



## 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, inalienable 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.

### ***Peifer v. Colerain Twp. Zoning Hearing Bd.***

*Commonwealth Court of Pennsylvania*

*July 12, 2023, Decided*

*302 A.3d 811*

Dwayne A. Peifer applied for a special exception to operate an industrial duck farm qualifying as a concentrated animal feeding operation in the agricultural zoning district of Colerain Township. The property is enrolled in the Township's agricultural security area and must be permanently preserved as a farm due to a conservation easement.

The property at issue is 60 acres. The proposed facility would include a duck barn measuring 63 feet by 640 feet and could house up to 40,000 ducks at a time. The Zoning Hearing Board made the following findings of fact:

- Daily average water consumption of the ducks would be approximately 3,500 gallons, equal to the water consumption of approximately 9 single family homes;
- Baby ducks would be delivered by truck monthly;
- 4 tractor-trailers would transport ducks from the facility to processing every four weeks;
- Feed trucks would enter and exit the property;
- Deceased ducks would be "handled" via an industrial incinerator system;

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- Duck manure would be scraped and conveyed to an outside concrete manure storage structure measuring 105 feet in diameter and 16 feet deep with a capacity of approximately 971,600 gallons;
- The manure structure would be pumped out, and the resulting wet manure applied, twice a year to the property as fertilizer at a rate of approximately 4,000 gallons per acre; and
- A natural enzyme would be added to the manure storage structure.

The proposed duck farm is located “in close proximity” to the Chester Water Authority’s (Authority) Octoraro Reservoir that provides drinking water to the City of Chester, Southern Chester County and Western Delaware County. The Authority also owned property adjacent to the proposed duck farm.

The Authority submitted written comments outlining why the Zoning Hearing Board should deny Peifer’s application. The comment also requested that the Authority be recognized as a party to the proceeding. While the comment was accepted for the record, it was not read aloud during the hearing, nor did the Board act on the request for party status.

The Zoning Hearing Board denied Peifer’s application in September 2021. The Zoning Board was concerned with the proximity to neighboring residences; that the land sloped into nearby Gables Run which flows to Octoraro Reservoir; that odors would “substantially injure or detract from the use of neighboring properties and from the character of the neighborhood;” and that Peifer failed to prove that “neighboring properties would be safeguarded from stormwater runoff and pollution.”

Peifer appealed the Zoning Hearing Board’s denial to the trial court, and the Authority applied to intervene in the appeal. The trial court denied the Authority’s application for intervention finding that the Township and the Zoning Hearing Board “could adequately represent [the Authority’s] interests.” The Authority appealed the trial court denial for intervention to the Commonwealth Court. Peifer filed a motion challenging the Authority’s intervention.

### ***Procedural Analysis of the Right to Intervene***

The Commonwealth Court laid out 3 criteria necessary for Chester Water Authority to appeal the trial court’s denial of its application for intervention:

1. the denial of intervention must be collateral to and separate from the main cause of action;
2. the right to intervention is too important to be denied review; and
3. if review were to be postponed until a final judgement in the case, the claim would be irreparably lost.

#### **Regarding criteria 1:**

All agreed that criteria one was met. But Peifer claimed the Chester Water Authority could not meet criteria 2 and 3.

#### **Regarding criteria 2:**

The Commonwealth Court determined the second criteria had been met. In its discussion it made some very important observations regarding the Pennsylvania Green Amendment rights and obligations, as well as implications regarding property rights.

The Commonwealth Court observed that the Authority is both an adjacent landowner and the owner of the Octoraro Reservoir that will be directly affected by the outcome of the decision, as such the authority has established a “legally enforceable interest”.

In addition, the Commonwealth Court noted that the Authority’s appeal implicates the Pennsylvania Green Amendment which provides that all Pennsylvanians 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.”

The Commonwealth Court affirmed that the Pennsylvania Green Amendment “imposes fiduciary duties on the Commonwealth and all state, county and local agencies, including [the Authority], ‘to prevent and remedy the degradation, diminution, or depletion of our public natural resources.’”

Notably, Peifer had asserted that the Authority had not presented an interest that was too important to be denied review because the state had a comprehensive set of regulations to protect ground and surface water, and other environmental resources. The Commonwealth Court rejected this argument: “The fact that other agencies may also have a duty to protect the environment does not negate [the Authority’s] duty, let alone obviate its very specific interest in protecting the quality of drinking water in its own reservoir.”

The Commonwealth Court went on to say: “In addition, in ascertaining whether the property interests of landowners seeking to intervene were too important to be denied review, this Court observed: ‘Every person has the right to the natural, proper, and profitable use of his or her own land. Implicit then is the right to protect one’s property from harm, whether it be in the form of decreased valuation, insufficient water supply, excessive dust, noise, pollution, or some other cause.’”

### Regarding criteria 3:

In addressing the third criteria, the Commonwealth Court noted that the Authority’s “failure to secure intervenor status would not only prevent it from asserting its interests in the land use appeal in the trial court, but it would also cause it to lose its ability to file an appeal from that court’s final order if review is postponed until final judgment.”

As important, the Commonwealth Court noted that the Authority’s “claim would be irreparably lost because it would not have the same remedy available, prohibition of the proposed use, and would be relegated to post-contamination damages and clean-up remedies. The Commonwealth Court referenced legal precedent establishing that the Pennsylvania Green Amendment “‘permit[s] not only reactive but also anticipatory protection of the environment’ before natural resources are degraded, diminished, or depleted.”

The Commonwealth Court determined that the three criteria necessary for consideration of the motion to intervene had been achieved.

### ***Analysis of the Substantive Merits of the Right to Intervene***

The Commonwealth Court then proceeded to address the merits of the trial court’s denial of the Authority’s application for intervention.

While the trial court found that the Authority had demonstrated it had a legally enforceable and sufficient interest to support intervention, the trial court ultimately denied intervention because it found that the Authority's interests were adequately represented by other parties to the case, specifically the Zoning Hearing Board and the Township.

The Commonwealth Court explained that denying the right to intervene because the intervenor's interest is already adequately represented "requires not just that the intervenor's interest be shared by an existing party, but that the existing party adequately and effectively represent that interest throughout the entire course of the litigation." The Commonwealth Court went on to recognize that the Authority's "interests are distinct from, much broader than, and not fully aligned with the interests of the Township and the [Zoning Hearing Board]. [The] Authority provides water service in 33 municipalities across 3 counties, whereas the Township and the [Zoning Hearing Board] represent only 1 municipality. In addition, any runoff from the proposed duck farm would go into Octoraro Reservoir, which [the Authority] owns and uses to provide water service. Although the Township and the [Zoning Hearing Board] were concerned about the water, they also considered the odor from the proposed duck farm and character of the neighborhood. In addition, [the Authority] has greater expertise and resources regarding water quality issues than do the Township and the [Zoning Hearing Board], putting [the Authority] in a more effective position to litigate the critical safety issues at stake here. In other words, [the Authority] is not the average proposed intervenor."

Of particular note the Court went on to say: "Furthermore, it is not clear that the Township and the [Zoning Hearing Board] can adequately represent [the] Authority's interests in the land use appeal. [The] Authority is affirmatively asserting an interest in the land use appeal premised on the [constitutional Green Amendment, Article 1, Section 27] whereas the Township and the [Zoning Hearing Board] are not. While it is true that a municipality in passing a zoning ordinance is bound by the [PA Green Amendment] and must consider all of the attendant protected rights, [the] Authority's primary purpose is to ensure the quality of the water in the Octoraro Reservoir and provide adequate and safe drinking water. Consequently, even though all three entities must abide by the [PA Green Amendment], their respective decisions as to how to do so may take different forms and not manifest in the same way. In addition, [the] Authority's goal is to prevent the development of a duck farm altogether to protect the water supply whereas the others' interests are focused on defending the [Zoning Hearing Board]'s assessment and application of the criteria for a special exception to Peifer's current proposal. Their goals are not necessarily to prevent the use under all circumstances."

Accordingly, the Commonwealth Court "den[ie]d Peifer's application to quash [the Authority]'s appeal as interlocutory because [the Authority] met the criteria for application of the collateral order doctrine. In addition, we reverse the trial court's order denying [the Authority]'s application for leave to intervene because the Township and [Zoning Hearing Board] cannot adequately and effectively represent [the Authority]'s interest in the land use appeal."

This case reaffirms that each government agency and entity has a duty to fulfill its own constitutional obligations enumerated in the Green Amendment – it cannot evade these obligations by handing them off to another government agency or entity, nor can another government agency or entity take it from them.