



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.

Gene Yaw, Senator; Lisa Baker, Senator, et.al. v. Delaware River Basin Commission, Delaware Riverkeeper Network, Senator Steven Santarsiero, etc. al.

**Decided September 16, 2022
United States Court of Appeals for the Third Circuit**

In February of 2021, the Delaware River Basin Commission (DRBC), put in place a permanent ban on high volume hydraulic fracturing within the boundaries of the Delaware River watershed. The ban made permanent a moratorium on fracking that had been put in place a decade before. As characterized by the court, “The ban reflected the Commission’s determination that fracking ‘poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources’ of the Delaware River watershed.

In this case, the United States Court of Appeals for the Third Circuit affirmed a lower court decision dismissing a legal challenge to the DRBC fracking ban. The challenge to the ban was filed by Pennsylvania State Senators Gene Yaw and Lisa Baker, the Pennsylvania Senate Republican Caucus, and

Damascus Township, Dyberry Township, Wayne County, and Carbon County. Delaware Riverkeeper Network and Delaware Riverkeeper Maya van Rossum were granted intervenor status as were Pennsylvania Senators: Steve Santarsiero, Carloyn Comitta, Amanda Cappelletti, Maria Collett, Wayne Fontana, Art Haywood, Vince Hughes, John Kane, Tim Kearney, Katie Muth, John Sabatina, Nikil Saval, Judy Schwank, Sharif Street, Tina Tartaglione, and Anthony Williams, as well as both Bucks and Montgomery Counties.

The District Court had not reached the substantive merits of the legal arguments challenging the ban. Dismissal was granted because the challengers had failed to demonstrate they had the legal standing necessary to bring their claims. The U.S. Court of Appeals for the Third Circuit agreed and affirmed the lower court's dismissal.

The plaintiffs, who filed their original complaint on January 11, 2021, claimed that the frack ban "palpably and substantially diminished the legislative powers" of the two Republican senators and the Republican Caucus, prevented the municipalities from economically benefiting from fracking-related activities, and infringed upon the duty of the government plaintiffs to serve as trustees of Pennsylvania's natural resources under the state's Environmental Rights Amendment [ERA] – i.e. the Pennsylvania Green Amendment -- found in Article 1, Section 27 of the state constitution.

In the precedential opinion issued on September 16, 2022, the Third Circuit found that the two state republican legislators, the Pennsylvania State Republican Caucus, and the municipal challengers all lacked standing for failing to demonstrate injuries that meet constitutional muster. In addition, the judges determined that the fracking ban furthered the purposes of the natural resources trust created by Pennsylvania's Green Amendment found in Article 1 Section 27 because the ban was protecting the natural resources of the Commonwealth as mandated by the constitution.

The Third Circuit Appellate Court summarily rejecting each of the plaintiff's standing arguments as follows:

"In our view, the state senators and the Senate Republican Caucus lack standing because the legislative injuries they allege affect the state legislature as a whole, and under well-established Supreme Court caselaw, "individual members lack standing to assert the institutional interests of a legislature."

In other words, if there were to be a challenge based on the trustee obligations created by the state constitution, the legislature as a whole would have to be plaintiff. Legislators as individuals do not have the trustee obligation, it is the legislature that has the obligation. The court noted that in this case, while there were some legislators challenging the fracking ban, there were other legislators who had intervened in defense of the ban – thereby demonstrating the problem with characterizing each individual legislator as a trustee rather than the legislative body as a unit.

"The municipalities lack standing because the economic injuries they allege are "conjectural" and "hypothetical" rather than "actual and imminent."

With regards to the Municipal plaintiffs (note it was not individual municipal officials asserting a claim, it was the municipal board as a whole), while no party argued that they weren't trustees pursuant to Article 1 Section 27, they failed to identify economic injuries that were actual or imminent, and given multiple factors that determine whether gas can be successfully extracted,

they did not allege an injury that could be fairly traceable to the ban on fracking or that could be redressed by removal of the ban.

In addition, and to the extent the legislator and municipal plaintiffs tried to rely upon the Pennsylvania Green Amendment by asserting the ban on fracking impinged on their ability to fulfill their obligation as trustees of the natural resources of Pennsylvania with an obligation to conserve and maintain them for present and future generations of Pennsylvanians the court ruled:

“And none of the Plaintiffs-Appellants have standing as trustees of Pennsylvania’s public natural resources under the Environmental Rights Amendment to the Pennsylvania Constitution because the Commission’s ban on fracking has not cognizably harmed the [natural resources] trust.”

The court explained:

“Pennsylvania voters ratified the ERA in 1971 after decades of “virtually unrestrained exploitation” of the state’s natural resources led to “destructive and lasting consequences not only for the environment but also for the citizens’ quality of life.”

The first sentence of the ERA is a “prohibitory clause” that limits the state’s ability to infringe on citizens’ right to clean air, pure water, and the preservation of the environment. The second and third sentences create a public trust pursuant to which Pennsylvania’s “[public] natural resources are the corpus . . . , the Commonwealth is the trustee, and the people are the named beneficiaries.””

According to the decision, because the fracking ban was serving the goals and mandates of the environmental rights amendment to protect the State’s natural resources, the Plaintiffs had failed to explain or identify how the ban on fracking was preventing them from exercising their trustee obligations. As the Court explained:

“When the nature of the public trust created by the ERA is properly understood, it becomes clear that neither the trust nor its corpus is being concretely harmed by the [DRBC’s] decision to ban fracking in the Basin. To the contrary, the ban *promotes* the purposes of the trust and *protects* its corpus by preventing Pennsylvania’s natural gas reserves, part of the Commonwealth’s ‘public natural resources,’ from being depleted. Thus, even if Plaintiffs-Appellants were trustees of Pennsylvania’s public natural resources under the ERA, they have failed to show that the ban on fracking is causing them harm in that role, let alone the kind of concrete injury-in-fact required to give them standing in federal court.”

As a result, the appellate court affirmed dismissal based on lack of standing.

There is one other argument discussed in the case that is notable and worthy of discussion.

The Plaintiffs had asserted “that the ban on fracking harms the public trust created by the ERA by decreasing fracking revenues in Pennsylvania. The idea is that the corpus of the trust includes not only the state’s public natural resources, including its oil and gas reserves, but also ‘any funds derived from the

sale or lease of those resources.” Therefore, allege the Plaintiffs, “by reducing fracking revenues”, the ban “directly and substantially injured the Trust’s corpus.”

The Court flatly rejected this argument:

“As several environmental organizations explain in a joint amicus brief, however, this argument fundamentally misunderstands the ERA and would turn it ‘upside down’ if accepted. Plaintiffs-Appellants are arguing that the ERA, a state constitutional amendment intended to protect Pennsylvania’s natural resources from exploitation by placing them in a public trust, actually “*requires* the liquidation of public natural resources for cash—that this actually improves the public trust.” We disagree. The problem with this argument is that it ignores the explicit purpose of the ERA and mistakes the unique public trust it created for a run-of-the-mill financial trust in which the trustees have a duty to maximize profits. The Supreme Court of Pennsylvania has explained that the purpose of the public trust created by the ERA is not to make money; it is to “conserve and maintain” the state’s public natural resources. To promote this purpose, the ERA “imposes two basic duties on the Commonwealth as the trustee.” First, “the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of [Pennsylvania’s] public natural resources, whether these harms might result from direct state action or from the actions of private parties.” Second, “the Commonwealth must act affirmatively via legislative action to protect the environment.” Importantly, under the ERA, the Commonwealth is not a “merely proprietor” that “deals at arms’ length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes.” Instead, it is a “*fiduciary*, measuring its successes by the benefits it bestows upon all citizens in their utilization of natural resources under law.”

The court explains that while under existing case law, certain fracking proceeds secured by the state as the result of natural gas extraction “must remain in the trust and must be devoted to the conservation and maintenance of [Pennsylvania’s] public natural resources”, this “does not mean that trustees somehow have a duty to keep fracking in order to make money. To the contrary, the duty of loyalty requires trustees to ‘manage the corpus of the trust so as to accomplish the trust’s purposes,’ which here is the conservation and maintenance of Pennsylvania’s public natural resources.”