), the Pennsylvania Fish and Boat Commission, and the Pennsylvania Game Commission. From 1929 to 1977 Monsanto manufactured, marketed, sold, and distributed approximately 99% of the PCBs (polychlorinated biphenyls) used in the United States.

PCBs are synthetic organic chemical compounds that are toxic and harmful to human health, animal health, and the environment. PCBs bio-accumulate and bio-magnify when in living tissue. As early as 1937, Monsanto acknowledged that PCBS "produce systemic toxic effects upon prolonged exposure." In the 1950s, a Monsanto medical director acknowledged that Aroclor (one of the trade names for PCBs) are toxic and advised that workers should not eat their lunch in Monsanto's PCB department. In 1979, the production and use (with limited exceptions) of PCBs was banned pursuant to the Toxic Substances Control Act, a federal law.

Plaintiffs alleged that Monsanto knew, or should have known, of the serious environmental hazards resulting from PCBs; that PCBs persisted in the environment; "that [PCBs] 'would inevitably volatilize and leach, leak, and escape their intended applications, contaminating runoff during naturally occurring storm and rain events and entering groundwater, waterways, waterbodies, and other waters, sediment, soils, and plants, as well as fish and other wildlife[;]' [ ] and 'that PCBs bio-accumulate and bio-magnify in animal tissue, including in fish tissue and human tissue, and . . . pose an increasingly hazardous threat to the health of the Commonwealth's residents,' [but] Monsanto nevertheless continued to market and sell its products containing PCBs." In addition, despite recognizing that there were no actions the company could meaningfully take to prevent its products from being used in a way that would avoid environmental contamination by the PCBs in its products, Monsanto developed and undertook strategies that would prolong the continued purchase and use of PCBs.

According to the Complaint:

- "[t]he ordinary and intended application of Monsanto's commercial and household PCB products . . . has resulted in the release of PCBs into the Commonwealth's air, waters, and soils, due principally to the chemical compound's well-known tendency to volatilize or redistribute itself across different environmental media."
- "PCBs entered the air, waters, sediments, and soils during their ordinary and prescribed uses."
- the state of Pennsylvania had invested millions in monitoring, removing, remediating, cleaning up, and otherwise working to address the PCB contamination, "but widespread contamination continues to extensively damage the Commonwealth's natural resources and poses current and future threats to human health and the well-being of the Commonwealth's environment and economy."
- Plaintiffs would continue to incur significant costs to address PCB contamination in the years to come.

To demonstrate its standing, the Plaintiffs argued that "as trustees of the Commonwealth's public natural resources [a status explicitly conferred by the Pennsylvania Green Amendment, Article 1 Section 27 of the state constitution], the Commonwealth, DEP, and DCNR have a duty to protect and preserve the Commonwealth's public natural resources, and to prevent and abate nuisances and hazards to the public health, safety, and welfare, and to the environment." The state also asserted the authority to pursue these claims pursuant to its police powers and "its inherent parens patriae authority" which allows it to pursue "remedy for an injury to its 'quasi-sovereign interest' in the physical and economic health and well-being of a substantial segment of its population."

The Plaintiffs' complaint asserted a variety of claims, including public nuisance, trespass, negligence, unjust enrichment, design defect, and failure to warn and instruct. The Defendant companies responded by challenging the Commonwealth's standing for all its claims, except its assertion of parens patriae for abatement of a public nuisance, arguing that "neither the Commonwealth nor its agencies have authority to bring this action under . . . common law theories or for tort damages as a function of its sovereign interest to protect the Commonwealth's citizens." The Defendants also argued that the Plaintiffs cannot pursue a claim for damages in its proprietary capacity and simultaneously invoke parens patriae standing for that claim.

With regards to standing as trustee for the Commonwealth, the court issued a precedent-setting opinion in deciding whether the Commonwealth and its agencies have trustee standing to bring a claim for damages pursuant to the Pennsylvania Green Amendment, Article I, Section 27. The court quickly referenced the Pennsylvania Green Amendment which reads:

> "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."

Arguing in favor of the court finding that the Commonwealth has trustee standing, the Plaintiffs asserted that they "'must be empowered to proceed with affirmative litigation, including prosecuting tort claims, to recover the damages to the trust's corpus so that they may be remedied.'" The court relied on the United States District Court for the District of Maryland—which relied on Supreme Court of the United States precedent—decision that held "Maryland's technical ownership of its waters gave it the legal right to sue on the public's behalf, stating that 'if the state is deemed to be the trustee of the waters, then, as trustee, the state must be empowered to bring suit to protect the corpus of the trust – i.e., the waters – for the beneficiaries of the trust – i.e., the public.'" The PA Commonwealth Court found the reasoning of the case persuasive, and thus, declared for the first time that the Commonwealth of Pennsylvania had trustee standing to sue for damages on the public's behalf to protect the corpus of the trust.

With regards to standing as trustee for the Commonwealth agencies, the court turned first to Pennsylvania precedent that established the "'public trustee duties were delegated concomitantly to all branches and level of government'" and that "'courts assessing the duties imposed upon executive branch departments and agencies by [the PA Green Amendment] must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act.'" Relying on both of those legal principles, and analyzing the duties imposed upon the Plaintiff agencies by various Pennsylvania statutes, the court held that PADEP, DCNR, FBC, and GC had trustee standing under [Article 1, Section 27, the PA Green Amendment] to sue on the public's behalf to protect the corpus of the trust. Further, the court declined to hold that the enforcement options provided for in the agencies' various enabling statutes precluded the agencies from pursuing common law actions. Instead, the court held that "[a]s legislatively created and appointed advocates for the express purpose of protecting the Commonwealth's natural resources and, broadly construing standing under [the PA Green Amendment], as we must, [] this Court concludes that [PA]DEP, DCNR, FBC, and GC have trustee standing to bring the instant action."

The court' decision in *Monsanto* is a landmark case determining that, by virtue of its trustee duties under the PA Green Amendment, the Commonwealth had standing to pursue claims for damages to the state's natural resources where the claim is related to its statutorily declared duties. This case affirms the Commonwealth's power to utilize the Green Amendment as a sword to litigate harm done by infringement of the rights, or degradation of the resources, delineated in the Pennsylvania Green Amendment.

Additional findings of importance:

With regards to parens patriae, the court explained: "This Court has held that '[t]he Commonwealth has parens patriae standing whenever it asserts quasi-sovereign interests, which are interests that the Commonwealth has in the well-being of its populace.'" The court held that the Plaintiffs did demonstrate the "quasi-sovereign interest in preserving its waters, soils, air, fish, wildlife, and the health and well-being of its citizens in the Complaint and, thus, has parens patriae standing to bring the instant action. The Court also determined that because the environmental regulatory agencies that were among the named plaintiffs in the case were empowered to protect the environment as the result of multiple state laws, that they too had legitimate quasi-sovereign government interests that are beyond those of a private citizen that that also entitles them to parens patriae status and may entitle them to a claim of damages.

With regards to the Commonwealth's ability to seek damages pursuant to parens patriae standing, the court explained: that there was no case law or legal argument that would "preclude [the] state, as trustee/parens patriae, from seeking damages for harm to its natural resources, or [that] limited its recovery to only those natural resources the state owns."

With regards to the Defendants objections to the Commonwealth's claims, the court explained: that the Commonwealth and agency plaintiffs sufficiently pled and demonstrated damages in order to overcome the defendants objections, and as such the plaintiffs could pursue their claims for damages resulting from harm to the natural resources of the state.