



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, infeasible 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.

Gibraltar Rock, Inc. v. Pa. Dep't of Env't Prot. Supreme Court of Pennsylvania December 21, 2022, Decided 286 A.3d 713

The Pennsylvania Department of Environmental Protection (PADEP) granted multiple permits to Gibraltar Rock, Inc. allowing it to quarry on a 241-acre property in New Hanover Township, PA. The required permits were originally issued in 2005 and were renewed several times thereafter. This legal action was in response to the issuance of a permit renewal for quarry operations. During litigation of the permits and zoning for the site, it was discovered that a site adjacent to the quarry was responsible for polluting groundwater with hazardous substances. Despite concerns that quarry activities by Gibraltar Rock could spread the groundwater contamination, PADEP did not investigate the contamination at the adjacent site. Instead, PADEP accepted assurances from Gibraltar Rock to the contrary and issued renewal of the permits.

New Hanover Township, joined by community groups (*Paradise Watchdogs* and *Ban the Quarry*), challenged the issuance of the permit renewals before the Pennsylvania Environmental Hearing Board (EHB). After a week-long hearing, the EHB determined PADEP improperly issued the permit renewals because Gibraltar Rock had not demonstrated its ability to comply with statutory and regulatory

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requirements, including that its operations “will not cause pollution to the waters of the Commonwealth.” Based on expert testimony provided during trial, the EHB found there was credible risk demonstrated to a reasonable degree of scientific certainty that pumping from the quarry operations would in fact intercept and spread the groundwater contamination found at the adjacent site. The EHB rescinded the permits.

In ordering rescission of the PADEP issued permits, the EHB “found that the Department did not uphold its constitutional duties as trustee of Pennsylvania’s public natural resources under Article I, Section 27 of the Pennsylvania Constitution because it did not ‘fully consider and understand the environmental effects of’ issuing the permit, and it ‘failed to act with prudence and impartiality as the trustee of Pennsylvania’s public natural resources by permitting Gibraltar’s quarry.’” The EHB also determined that PADEP erred in concluding that Gibraltar’s operations “could be reasonably accomplished in accordance with the law,” including the requirement that the application be “complete” because it “d[id] not describe how a discharge potentially containing hazardous substances w[ould] be treated.”

Pennsylvania’s Green Amendment
Article I, § 27 Natural resources and the Public Estate.

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.

Gibraltar Rock appealed the EHB decision to the Commonwealth Court challenging the EHB’s decision to rescind the permit, rather than remand to PADEP, asserting the decision was not supported by substantial evidence. The Commonwealth Court reversed the EHB’s order and remanded the case back to PADEP, ordering PADEP to direct Gibraltar Rock on what it must do to obtain the permits. Of legal significance, the Commonwealth Court did not address the claim that the EHB decision was not supported by substantive evidence. Rather, the Commonwealth Court based its decision on multiple unique legal theories, none of which were raised by Gibraltar Rock in its appeal documents. With regards to Article 1, Section 27, the Commonwealth Court found that rescinding the permit meant the quarry could not help with the remediation of the groundwater contamination which could result in greater harm to the environment, and thereby violated Article 1, Section 27.

Hanover Township and PADEP appealed the Commonwealth Court’s order reversing the EHB decision to the Supreme Court of Pennsylvania on several claims, including that the Commonwealth Court based its decision on arguments not raised in the appeal.

The Supreme Court agreed that the Commonwealth Court had erred in basing its decision on arguments that were not raised on appeal. The Supreme Court vacated and remanded to the Commonwealth Court to consider the issues raised in the appeal documents. Concerning the PA Green Amendment findings made by the Commonwealth Court, the Supreme Court determined “the Commonwealth Court exceeded its authority when it sua sponte addressed the two constitutional issues – i.e., that the ‘Board effected a taking ... without due process of law’ and that ‘the Board’s adjudication is not consonant’ with Article 1, Section 27. Because these issues were never preserved or raised on appeal, the Commonwealth Court should not have raised and considered them sua sponte.”

The Supreme Court vacated and remanded the case back to the Commonwealth Court.

Outcome of the Remand Before the Commonwealth Court (Decided May 8, 2024)
316 A.3d 668

On remand, the Commonwealth Court explained that the EHB reviews PADEP’s permitting decision de novo, or in other words, the EHB reviews all the evidence as if it was hearing the case for the first time. The Commonwealth Court also explained that the EHB has the authority to rescind a PADEP determination, including permitting decisions rendered by PADEP. The court determined that “[t]he Board's decision to rescind the permits, rather than remanding the matter to DEP for further review, did not lack the support of substantial evidence or constitute an arbitrary and unreasonable abuse of discretion contrary to law.”

The Court reviewed key findings of the EHB review, including that:

“Based on the extensive factual findings and applicable law, the Board concluded that the ‘spread of multiple hazardous contaminants in the groundwater that would result from [Gibraltar’s] quarry pumping constitutes presumptive evidence of potential pollution that cannot be permitted consistent with the Noncoal Act.’”

“[Gibraltar] has not shown that the quarry can be operated without disturbance to the prevailing hydrologic balance, without deleterious changes in groundwater quality, and without causing water pollution in violation of [the applicable regulations].”

And most notably that:

the EHB “found that DEP did not uphold its constitutional duties as trustee of Pennsylvania’s public natural resources under article I, section 27 of the Pennsylvania Constitution because it did not ‘fully consider and understand the environmental effects of’ issuing the permit, and it ‘failed to act with prudence and impartiality as the trustee of Pennsylvania's public natural resources by permitting [Gibraltar’s] quarry.’”

The Commonwealth Court upheld the EHB’s rescission of the permits because Gibraltar failed to demonstrate that the EHB’s decision was not supported by substantial evidence or that the EHB abused its discretion in deciding to rescind the permit.

Gibraltar petitioned the Supreme Court for allowance of appeal to challenge the Commonwealth Court’s decision upholding the EHB’s recession of the permits. The Supreme Court denied Gibraltar’s petition on January 7, 2025.