SUPREME COURT OF PENNSYLVANIA

Nos. 104 & 105 MAP 2014

ROBINSON TOWNSHIP, ET AL.
Designated Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Designated Appellees

Brief of Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Susquehanna Industrial Development Corporation, and Warren County Chamber of Business & Industry in Support of Designated Appellees

---

Appeal of the Pennsylvania Public Utility Commission & Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission and Cross-Appeal of the Township of Nockamixon, et al. from the Order of the Commonwealth Court Entered July 17, 2014 at Docket No. 284 MD 2012

OF COUNSEL:

Steven P. Lehotsky
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street NW
Washington, DC 20062-2000
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Robert L. Byer
Robert M. Palumbos
Andrew R. Sperl
Meredith E. Carpenter
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Susquehanna Industrial Development Corporation, and Warren County Chamber of Business & Industry

TABLE OF CONTENTS

Page

TABS:

A. *Fegley v. Lehigh County Board of Elections*
No. 2013-C-3436 (C.P. Lehigh Oct. 3, 2014)

B. Intervenor Delta Thermo Energy A, LLC's Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, *Fegley v. Lehigh County Board of Elections* (filed July 1, 2014)

C. *Gorsline v. Board of Supervisors of Fairfield Township*
No. 14-000130 (C.P. Lycoming Aug. 29, 2014)

D. Notice of Appeal, Delaware Riverkeeper Network v. Commonwealth (Pa. Envtl. Hearing Bd. filed Sept. 15, 2014) (No. 2014128)

E. Notice of Appeal, Delaware Riverkeeper Network v. Commonwealth (Pa. Envtl. Hearing Bd. filed Oct. 13, 2014) (No. 2014142)

F. Petition for a Writ of Certiorari, *Alec L. v. McCarthy*, 135 S. Ct. 774 (2014) (No. 14-405)

G. Brief of Climate Scientists as Amici Curiae Supporting Petitioners, *Alec L. v. McCarthy*, 135 S. Ct. 774 (No. 14-405)

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including Pennsylvania. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community. This is such a case.

The Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber") is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ more than 50% of Pennsylvania's private workforce. The Pennsylvania Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

The Susquehanna Industrial Development Corporation ("SIDCO") aims to advocate and promote economic growth throughout the Greater Susquehanna Valley by stimulating, influencing and facilitating new public and private investment and to undertake business ventures that may be beyond the capabilities of the private sector.

The Warren County Chamber of Business & Industry ("Warren County Chamber") is a multi-faceted organization serving businesses throughout Warren County and serving the county as the designated Lead Economic Development Agency.

SUMMARY OF ARGUMENT

The designated appellants invoke the plurality opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), to argue that the enactment of 58 Pa.C.S. § 3218.1 under Section 1 of Act 13 of 2012-13, P.L. 87, "demonstrates a breach by the General Assembly of its fiduciary obligations under Article I, Section 27" of the Pennsylvania Constitution.[1] Because that portion of former Chief Justice Castille's opinion did not represent the views of a majority of this Court, it is not binding precedent and is not controlling law on the proper interpretation or construction of Article I, Section 27 of the Pennsylvania Constitution, also known as the "Environmental Rights Amendment."

Nonetheless, the plurality opinion in *Robinson Township* is causing confusion and uncertainty for courts and litigants who are attempting to follow its guidance. That is because the *Robinson Township* plurality's expansive interpretation of Article I, Section 27 provides no practical limit to the Amendment's application. In addition, zealous advocates and activists have been using the plurality decision to "push the envelope" in diverse contexts

[1] Brief of Designated Appellants at 18 n.3.

that this Court probably did not contemplate. An affirmative statement by this Court that the plurality opinion in *Robinson Township* is not a controlling statement of the law of this Commonwealth is necessary to allay the flurry of confusion in the wake of *Robinson Township*.

ARGUMENT

I. The Plurality Opinion's Reasoning in *Robinson Township* on the Scope of the Government's Constitutional Obligations Under Article I, Section 27 of the Pennsylvania Constitution Is Not Binding Precedent

A. This Court's Plurality Opinions Are Not Binding Precedent

A plurality opinion "is without precedential authority, which means that no lower court is bound by its reasoning." *Cry, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 376 n.3 (Pa. 1994); *see also Commonwealth v. Brown*, 872 A.2d 1139, 1165 (Pa. 2005) (Castille, J., concurring). Recognition of this lack of precedential authority is critical, because the plurality opinion in *Robinson Township* directly contradicts decades of jurisprudence under Article I, Section 27.

The *Robinson Township* plurality interprets the Environmental Rights Amendment with exceptional breadth. The plurality concludes that Article I, Section 27 requires the government to "prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Robinson Township*, 83 A.3d at 957. Under that standard, every governmental action that reduces open space arguably is a violation of the Pennsylvania Constitution. The plurality opinion also held that individuals and associations as well as municipalities had standing to enforce of the Environmental Rights Amendment. *Id.* at 918-25.

As shown below, activists now regularly assert such a contention in opposition to routine zoning applications and other land development requests.

The *Robinson Township* plurality does not provide a workable standard. The plurality ignores that "[i]t is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment." *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973) (en banc) (quoting *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.,* 302 A.2d 886, 895 (Pa. Cmwlth. 1973)), *aff'd*, 361 A.2d 263 (Pa. 1976). In recognition of the near-impossible demands of Article I, Section 27's plain text, this Court affirmed the Commonwealth Court's en banc decision in *Payne*, which declined "to read Article I, Section 27 in absolute terms," and instead crafted a three-part test to evaluate whether government action complies with the Environmental Rights Amendment. *Id.* at 94. In affirming the Commonwealth Court, this Court approved of the balancing approach to Article I, Section 27, stating: "The new amendment speaks in no such absolute terms. . . . The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people." 361 A.2d at 273.

Following this Court's affirmance in *Payne*, the courts of this Commonwealth have consistently followed the *Payne* test. *See Pa. Envtl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015); *Energy Conservation Council of Pa. v. Pub. Util. Comm'n*, 25 A.3d 440, 447 (Pa. Cmwlth.

2011); *Blue Mountain Pres. Ass'n v. Twp. of Eldred*, 867 A.2d 692, 702-04 (Pa. Cmwlth. 2005); *Dep't of Envtl. Prot. v. Pub. Util. Comm'n*, 335 A.2d 860, 865 (Pa. Cmwlth. 1975), *aff'd*, 374 A.2d 693 (Pa. 1977) (per curiam). However, the *Robinson Township* plurality opinion has injected tremendous confusion as to whether the *Payne*'s balancing test still truly controls, or if it has been displaced or modified by the rigid, essentially anti-development approach embodied by the *Robinson Township* plurality. Most recently, in a case where plaintiffs claimed that the Commonwealth violated the Environmental Rights Amendment by leasing state land for oil and gas exploration and using the revenue from those leases to balance the state budget, the Commonwealth Court claimed to reaffirm the applicability of the *Payne* test and that it was not bound by the *Robinson Township* plurality opinion. *Pa. Envtl. Def. Found. v. Commonwealth,* 105 A.3d at 156 n.37.

However, in nearly the same breath that the Commonwealth Court claimed that it was not bound by *Robinson Township*, except "to the extent it is consistent with binding precedent from this Court and the Supreme Court," it also applied the plain language of Article I, Section 27 in reaching its decision, in accordance with the approach of the *Robinson Township* plurality. 2015 Pa. Commw. LEXIS 9, at *64-81. And it confusingly cited *Robinson Township* throughout its opinion. Until this Court affirmatively states that the *Robinson Township* plurality opinion is not the law of Pennsylvania, the confusion about what law is controlling will remain.

B. This Court Has Previously Corrected Inappropriate Reliance On Non-Precedential Decisions

This Court previously has directed that its non-precedential decisions be disregarded where those decisions have been invoked as if they were the law of Pennsylvania. For example, in *Mt. Lebanon v. County Board of Elections of the County of Allegheny*, 368 A.2d 648, 650-51 (Pa. 1977), this Court expressly disapproved of the plurality opinion in *Schultz v. Philadelphia*, 122 A.2d 279 (Pa. 1956), which had opined that courts could rule on the constitutionality of proposed amendments to the Philadelphia Home Rule Charter before their adoption. *Id.* at 650-51. The Court stated: "We believe the above-quoted language in *Schultz* . . . must be disregarded." *Id.* The Court disapproved of the statement in *Schultz* in part because it was a non-binding plurality expression, and "[t]he nondecisional nature of the opinion is [a] factor in deciding to disregard the statement." *Id.* at 651. *See also Pa. Gaming Control Bd. v. City Council*, 928 A.2d 1255 (Pa. 2007) (analyzing *Mt. Lebanon*'s disregard of *Schultz*).

Similarly, this Court declined to follow the plurality opinion in *Commonwealth v. Ceja*, 427 A.2d 631 (Pa. 1981), observing that it is "of no precedential value whatsoever—it merely announced the Court's result." *LeGare v. Commonwealth*, 444 A.2d 1151, 1154 n.3 (Pa. 1982). *See also Cry, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 376 n.3 (Pa. 1994) ("It is axiomatic that a plurality opinion of this court is without precedential authority.").

II. The *Robinson Township* Plurality's Statement on the Scope of Article I, Section 27 Has Created a Dangerously Confused Legal Landscape

A. The *Robinson Township* Plurality Opinion Is Causing Widespread Confusion Throughout the Commonwealth

Because there is no limiting principle to the *Robinson Township* plurality's approach to Article I, Section 27, its invocation is creating confusion throughout the Commonwealth. For example, in *Fegley v. Lehigh County Board of Elections*, No. 2013-C-3436 (C.P. Lehigh, Oct. 3, 2014), attached under Tab A, the Court of Common Pleas of Lehigh County faced an Article I, Section 27 claim raised by citizens who challenged the Board of Elections' refusal to place a Clean Air Ordinance on the ballot. The Board had determined that the changes proposed in the initiative would have violated the Pennsylvania Air Pollution Control Act, meaning that it could not validly be passed. *Id.* Based on the *Robinson Township* plurality, the plaintiffs asserted that the Board's failure to list the initiative violated its constitutional obligation under Article I, Section 27 to act for the public trust and allow the citizens to consider measures to improve the environment. *Id.* The intervenor-defendant turned this argument on the plaintiffs, however, and argued that, in fact, listing the initiative would have violated the *Robinson Township* plurality's interpretation of Article I, Section 27, as the government cannot abdicate its environmental responsibilities by placing environmental decision for a vote. Intervenor Delta Thermo Energy A, LLC's Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 6-7 (filed July 1, 2014), attached under Tab B. The court thus faced competing constitutional obligations under the

Robinson Township plurality opinion and ultimately found the intervenor-defendant's view of *Robinson Township* more convincing: "Plaintiffs have improperly relied upon *Robinson Township v. Commonwealth* . . . . *Robinson* makes it clear that the relief Plaintiffs seek would unconstitutionally deprive the Pennsylvania Department of Environmental Protection and the City of the ability to fulfill their duties as a trustee of the environmental resources of the Commonwealth, as required under Article I §27 of the PA Constitution." *Fegley*, No. 2013-C-3436.

On the municipal and agency level, "[l]egal challenges are flying" from citizens and activist organizations who oppose zoning ordinances that allow drilling activities in non-industrially zoned areas[2] and the issuance of permits

[2] Ellen M. Gilmer, "Topsy-turvy" Legal Landscape in Aftermath of Nixed Pa. Drilling Law, eenews.net (Nov. 25, 2014), http://www.eenews.net/stories/1060009504 (noting a challenge in Middlesex Township to stop an oil company from drilling near school buildings); Mary Grzebieniak, Pulaski Zoning Challenge Begins, New Castle News (Feb. 11, 2015), http://www.ncnewsonline.com/news/pulaski-zoning-challenge-begins/article_c4b58408-b229-11e4-bf40-571207015f49.html (discussing a constitutional challenge to Pulaski Township's zoning ordinance, which allows fracking activities in agricultural and residential zoning districts as a conditional use); David E. Hess, Range Resources Withdraws 3 Well Pad Permits In Washington County, PA Environment Digest (Feb. 3, 2015), http://paenvironmentdaily.blogspot.com/2015/02/range-resources-withdraws-3-well-pad.html (discussing a challenge to Mount Pleasanton Township's issuance of conditional use permits to locate well pads in a residential district, where citizens became involved "in order to exercise their constitutionally protected right to ensure their children will have clean air, land and water").

that allow drilling activities in those areas.[3] These landowners believe that *Robinson Township* is a "straightforward declaration" that drilling is incompatible with non-industrially zoned areas.[4] Indeed, local zoning attorneys have stated that the decision has "created a mess."[5]

This messiness shows in a recent Lycoming County Court of Common Pleas decision. In *Gorsline v. Board of Supervisors of Fairfield Township*, No. 14-000130 (C.P. Lycoming, Aug. 29, 2014), attached under Tab C, Judge Marc. F. Lovecchio overturned Fairfield Township's grant of a conditional use permit for a gas exploration company. In part, Judge Lovecchio found that the

---

[3] In Jersey Shore, Lycoming County, activist organizations appealed the Pennsylvania Department of Environmental Protection's issuance of permits to an oil and gas company to construct well pads. Notice of Appeal, Delaware Riverkeeper Network v. Commonwealth (Pa. Envtl. Hearing Bd. filed Sept. 15, 2014) (No. 2014128), attached under Tab D. Citing Robinson, the organization argued to the Environmental Hearing Board that in issuing the permits, the "DEP [a]cted [c]ontrary to [l]aw [b]ecause as a [t]rustee it [s]hall [c]onserve and [m]aintain [p]ublic [n]atural [r]esources and [t]hey [h]ave [f]ailed to do so." Id. at 12. This same organization also challenged the issuance of another well pad permit in Butler County, again citing Robinson: "The [DEP] violated its independent obligation under Article I, Section 27 to confirm that an operation is suitable in the proposed location. . . . The [DEP] cannot simply rely on a Township's decision to allow gas development in a location that clearly is not a proper site for industrial development. In order to meet its trustee obligations under Section 27, and in order to avoid infringing on neighbors' environmental and property rights, the Department has an independent obligation to confirm that a proposed location of an operation is suitable." Notice of Appeal at 13-14, Delaware Riverkeeper Network v. Commonwealth (Pa. Envtl. Hearing Bd. filed Oct. 13, 2014) (No. 2014142), attached under Tab E.

[4] Gilmer, *supra* note 9.

[5] *Id.*

Township failed to follow the Environmental Rights Amendment and properly consider the impact proposed well pads would have on nearby landowners, even though the Township had made a finding that the use was "similar to and compatible with" the other uses authorized by right in the district. *Id.* Invoking the *Robinson Township* plurality opinion, he found: "[O]ur Supreme Court has now ruled [with respect to Act 13], the citizens' rights cannot be ignored and must be protected. Neither the Applicant nor the Board explained how unconventional natural gas operations are compatible with the permitted uses" in the area. *Id.* In response to the decision, the organization that represented the plaintiffs stated: "[T]he court supported the rights of citizens to rely on local zoning to protect their property values and way of life. . . . *Robinson Township* recognized that local governments have a constitutional obligation to protect the environment and quality of life of their citizens and this decision affirms that principle. . . . [Judge Lovecchio's] decision is a wake-up call to all municipalities that after *Robinson Township*, local government cannot ignore their Article I, Section 27 responsibilities."[6]

In addition to disrupting the legal landscape, these challenges also financially harm municipalities – which, in turn, will chill or block economic development projects in the state. Even if the forums hearing these challenges dismiss the *Robinson Township* plurality's statement on the scope of Article I,

---

[6] Chip Northrup, Judge Bars Fracking in Residential Area, No Fracking Way (Sept. 3, 2014), http://www.nofrackingway.us/2014/09/03/judge-bars-fracking-in-residential-area/.

Section 27, the decision makers still face the costs of defending the challenges.[7] And to the extent that challengers are successful, the additional requirements that would be imposed under *Robinson Township* would financially harm municipalities: "The thrust of a lot of these [challenges] is municipalities have an obligation to do their due diligence and undertake a number of studies as a predicate to adopting an ordinance for drilling . . . . The arguments being raised, in some instances, would bankrupt these small towns. The level of studies that advocates are pursuing would involve substantial costs."[8]

Some of the effects on municipalities can already be seen. In the aftermath of *Robinson Township*, municipalities have no clear standard to identify their constitutional obligations when crafting new zoning ordinances. Penn Township in particular demonstrates this struggle. In the Township's February 16, 2015 Meeting of the Board of Commissioners, Township Solicitor Leslie Mlakar grappled with whether Penn Township's ordinance could allow oil and gas uses in a Mineral Extraction Overlay district that would include non-

---

[7] See John C. Dernbach et al., Robinson Township v. Commonwealth of Pennsylvania: Examinations and Implications, Widener Law School Legal Studies Research Paper Series No. 14-10 (Mar. 2014), available at http://papers.ssrn.com/sol3/papers.cfin?abstract_id=2412657 (noting that because the plurality's decision purportedly recognized constitutional obligations at the local level, Article I, Section 27 challenges to local actions and non-actions are possible, and this would impose defense burdens on municipalities).

[8] Jamison Cocklin, Act 13 Fallout Still Posing Challenges for Pennsylvania Operators, Natural Gas Intelligence (Dec. 1, 2014), http://www.naturalgasintel.com/articles/100572-act-13-fallout-still-posing-challenges-for-pennsylvania-operators.

industrial areas.[9] Mr. Mlakar stated: "[E]verybody has to understand that the *Robinson Township* case is a plurality decision, which means, it isn't binding in Pennsylvania. It's very instructive and a court could use that for instruction, but it isn't binding."[10] Still, with respect to where a township's zoning ordinance may allow oil and gas uses, Mr. Mlakar stated: "The *Robinson Township* case created more problems than it solved. It really did. It sustained your right to say where, but it didn't go any further. It didn't discuss any of the other collateral issues that I've raised. . . . They've kicked it back to the local jurisdictions but ultimately they're going to make the decision as to whether or not your decision is correct. That issue has to be cleared up."[11]

Municipalities like Penn Township are struggling because the *Robinson Township* plurality opinion would, if applied as binding law, drastically hinder the ability of Pennsylvania governments to promote development. Businesses operating in Pennsylvania appreciate the need to both protect the environment and to encourage progress and economic prosperity.[12] A rigid interpretation of

---

[9] Regular Meeting of the Penn Township Board of Commissioners, Feb. 16, 2015, at 5-7, available at http://www.penntwp.org/pdf/Responses%20Jan%202015/Penn%20Township%20Responses%20to%20List%20of%20Questions%2011-17-14%20(version%202).pdf.

[10] *Id.*

[11] *Id.*

[12] Timothy Merrill, A Pernicious Ruling on Gas, Pittsburgh Post-Gazette (Jan. 11, 2014), http://www.post-gazette.com/opinion/Op-Ed/2014/01/12/A-pernicious-ruling-on-gas/stories/201401120007.

the Environmental Rights Amendment prioritizes environmental concerns above all others, handcuffing the ability of the Commonwealth's governments to achieve the proper balance between economic development and reasonable environmental protection.[13]

B. Litigants and Activists Are Urging Courts, Agencies, Local Governments and Other Policy Makers to Follow the *Robinson Township* Plurality Opinion As If It Were a Controlling Statement of Law

Litigants and courts are aiding the spread of confusion by treating the *Robinson Township* plurality's statement on the Environmental Rights Amendment as if it were a controlling statement of law in both the oil and gas context and in areas far afield. The Commonwealth Court recently ruled that the Public Utility Commission ("PUC") did not commit error in allowing a public utility to exercise eminent domain to construct an electric transmission line. *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 2014 Pa. Commw. LEXIS 587, at *36-37, *40-41, *49-50 (Pa. Cmwlth. 2014). However, a dissenting opinion noted that if the PUC had made its findings post-*Robinson Township*, it might have been held to a higher standard, based on its constitutional duty to protect the environment. *Id.* at *55 ("The Supreme Court suggested that the constitutional duties of executive agencies should not be dependent upon

[13] Letter to State Legislators from PA Chamber of Business & Industry et al. (Apr. 14, 2014), available at https://www.pachamber.org/advocacy/priorities/energy_environmental/energy/testimony/pdf/Act_13_Sign_On_Letter_FINAL.pdf.

legislative enactments or quasi-legislative regulations, such as the one applicable [here] . . . .").

Litigants also cited the *Robinson Township* plurality opinion to the U.S. District Court for the Middle District of Pennsylvania to argue that Article I, Section 27 should prevent a State employer from terminating their employment with the Underground Storage Tank Indemnification Fund for helping a gas station owner seek indemnification for a fuel release. *Herman v. Harman*, No. 3:13-cv-1118, 2014 U.S. Dist. LEXIS 5322, at *1-3, *8-9 n.3 (M.D. Pa. Jan. 15, 2014) (citing *Robinson Township* to argue that "a recent Pennsylvania Supreme Court decision is 'the dawn of a new era of recognition of environmental values in Pennsylvania'").

A conservation group relied entirely on the *Robinson Township* plurality to argue in an *amicus* brief that the Commonwealth Court should prevent the Borough of Downingtown from approving development at Kardon Park, an environmentally contaminated public park. Brief of Amicus Curiae Pennsylvania Land Trust Association, Petition of the Borough of Downingtown, Nos. 2342 CD 2013, 26 CD 2014, 75 CD 2014, & 76 CD 2014 (Pa. Cmwlth. Apr. 18, 2014). The *amicus* brief argued that the Borough's decision should be governed by the *Robinson Township* plurality's interpretation of Article I, Section 27, stating: "The Supreme Court's plurality decision in *Robinson Township* suggests what it means to fulfill the constitutional duty to conserve and maintain the public's natural resources. . . . [T]he Court suggests that the trustee must conserve and maintain trust resources, and if using those

resources, must consider the effect of use on the beneficiaries' trust interests, and avoid where feasible any harm to those interests." *Id.* at 17 (internal citations omitted).

The *Robinson Township* plurality has even been cited as controlling precedent to the United States Supreme Court. In support of a petition for writ of certiorari, petitioners and amici curiae cited *Robinson Township* in their attempt to require the Environmental Protection Agency ("EPA") to "prepare a comprehensive climate recovery plan to protect the atmosphere from global climate change." Petition for a Writ of Certiorari at 5, *Alec L. v. McCarthy*, 135 S. Ct. 774 (2014) (No. 14-405), attached under Tab F. Amici curiae stated that by refusing to create such a plan, the EPA's "actions and inactions with respect to global climate change are causing harm to public trust resources, including the atmosphere upon which Petitioners depend for their life, liberty, and property." Brief of Climate Scientists as Amici Curiae Supporting Petitioners at 25, *Alec L.*, 135 S. Ct. 774 (No. 14-405), attached under Tab G (citing *Robinson Township* as a "case[that] indicat[es] that . . . the source of the public trust may run very deep, indeed to the very nature of self-government and freedom").

Outside of the adjudicative context, politicians, citizens, and advocacy groups are also relying on the *Robinson Township* plurality's statement on the Environmental Rights Amendment to influence legislation and regulation, threatening to entrench an unworkable, confusing standard. In 2013, the DEP proposed regulations that would require the DEP to consider whether any conditions placed on well permits would interfere with landowners' oil and gas

rights. After the decision in *Robinson Township*, former State Representative Phyllis Mundy opposed these regulations, arguing that they prevented the DEP from fulfilling its duty under the Environmental Rights Amendment to protect natural resources from pollution.[14]

In testimony before the Uniform Construction Code Review and Advisory Council, the Clean Air Council invoked *Robinson Township* to influence updates to the Uniform Building Code, stating: "The [Review Advisory Counsel] is neglecting its duties to Pennsylvania citizens by not adopting new building energy efficiency codes. . . . The [Review Advisory Council] is obligated under the Pennsylvania Constitution []to . . . consider the potential environmental impacts on the environment when making your decision. When considering this, it is clear that making buildings more energy efficient is the obvious path to reducing air pollution in Pennsylvania."[15]

Activist organizations also misstated the force of *Robinson Township* to oppose Senate Bill 411, which would have amended the Environmental Good Samaritan Act to extend treatment immunity for entities using acid mine water in connection with oil and gas operations. These organizations wrote to the

---

[14] Matt Fair, *Pa. Lawmaker Slams DEP's Surface Rules For Fracking Sites*, Law360 (Feb. 11, 2014), http://www.law360.com/articles/508930/pa-lawmaker-slams-dep-s-surface-rules-for-fracking-sites.

[15] Logan Welde, Staff Attorney, Clean Air Council, Testimony Before the Pennsylvania Uniform Construction Code Review and Advisory Council (May 14, 2014), available at http://www.cleanair.org/program/energy/energy_efficiency/council_testifies_support_updating_building_codes (citing Robinson Twp. v. Commonwealth, 83 A.3d 901 (2013)) (footnote omitted).

General Assembly to express their belief that the passage of the bill would violate Pennsylvania's constitution because "the General Assembly has fiduciary obligations as a trustee of public natural resources who must conserve and maintain those resources for present and future Pennsylvanians[, and t]he General Assembly must consider before acting whether the proposed legislation will lead to the 'degradation, diminution, or depletion' of the people's public natural resources either now, or in the future[, as well as] whether the legislation places higher environmental burdens on some Pennsylvania citizens than others."[16] The bill has since been tabled.

The invocation of the *Robinson Township* plurality opinion in such varied contexts not only damages the Commonwealth by spreading confusion, but it also causes increased litigation and expense for businesses, including real estate developers. When parties invoke the plurality opinion to oppose routine zoning applications and land development efforts, the cost of those projects increases, and needless litigation or administrative proceedings with their attendant expense results. The additional delay caused by these efforts also deprives local governments and school districts of property and other tax revenue. This situation will persist until this Court corrects it.

---

[16] Press Release, Delaware Riverkeeper Network, Environmental and Community Organizations Oppose SB411 Acid Mine Drainage Immunity for Fracking Bill (Jan. 16, 2014), available at http://www.delawareriverkeeper.org/resources/PressReleases/press%20release%20SB411%20org%20sign%20on%20to%20Senate%201.16.14.pdf.

This Court cannot be expected to control every mis-citation of its decisions. However, there are occasions where action by this Court becomes necessary. The *Robinson Township* plurality opinion is causing unusual and unprecedented chaos. An affirmative statement by this Court that the plurality opinion in that case does not express the law of this Commonwealth will help to resolve that chaos.

CONCLUSION

Because this Court's statement in *Robinson Township* on the scope of the government's obligation under Article I, Section 27 of the Pennsylvania Constitution was a plurality opinion, and because this plurality opinion has created a dangerous state of confusion in the Commonwealth, this Court should affirmatively clarify that the *Robinson Township* plurality opinion is not controlling law for assessing the government's constitutional obligations under the Environmental Rights Amendment.

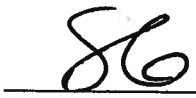
Respectfully submitted,

/s/ Robert L. Byer

Robert L. Byer
Robert M. Palumbos
Andrew R. Sperl
Meredith E. Carpenter
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Susquehanna Industrial Development Corporation, and Warren County Chamber of Business & Industry

OF COUNSEL:



Steven P. Lehotsky
Sheldon Gilbert
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062-2000
(202) 463-5685

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

April 22, 2015

DM1\5469503.21

TAB A

Fegley v. Lehigh County Board of Elections, No. 2013-C-3436
(C.P. Lehigh, Oct. 3, 2014)

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

RICHARD D. FEGLEY, DIANE E. TETI, EDWARD F. BECK and MARVIN M. WHEELER,	)	**No. 2013-C-3436**
Plaintiffs	)	
vs.	)	**CIVIL**
LEHIGH COUNTY BOARD OF ELECTIONS, MATTHEW T. CROSLIS, DORIS A. GLAESSMANN and JANE M. GEORGE, In Their Official Capacity Only Chief Clerk, Lehigh County Board of Elections Timothy A. Benyo In His Official Capacity Only,	)	**ASSIGNED TO: The Honorable Michele A. Varricchio**
Defendants	)	
and	)	
DELTA THERMO ENERGY A, LLC,	)	
Intervenor	)	

ORDER

AND NOW, this 3rd day of October, 2014, upon consideration of *Plaintiff's Motion for Summary Judgment* filed June 2, 2014, and the response thereto, and the *Intervenor Delta Thermo Energy A., LLC's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment* filed July 1, 2014 by Intervenor, Delta Thermo Energy A, LLC, and for reasons set forth in the accompanying memorandum opinion;

IT IS HEREBY ORDERED that *Plaintiff's Motion for Summary Judgment* is DENIED.[1]

[1] This Court denied Plaintiff's Petition for Preemptory Writ of Mandamus on September 30, 2013, and subsequently filed an opinion on October 2, 2013.

IT IS FURTHER ORDERED that *Intervenor's Cross-Motion for Summary Judgment* is GRANTED and the above captioned case is DISMISSED.

BY THE COURT:

Michele A. Varricchio, J.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

RICHARD D. FEGLEY, DIANE E. TETI, EDWARD F. BECK and MARVIN M. WHEELER,	)	**No. 2013-C-3436**
Plaintiffs	)	
vs.	)	**CIVIL**
LEHIGH COUNTY BOARD OF ELECTIONS, MATTHEW T. CROSLIS, DORIS A. GLAESSMANN and JANE M. GEORGE, In Their Official Capacity Only Chief Clerk, Lehigh County Board of Elections Timothy A. Benyo In His Official Capacity Only,	)	**ASSIGNED TO: The Honorable Michele A. Varricchio**
Defendants	)	
and	)	
DELTA THERMO ENERGY A, LLC,	)	
Intervenor	)	

MEMORANDUM OPINION

Michele A. Varricchio, Judge

Plaintiffs sought ballot inclusion of a proposed "City of Allentown Clean Air Ordinance" (Ordinance) to be voted upon during the City of Allentown's municipal election on November 5, 2013. On August 27, 2013, the Lehigh County Board of Elections (Board) voted unanimously against the inclusion of the Ordinance. After evaluation, the Board found that the Ordinance was preempted by the Pennsylvania Air Pollution Control Act (APCA), 35 P.S. §§4001-4106. Essentially, under the law, the Board determined that even if the Ordinance were adopted it would be invalid.

On September 19, 2013, Plaintiffs filed an Emergency Petition for Review and a Complaint in Mandamus. Contemporaneously, Plaintiff's filed a Motion of Peremptory Writ of Mandamus (Mandamus Petition) asking this Court to direct the Board to place the Ordinance on the November 2013 ballot. Thereafter, on September 30, 2013, this Court held a hearing and denied Plaintiff's Mandamus Petition. By way of this Court's Memorandum Opinion, dated October 2, 2013, it was determined that the APCA preempted various provisions of the Ordinance, and if placed on the ballot the Ordinance would have been a violation of law.

Plaintiffs appealed to the Commonwealth Court, which issued an order dated October 10, 2013, dismissing Plaintiffs appeal with prejudice. The Commonwealth Court determined that Pa.R.A.P. 311(a)(5) prevents the appeal of an order denying peremptory mandamus, but ruled that "even if we had addressed the merits of this action, it is apparent that the trial court reached the correct conclusion and we would affirm the trial court's order...." As a result, Plaintiffs moved for summary judgment and intervenor, Delta Thermo Energy A, LLC (Delta), filed a cross motion for summary judgment.

I.

A Motion for Summary Judgment (pursuant Pa.R.C.P. 1035.2) provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Essentially, summary judgment may be granted when the pleadings, depositions, interrogatory answers, admissions, affidavits, and expert reports, if any, show that there is no genuine issue as to any material fact and that the record entitles the moving party to judgment as a matter of law.

The burden rests squarely on the moving party to prove that no genuine issue of material fact exists. *Smitley v. Holiday Rambler Corp.*, 707 A.2d 520 (Pa.Super. 1998). However, an adverse party is required to identify evidence in response to the motion for summary judgment motion, contained in the record, which establishes the facts essential to their cause of action or defense which the motion cites as not having been produced. *Eaddy v. Hamaty*, 694 A.2d 639 (Pa. Super. 1997). Namely, in order to withstand a motion for summary judgment, the nonmoving party must present sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998) (quoting *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996), cert denied, 519 U.S. 1008 (1996)). Without evidence of facts that would allow a plaintiff to make out a prima facie case, the cause of action must be dismissed. *Fazio v. Fegley Oil Co.*, Inc., 714 A.2d 510, 512 (Pa. Cmwlth. 1998).

III.

As mentioned above, the Plaintiffs moved for summary judgment on June 2, 2014. Thereafter, on July 1, 2014, Delta replied to Plaintiffs motion and filed their cross motion for summary judgment. Based on the standard above with regard to both parties' motions; Plaintiffs motion is denied and Delta's motion is granted based on the following.

Plaintiffs' response is concentrated on arguments that this Court has already rejected while their factual assertions are not corroborated by affidavits or any other evidence in the record that are contrary to the evidence submitted by Delta. Essentially, the only issue the Plaintiffs raised in their motion, that this Court and the Commonwealth Court have not already rejected, is that Defendants failed to fulfill their duties as trustee. However, based upon Pennsylvania Constitution Article I §27[2], both Courts declined to put the Ordinance on the November 2013 election ballot. Furthermore, Delta has shown that Plaintiffs have improperly relied upon *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), in which the Pennsylvania Supreme Court ruled that a specific act was unconstitutional under the Article I §27. Ultimately, this Court agrees with Delta that the opinion in *Robinson*, relied upon by Plaintiffs, has no bearing on the APCA. *Robinson* does not support the relief the Plaintiffs requested and does not alter the provisions of the APCA regarding local authority and preemption. *Robinson* makes it clear that the relief Plaintiffs seek would unconstitutionally deprive the Pennsylvania Department of Environmental Protection and the City of the ability to fulfill their duties as a trustee of the environmental resources of the Commonwealth, as required under Article I §27 of the PA Constitution.

Lastly, the proposed Ordinance is moot. The election for which the Ordinance was sought to be placed on the ballot has occurred and the results certified so that the matter is now moot.

Date: October 3, 2014

Michele A. Varricchio, J.

[2] Article I §27 states: "The people have the 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 a trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

TAB B

Intervenor Delta Thermo Energy A, LLC's Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment,
Fegley v. Lehigh County Board of Elections, No. 2013-C-3436
(filed July 1, 2014)

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

RICHARD D. FEGLEY, DIANE E. TETI, EDWARD F. BECK, and MARVIN M. WHEELER,	:	
Plaintiffs,	:	
v.	:	ELECTION MATTER
LEHIGH COUNTY BOARD OF ELECTIONS, MATTHEW T. CROSLIS, DORIS A. GLAESSMANN, and JANE M. GEORGE, In their official capacity only, CHIEF CLERK, LEHIGH COUNTY BOARD OF ELECTIONS, TIMOTHY A. BENYO, In his official capacity only,	:	NO. 2013-C-3436
Defendants.	:	
and	:	
DELTA THERMO ENERGY A, LLC, Intervenor.	:	

ORDER

THIS MATTER, having come before the Court upon the Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment of Intervenor, Delta Thermo Energy A, LLC, by and through their counsel, and the Court having received and reviewed the papers and any opposition submitted thereto, and having heard oral argument, if any, and for other good cause having been shown,

IT IS ON THIS ____ day of _____, 2014, **ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment is **DENIED**;

2. Intervenor's Cross-Motion for Summary Judgment is **GRANTED**;

3. Plaintiffs' Complaint is **DISMISSED**.

_____

J.

BALLARD SPAHR LLP
By: Robert B. McKinstry, Jr., Esq.
Identification No. 30015
Ronald M. Varnum, Esq.
Identification No. 200203
Michael C. Duffy, Esq.
Identification No. 308043
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Attorneys for Intervenor,
Delta Thermo Energy A, LLC

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

RICHARD D. FEGLEY, *et al.*, Plaintiffs,	:	
v.	:	
LEHIGH COUNTY BOARD OF ELECTIONS, *et al.*, Defendants,	:	ELECTION MATTER
	:	NO. 2013-C-3436
and	:	
DELTA THERMO ENERGY A, LLC, Intervenor.	:	

INTERVENOR DELTA THERMO ENERGY A, LLC'S
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor Delta Thermo Energy A, LLC ("DTE"), by its undersigned counsel, hereby incorporates by reference the Lehigh County Board of Elections' Answer to Plaintiffs' motion for summary judgment and cross-moves for summary judgment as follows:

1. Plaintiffs' motion for summary judgment ("Plaintiffs' Motion") on Plaintiffs' Complaint in Mandamus must be denied because Plaintiffs have not established a legal right to the relief requested.

2. On August 27, 2013, the Lehigh County Board of Elections ("Board") voted unanimously not to include a proposed "City of Allentown Clean Air Ordinance" ("Proposed Ordinance") drafted by Plaintiffs on the ballot for the November 5, 2013, City of Allentown (the "City" or "Allentown") municipal election.

3. The Board took that action based on its determination that the Proposed Ordinance was preempted by the Pennsylvania Air Pollution Control Act ("APCA"), 35 P.S. §§ 4001-4106, and therefore would be invalid if adopted.

4. By their September 19, 2013, Emergency Petition for Review and Complaint in Mandamus and Motion of Peremptory Writ of Mandamus ("Mandamus Petition"), Plaintiffs asked this Court to issue a Writ of Mandamus directing the Board to place the Proposed Ordinance on the November 2013 ballot.

5. After a hearing and consideration of the briefs submitted by all parties, this Court denied Plaintiffs' Mandamus Petition on September 30, 2013, and entered a Memorandum Opinion dated October 2, 2013.

6. This Court found that, because the APCA preempted various provisions of the Proposed Ordinance, placing the Proposed Ordinance on the ballot would have been a violation of law, and that the Board properly relied on those grounds for deciding not to include the Proposed Ordinance on the November 2013 ballot.

7. The Court ruled, and the parties agreed, that the issue of preemption was the sole dispositive issue raised in Plaintiffs' Mandamus Petition.

8. The Court's conclusion that the Proposed Ordinance would be invalid if adopted is law of the case.

9. Plaintiffs appealed the Court's ruling to the Commonwealth Court, which dismissed the appeal in an Order dated October 10, 2013, as an improper appeal from an interlocutory order.

10. In dismissing the appeal, the Commonwealth Court endorsed the merits of this Court's ruling. *See* Exh. 1.

11. On December 19, 2013, the Pennsylvania Supreme Court issued an opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

12. *Robinson Township* arose from a challenge based on Article I, Section 27 of the Pennsylvania Constitution to Pennsylvania's 2012 amendments to the Oil and Gas Act and does not deal with the APCA in general nor the APCA's preemption provisions specifically.

13. Plaintiffs have belatedly raised a challenge based on Article I, Section 27, to the Board's action well after the law of this case had been decided and affirmed. However, *Robinson Township* does not upset this Court's prior decision and does not imply that the Proposed Ordinance would be lawful if enacted. Therefore, Plaintiffs' Motion for Summary Judgment should be denied.

14. Defendants are also entitled to summary judgment dismissing the case because the relief sought by Plaintiffs, an order compelling the Lehigh County Board of Elections to print Plaintiffs' proposed ordinance as a ballot initiative, would be unconstitutional under the *Robinson Township* Court's interpretation of Article I, Section 27 of the Pennsylvania Constitution, in that it would allow the resolution of the matter by way of a plebiscite in violation of the City's duty as a trustee.

15. On May 13, 2014, the Pennsylvania Department of Environmental Protection ("PADEP") issued to DTE General Permit Number WMGM047 ("Waste Permit")

under authority of the Pennsylvania Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, and other authorities referenced in the Waste Permit. *See* Affidavit of Robert Van Naarden, attached as Exh. 2, ¶ 2; General Permit Number WMGM047, attached as Exh. 2-A.

16. The Waste Permit authorized DTE to process municipal solid waste and sewage sludge to manufacture an engineered pulverized fuel ("EPF") using DTE's process of sorting, size reduction, and treatment using heat and pressure to produce a clean fuel product for use for electricity production, at DTE's facility in Allentown, Pennsylvania. Exh. 2, ¶ 2.

17. PADEP's decision to issue the Waste Permit was supported by a Comment and Response Document dated May 9, 2014, in which PADEP responded to public comments on DTE's application for the Waste Permit ("Waste Comment Response"). Exh. 2, ¶ 2; Exh. 2-A; PADEP Waste Permit Comment and Response Document, attached as Exh. 2-B.

18. On May 14, 2014, PADEP issued Air Quality Program Permit Number No. 39-00099A ("Air Permit") pursuant to the Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, authorizing the construction and start-up of both (i) the DTE facility to produce EPF and (ii) the DTE facility to produce electricity using that EPF (collectively the "DTE Facility"). *See* Exh. 2 ¶ 3; Air Quality Program Permit No. 39-00099A, attached as Exh. 2-C.

19. PADEP simultaneously released a written response to public comments ("Air Comment Response") supporting PADEP's determination that the Air Permit should be issued. *See* Exh. 2 ¶ 3; Exh. 2-C; PADEP Air Permit Comment and Response Document, attached as Exh. 2-D.

20. PADEP engaged in an enhanced public comment and response process to satisfy its Environmental Justice objectives, in which it considered potential environmental and public health concerns and impacts of the proposed DTE Facility, including those raised by

members of the neighboring community. This process involved multiple public meetings. *See* Exh. 2 ¶ 6.

21. PADEP called upon DTE to provide written responses to issues and comments raised by the public, including Plaintiffs and their attorney, and to conduct and submit additional technical analyses of EPF produced from Allentown municipal solid waste ("MSW") and sludge at its pilot facility in New Jersey. Those additional technical analyses were required to demonstrate that the EPF did not have the characteristics of a waste but those of a clean fuel. DTE's consolidated responses and additional technical analyses were submitted to PADEP February 25, 2014. *See* Exh. 2-F. DTE made additional submissions dated March 20, 2014, April 4, 2014 (Exh. 2-G), April 8, 2014 (Exh. 2-H), and April 25, 2014 (Exh. 2-I).

22. DTE provided PADEP with a careful written evaluation of all of the concerns raised by the Plaintiffs and other members of the public and responded and addressed issues under Article I, section 27, even though neither Plaintiffs nor other commenters raised any constitutional issue regarding these permits. Exh. 2 ¶ 12.

23. PADEP's modification to the terms of both the draft Air Permit and the draft Waste Permit and its extensive written responses to public comment reflect the agency's consideration of those comments. Exh. 2 ¶ 12.

24. Under its current contract with Waste Management, Inc., the City of Allentown transports its municipal solid waste 27 miles, through many other municipalities, to dispose of that waste in the Waste Management Landfill, Grand Central Landfill, located at 1963 Pen Argyl Rd., Pen Argyl, PA. Exh. 2 ¶ 11.

25. In issuing the Waste Permit, PADEP is required to make the determinations specified by 25 Pa. Code § 271.201, including the determination that the "requirements of . . . Pa. Const. art. I, § 27 have been complied with." Exh. 2 ¶ 9.

26. As held in *Robinson Township*, the extant law of trusts in Pennsylvania establishes the fiduciary duties of the government as a trustee of the environmental trust established under Article I, Section 27. 83 A.3d at 956-59. It is unconstitutional to prevent an Article I, Section 27 trustee from fulfilling its duties in accordance with Pennsylvania trust law.

27. The Restatement (Second) of Trusts § 171 states, "[a] trustee has a duty *personally* to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities." RESTATEMENT (SECOND) OF TRUSTS § 171 (1959) (emphasis added); *also see Quinlan Estate*, 441 Pa. 266, 269, 273 A.2d 340, 342 (1971). The trustee must use "fiduciary discretion" with beneficiaries in mind when delegating responsibility. *Id.*

28. When a trustee's personal interests conflict with those of other beneficiaries, an improper fiduciary relationship results in violation of Pennsylvania trust law. *Rafferty Estate*, 377 Pa. 304, 305-06, 105 A.3d 147 (1954). *Quinlan Estate*, 441 Pa. at 270, 273 A.2d at 342.

29. The Restatement (Second) of Trusts § 183 states that "[w]hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." RESTATEMENT (SECOND) OF TRUSTS § 183 (1959); *see also In re Estate of Hamill*, 487 Pa. 592, 599, 410 A.2d 770, 773 (1980); *Estate of Sewell*, 487 Pa. 379, 383, 409 A.2d 401, 402 (1979).

30. The Pennsylvania legislature met its trustee responsibilities under Article I, Section 27 in enacting the APCA by including the Act's pre-emption of local law provisions in a complete legislative package which provides for the thorough evaluation of the environmental

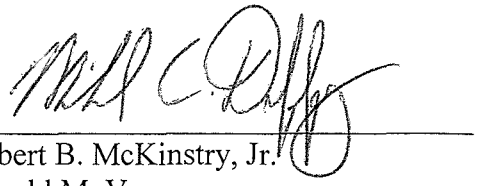
aspects of a significant source evaluation through facility-specific permitting and monitoring requirements, which were applied in DTE's case as summarized above.

31. In contrast, however, in seeking to bypass the extensive permit review process for a facility such as DTE's, including public comment and response and consideration of Environmental Justice objectives, which is a critical element in the government's fulfillment of its mandatory duty as Article I, section 27 trustee, Plaintiffs are asking for relief that would be not only unlawful on its face, but unconstitutional in its application.

32. If the City were to abdicate its fiduciary duties as trustee of the environmental trust to the voters of Allentown, who are themselves a small subset of beneficiaries (the people of the Commonwealth) of the environmental trust, the result would be: (1) an unconstitutional failure of the City to personally perform the responsibilities of the trusteeship or prudently delegate responsibility, (2) an unconstitutional conflict of interest between the *de facto* trustee (the voters of Allentown) and other beneficiaries (such as Commonwealth residents outside of Allentown located near landfills where Allentown's municipal waste is otherwise disposed, or along truck routes used for transporting waste to those landfills), and (3) an unconstitutional failure of the City to deal impartially with and to consider the interests of all beneficiaries of the trust.

33. In support of this response and cross-motion, DTE relies on the accompanying memorandum of law.

Respectfully submitted,



Date: July 1, 2014

Robert B. McKinstry, Jr.
Ronald M. Varnum
Michael C. Duffy
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Intervenor,
Delta Thermo Energy A, LLC

TAB C

Gorsline v. Board of Supervisors of Fairfield Township, No. 14-000130
(C.P. Lycoming, Aug. 29, 2014)

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BRIAN GORSLINE,	**:**	
DAWN GORSLINE,	**:**	
PAUL BATKOWSKI and	**:**	
MICHELE BATKOWSKI,	**:**	**CIVIL ACTION – LAW**
Appellants	**:**	
vs.	**:**	**NO. 14-000130**
	:	
BOARD OF SUPERVISORS OF	**:**	
FAIRFIELD TOWNSHIP,	**:**	**ZONING/LAND USE APPEAL**
Appellants	**:**	
	:	
vs.	**:**	
	:	
INFLECTION ENERGY, LLC, and	**:**	
DONALD SHAHEEN and	**:**	
ELEANOR SHAHEEN, his wife	**:**	
Intervenors		

OPINION AND ORDER

Before the Court is the Appeal of Brian and Dawn Gorsline, and Paul and Michele Batkowski (Appellants) to the decision of the Board of Supervisors of Fairfield Township (Fairfield or the Board), which granted a conditional use approval to Inflection Energy, LLC (Inflection) for the construction and use of an oil and gas well pad on property owned by Donald and Eleanor Shaheen and located in Fairfield Township.

Inflection filed a Zoning and Development Permit Application (Application) to construct an oil and gas well site on the Shaheen property. As described in its Application, the proposed use of the property was as a site to "be used for the drilling, completion, production and operations of multiple gas wells." Public hearings on the Application were held before the

Board on October 7, 2013 and November 4, 2013.

The well pad is proposed to measure approximately 300 feet by 350 feet initially and will ultimately measure 150 feet by 150 feet once completed. The well pad would be located on the Shaheen property which is located within a Residential Agricultural (RA) district. While there is only one residence that is located within a 1000 foot radius of the proposed well pad location, there is a large residential development, as well as many individual family homes located within a 3000 foot radius of the proposed well pad location.

On December 2, 2013, public action was taken by the Board of Supervisors on the Conditional Use Application. In accordance with the provisions of 53 P.S. § 10908 (10), the Board transmitted its final decision on December 18, 2013. On January 17, 2014, Appellants filed a land use appeal from the written decision of the Board. In their notice of appeal, Appellants lodged numerous objections to the decision.

Arguments on the appeal and the issues raised therein were subsequently held before the Court. The parties agreed that the Court could hear and decide the appeal on the record without any further facts being presented. As well, the parties submitted written legal briefs in support of their respective positions.

In opposition to the appeal, Fairfield, Inflection and the Shaheens first argue that Appellants have waived any right to raise the issues at this juncture because these issues were not raised before the Board.

During the oral argument on this matter, Fairfield, Inflection and the Shaheens

submitted that the appeal is governed by the Local Agency Law and in particular 2 Pa. C.S.A. § 753. Appellants disagreed and argued that their appeal is governed by the applicable provisions of Pennsylvania's Municipal Planning Code (MPC).

Conditional uses in Fairfield Township are governed by § 14.2 of the Fairfield Township Zoning Ordinance of 2007 ("ordinance"). The criteria for review and approval of a given conditional use are set forth in § 14.2.5 of the ordinance. The ordinance also establishes procedures for the application and mandates criteria that the Board must consider in making a decision. In this matter and pursuant to § 14.2.6 of the ordinance, the Board established findings of fact and issued a written decision within the prescribed time period after the last hearing. The Board transmitted its written decision "in accordance with the provisions of 53 P.S. § 10908 (10)." Clearly, the Board conducted the hearing and issued its decision pursuant to the MPC.

The appeal by Appellants was styled as a "Land Use Notice of Appeal." Land use appeals are specifically addressed in the MPC. 53 P.S. § 11001-A.

The argument by Fairfield, Inflection and the Shaheens that the provisions of the Local Agency Law apply to the exclusion of the MPC lacks merit. The Board issued its decision pursuant to the MPC and Inflection and the Shaheens intervened in the appeal pursuant to the MPC. 53 P.S. § 11004 (A).

As Appellants correctly note, the hearing and argument on the land use appeal is governed by the MPC and in particular 53 P.S. § 11005-A. That provision specifically notes that "[i]f the record below includes findings of fact made by the governing body, board or agency

whose decision is brought up for review and the court does not take additional evidence, the findings of the governing body shall not be disturbed by the court if supported by substantial evidence." 53 P.S. § 11005-A.

Pursuant to 53 P.S. § 11006-A, in a land use appeal, "the court shall have the power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body…brought up on appeal."

There is no provision in the MPC that limits the Court from addressing issues raised by Appellants to only those issues that Appellants raised before the Board. Accordingly, the Court dismisses the waiver argument of Fairfield, Inflection and the Shaheens.

Alternatively, even if the position of Appellees and Intervenors is deemed to have merit, the Court agrees with Appellants that the issues asserted by them in their appeal should be addressed for due cause shown. When the ordinance was adopted, it is safe to assume that neither the drafters, the municipality or the citizens contemplated the issues involved in oil and gas exploration. Moreover, and in light of the Supreme Court's decision in Robinson Township v. Commonwealth, 83 A.2d 901 (Pa. 2013), the issues raised by Appellants have significant constitutional import.

The first issue asaserted by Appellants concerns whether Fairfield erred as a matter of law by reviewing the land use application as a "use provided for" under § 12.18 of the ordinance, rather than an application for "surface mining."

Unfortunately, § 12.18 of the ordinance is inartfully drafted and confusing in part.

The Court will endeavor to apply the ordinance and its required criteria consistent with its language and intent. The first criterion that the applicant must establish is that the proposed use is neither specifically permitted nor denied "under [the] ordinance." Clearly, the burden falls on Inflection to establish that its proposed use complies with the requirements of the ordinance. Aldridge v. Jackson Township, 983 A.2d 247, 253 (Pa. Commw. 2009).

Appellants argue that an oil and gas well pad and well drilling fall within the definition of surface mining which is permitted as a conditional use in the industrial district. They assert that the plain language of the ordinance provides that surface mining activities are authorized as a conditional use in the industrial district of Fairfield. Specifically, they further assert that the ordinance defines "surface mining" to include industrial surface activities aimed at extracting minerals from the ground and that the ordinance defines "minerals" to include "oil and natural gas." They contend that an interpretation of "surface mining" that does not include natural gas extraction within its meaning would render the term "minerals" and the phrase "oil and natural gas" meaningless and superfluous.

While the Court sees some merit in this argument, given the specific language of the ordinance and the legal precedents governing the interpretation of ordinances in general, the Court cannot agree with Appellant's position. Under the specific terms of the ordinance, the use proposed on the property is only permitted if it is not permitted in any other zone under the terms of the ordinance. Ordinance, § 12.18.2. Article 6 of the ordinance entitled "Industrial District" permits as a conditional use "surface mining." Ordinance, § 6.2.3.12. Surface mining is defined

in Article 2. It includes the extraction of minerals from the earth but specifically does not include those mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings. Minerals are defined under Article 2 as well. The definition of minerals includes "crude, oil and natural gas."

The Court agrees with Fairfield and the Intervenors that the language of the ordinance does not provide for Inflection's natural gas operations. It makes no mention of natural gas operations and said operations are not included in the definition of surface mining. As Fairfield and the Intervenors assert, in order to qualify as surface mining, it is not enough to simply involve certain minerals. Instead, the ordinance requires the removal of the minerals in a certain fashion and specifically excludes subsurface mining.

Moreover, even if the language can be considered ambiguous, this Court must give great weight and deference to the interpretation of it by Fairfield. In Re: Thompson, 896 A.2d 659, 669 (Pa. Commw. 2006); 1 Pa. C.S. § 1921 (c) (8). As Intervenors correctly note in their brief, "The basis for the judicial deference is the knowledge and expertise that a [municipality] possesses to interpret the ordinance that it is charged with administering." In Re: Thompson, supra.

As well, and also as Fairfield and the Intervenors correctly note, this Court is required to interpret any ambiguous language in favor of the property owner and against any implied extension of the restriction. City of Hope v. Sadsbury Township Zoning Hearing Board, 890 A.2d 1137, 1143 (Pa. Commw. 2006). "In interpreting the language of zoning ordinances to

determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction." 53 P.S. § 10603.1. Accordingly, the Court concludes that Fairfield did not commit an error of law in concluding that the proposed use was neither specifically permitted or denied in the zoning ordinance.

The second criteria the Board must consider in addressing a conditional use are set forth in § 14.2 of the ordinance. The burden of proof with respect to these factors depends on whether the factors are deemed to be specific or general. Bray v. Zoning Board of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980); Appeal of Baker, 339 A.2d 131 (Pa. Commw. 1975). In light of the Court's decision below with respect to the remaining § 12.18 factors, the Court need not address the § 14.2 factors.

As set forth in the December 18, 2013 Opinion and Order of Fairfield, it concluded that the proposed use "satisfies the requirements of the zoning ordinance applicable to the proposed use in the RA-Residential Agricultural District." (Opinion and Order, Conclusions of Law, Paragraph 8). Fairfield further found that the criteria for review as set forth in § 12.18 have been "sufficient (sic) satisfied." (Opinion and Order; Conclusions of Law, Paragraph 20). More specifically, Fairfield concluded that the site selected is generally appropriate for the proposed uses, and no evidence was offered that there would be any adverse impacts to the surrounding neighborhoods or negative impacts to adjoining properties that are not appropriately

mitigated by the Board's conditions to the conditional use approval. (Opinion and Order, Conclusions of Law, Paragraph 20). Curiously, other than a general finding by Fairfield that the criteria in § 12.8 have been satisfied, there are no specific findings regarding the required factors set forth in §§ 12.18.1, 12.18.2 or 12.18.3.

§ 12.18.1 establishes the third set of criteria. The use may only be permitted if the proposed use is similar to and compatible with other uses permitted in the zone where the subject property is located. The burden is on the applicant to prove such. Aldridge, 983 A.2d at 253.

This Court must specifically determine whether there is substantial evidence to support a finding that Inflection demonstrated that its proposed use is similar to the other uses permitted in the zone where the subject property is located. Stated otherwise, the Court must determine whether relevant evidence was presented to Fairfield such that a reasonable person might accept it "as adequate" to establish that the proposed use is similar to other uses "permitted in the zone."

The Court concludes that with respect to the similarity issue Fairfield abused its discretion in concluding that Inflection complied with its burden. Fairfield's decision is not supported by such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

First, and perhaps determinatively, the evidence presented as to the actual proposed use is not at all clear. The actual proposed use is fraught with significant uncertainties.

Inflection presented the testimony of both Thomas Irwin, a Senior Field

Operations Manager for Inflection and Thomas Gillespie, the Director of Regulatory Affairs and Environmental Health and Safety at Inflection. While numerous specifics were set forth in connection with the proposed use, many determinative questions were left unanswered.

Inflection was unable to state with any certainty whatsoever, how many wells would be drilled. Transcript, 10/713, at 13 ("We will probably drill two wells off the pad initially, and it depends upon the results."). Inflection was unable to state with certainty how much water would be needed. Id. ("we like to start with a couple million gallons before we start the fracking operation."). Inflection was unable to state with certainty the type of energy it would be utilizing. Id. at 15 ("If we decide to use electricity---. We will probably use solar, that is what we have been using on all our other sites. There is electricity to the location though if we need it."). Inflection was unable to state how long the site would be used for construction or otherwise. Id. at 26 ("We may come back…and so that makes it longer, a more drawn out process."). Inflection also could not say if after they drilled through the Marcellus shale, they would be drilling other layers, thus being on the property much longer. Id.

With respect to adjoining property owners, Inflection could not state if the wells would be going under their property or "whose property it goes under." Id. at 35. With respect to a water source, Inflection could not confirm whether it would be supplied by pipeline or trucked in. Id. at 42-43.

No one testified that the proposed use is similar to other uses specifically permitted in the residential agriculture district. The permitted uses in a RA district are:

Accessory Uses/Structures; Agriculture; Dwelling – Single Family Detached; Essential Services; Family Based Group Home; Family Day Care Home; Forestry Activities; Home Occupation; Hunting Camp or Seasonal Dwelling; and No Impact Home Based Business. Zoning Ordinance §4.2.1.

Fairfield argues in its brief that a natural gas pad is similar to the public service facilities that are permitted by conditional uses in the RA District. Such facilities include: power plants or substations; water treatment plants or pumping stations; sewage disposal or pumping plants and other similar public services, whether publicly or privately owned.

Appellants contend, and rightfully so, that Inflection's testimony was conclusory and not supported by any factual evidence whatsoever. Further, they persuasively argue that the uses permitted in the RA District do not involve the use of industrial machinery and chemicals, do not entail thousands of roundtrips of heavy truck traffic, do not cause loud noises at all hours of the day, do not impose threats to human health and safety and do not have negative impacts on the environment.

Mr. Irwin testified that Inflection's proposed use was **not** classified as a public service facility under the ordinance. Transcript, 10/7/13, at 8. Apparently dissatisfied with that answer, Inflection's attorney then asked the following leading question, "It fits the definition as a public service facility under the Fairfield Township Zoning Ordinance, it that correct?" After this prompting, Mr. Irwin said, "Yes." There was absolutely no explanation for Mr. Irwin's arguably inconsistent answers. The definition of a public service facility was not discussed or

alluded to and no testimony was provided to show how Inflection's proposed use fits the definition. There was just a bald, conclusory statement that the use fit the definition of a public service facility.

Inflection also testified that it "received approval" for four other wells in the same zoning district. The Court cannot conclude that this statement, in and of itself, constitutes such relevant evidence as a reasonable mind might accept as adequate to support the similarity conclusion. Inflection did not present any evidence whatsoever describing the specifics with respect to those other "four" wells. A resident, however, noted that the wells that have gone in seem to be much further from residential areas. Transcript, 11/4/2013, at 67. Furthermore, the criteria relates to similarity to explicit permitted uses, not other gas wells which are a use that is neither specifically permitted nor denied in the zoning ordinance. Moreover, Inflection is not constructing these gas wells to furnish natural gas to the residents of the Pines Development, or even Fairfield Township.

There was also insufficient evidence to support the finding that Inflection met its burden of proving that the proposed use was compatible. The only testimony presented by Inflection on this issue was a statement by Mr. Irwin that he believes, given the location of the well, that it is compatible "with the surrounding properties." Transcript, 10/7/13, at 20. This conclusory statement falls far short of establishing that the proposed use is compatible. Being compatible with "other properties" also does not prove compatibility with "other uses" in the zoning district.

As well, numerous residents of Fairfield Township as well as other concerned individuals provided contrary proof. Their testimony raised specific issues regarding the compatibility of the subject property, the general purposes of the RA district and how the proposed use conflicted with those purposes and other uses permitted in the zone. Their concerns went beyond mere speculation, bald assertions, personal opinions or perceptions. Their concerns were factually based and supported by cogent arguments and evidence.

By way of example, numerous questions were raised regarding what, in fact, the limits were with respect to the proposed use. If the limits could not be explained by Inflection, the proposed use could not be deemed to be compatible with other uses. As well, the record is replete with testimony of individuals verifying the uses presently in existence in the zoning district and describing in detail how the proposed uses by Inflection would not be compatible.

The next factor to be considered is the general purposes factor set forth in 12.18.3. The proposed use may only be permitted if it "in no way is in conflict with the general purposes of [the] ordinance."

Appellants argue that the purpose of the RA district is to encourage development of a quiet, medium density, residential environment. See ordinance § 3.1. They argue further that unlike the uses permitted in the RA district, the Shaheen pad activities are clearly industrial related activities and uses.

Appellants note that the general purposes of the ordinance are to promote public health, safety and welfare; encourage the most appropriate use of land; conserve and stabilize the

value of property; provide adequate open spaces for light and air; prevent undue concentration of population; and lessen congestion on streets and highways.

They argue that the testimony at the hearing established that the Shaheen pad poses the risk of spills, fires, accidents and other activities that threaten the public health, safety and welfare. Moreover, they argue that no testimony was offered to show that the Shaheen pad activities will conserve and stabilize the value of the residential properties or that traffic congestion would remain the same or lessen. Since traffic congestion, public health, safety and welfare, and property values are all general purposes of the ordinance, Appellants argue that Fairfield could not properly conclude that the proposed use is in accordance with the ordinance purposes.

According to the clear language of Article 3 of the ordinance, the RA district is generally intended for application to rural development areas. The purpose of the regulations for this district is to foster a quiet, medium density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland. Industrial uses are discouraged in this district. Compatible public and semipublic uses such as schools, churches and recreational facilities are provided for. As well, a higher density residential development may be permitted under certain circumstances. Ordinance, § 3.1.

As set forth in Article 4 of the ordinance, the purpose of the RA district is to encourage the continued use of areas of the Township for rural living including open space, agricultural and residential uses. Such uses typically do not require public utilities or community

services. Uses which specify the provision of community or public utilities may be feasible in certain locations in the Township provided that the developer is able to furnish the necessary utility infrastructure. Ordinance, § 4.1.

The only evidence presented by Inflection, in support of meeting its burden in connection with the general purposes factor was the testimony of Mr. Irwin. Mr. Irwin stated that he was familiar with the purpose of the RA zone and "believed" that the proposed use furthered that purpose as set forth in § 4.1 of the ordinance. Yet he failed to support his conclusion with any facts whatsoever. He failed as well to reference, let alone provide any facts, as to the purposes of the RA district as set forth in § 3.1 of the ordinance.

However, and in addition to the uncertainties relating to the actual use and activities, many facts were developed at the hearing supporting the position that the proposed use is actually in conflict with the aforesaid general purposes.

During construction and drilling there would be an extreme amount of truck traffic. Mr. Irwin testified that "there will be a lot of trucks…I am guessing 1400, 1800 trucks just to get the gravel on location to meet the DEP permit we have applied for." Transcript, 10/7/13, at 18. There will be about 206 truck trips to bring the three drilling rigs onto and off of the property – three loads in and three loads out for the conductor rig, 40 loads in and 40 loads out for the top all rig, and 60 loads in and 60 loads out for the horizontal rig. Id. at 18-19. These figures did not include any trucks to get 2,000,000 gallons of water to the property. Id. at 13, 42-43. Inflection did not know how it was going to get the water to the property. It would take an

additional 100 trucks to install a pipeline and if a pipeline did not go through it could be a very large number of trucks. Id. at 43. Mr. Irwin initially estimated the number of trucks to be 3000, but then he changed that number to 500 per well and stated that initially there would probably be two wells. Id. at 43-44. At the second hearing, however, Mr. Irwin stated that it would be 1430 trucks each with a trip in and out per well. Transcript, 11/4/13, at 61-62. The truck traffic would run 24 hours a day, nonstop except for two 45-minute shutdown periods. Transcript 10/7/13 at 44. Contrary to this clear evidence, the Board found that (excluding water trucks) "total traffic is anticipated at 300 trucks during construction, 120 trucks during drilling and 225 during completion." Board Opinion and Order, Finding of Fact 31.

With respect to burning off excess gas, or what is known as a flare or a controlled kick, Mr. Irwin could only state that Inflection did not "anticipate" doing it. Id. at 38. However, Inflection did not anticipate doing that with another well either. When they did, there were numerous noise complaints and Inflection shut down over the holidays. Id. at 50-51.

With respect to noise, Mr. Irwin's testimony was inconsistent. At one point he stated that "there might be a little noise" and "there is not very much, but if there is, [Inflection] tries to help the residents out." Id. at 21, 39. But if there is a lot, they put some hay bales around. Id. When a resident asked what the fracking was like compared to the seismic testing that shook her house and rattled her dishes, Mr. Irwin stated, "It's loud, and like I have said, we will try and take care of the neighbors." Id. at 65. When the resident indicated that her house was way up high, Mr. Irwin said, "I understand that. It is going to be hard to do that. But we will try and we

have tried with all of our neighbors so far." Notably, however, when one of the residents asked how she or any of her neighbors would be compensated for the noise, trucks and everything else that goes on, Mr. Irwin replied "There is no compensation, I am sorry. There is just no compensation. We will try to work with you, and if there is noise we will try to keep the noise down." Id. at 48-49. Despite this testimony and there being no reference in the transcripts to any Lycoming County noise standards, the Board found in Finding of Fact 35 that "Applicant testified that any noise generated by Applicant's operations would be below the Lycoming County noise standards."

With regard to how long this whole ordeal was going to last, the Application submitted by Inflection stated the drilling and completion stages would be for a period of 2-3 years. Intervenor's Exhibit 6, at 2, 10. In response to questions from the residents, Mr. Irwin testified that that it would take at least 9 months, maybe longer. Transcript, 10/7/13, at 26, 32. Mr. Gillespie testified that the aggregate number of days with truck traffic would be 90 days, but the whole process takes about 4 months or so – three to four weeks of construction, a month to six weeks where there would be no trucks on the road, two to three weeks of actual well drilling, weeks later the fracking string comes in and they don't leave for another three weeks.[1] Transcript, 11/4/13, at 58-60. This, however, does not include any time for any post construction activities such as

[1] Inflection's attorney, Mr. Karpowich, suggested that the whole process would take 90 days. Transcript, 11/4/13 at 38. It is well settled, however, that arguments and statements of attorneys are not evidence. Commonwealth v. LaCava, 542 Pa. 160, 182, 666 A.2d 221, 231 (1995); Pa.SSJI (Civ.) 1.190.

reduction of the well pad from 350' by 300' to 150' by 150'. See, Transcript, 10/7/13, at 12.

Curiously, when Mr. Minium, a resident who worked on a well pad in Susquehanna County, was commenting that life is going to "suck" for the next two years for anybody who lives around that pad and how it was going to be 24 hours a day, seven days a week and 365 days a year (Transcript, 11/4/13, at 45-48), the Chairman of the Board interrupted him and said that the "inconvenience" would be gone in 90 days. Transcript, 11/4/13/ at 48. Not surprisingly given the Chairman's comments, but contrary to the clear evidence of record, the Board found that "Applicant testified that the initial well pad construction and drilling process would take approximately three (3) months." See The Board's Opinion and Order, Finding of Fact 34.

Of great concern to the Court is the use of the term "no way" in the ordinance. Section 12.8.3 of the zoning ordinance states that the use may only be permitted if it "in no way is in conflict with the general purposes of this Ordinance." The Court defines "no way" as when there is a zero percent chance that something will or will not occur. There was insufficient evidence to conclude to a 100% certainty that the proposed use would not conflict with the general purposes of the Ordinance.

The construction of anywhere from one or more well pads with potentially one to four wells on each well pad is clearly in conflict with the general purposes of the ordinance as set forth in the aforesaid sections. It is not an open space, agricultural or residential use, and it does not foster a quiet, medium density residential environment while encouraging the continuation of

agricultural activities and the preservation of prime farm land.

The final factor addressed in 12.18 concerns detriment to public health, safety and welfare of the neighborhood where the well pad and wells are to be located. Ordinance, § 12.18.3. Regarding the applicable burden of proof with respect to this factor, Appellants argue that pursuant to the express terms of the ordinance, the Applicant, Inflection, bears the burden of proof.

A reading of the ordinance supports Appellants' position. The ordinance reads as follows:

> *"The burden of proof shall be upon the Applicant to demonstrate that the proposed use meets the foregoing criteria and would not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located."*

Appellants logically argue that the provision means what it says.

Appellee and Intervenors argue on the contrary that despite said express language, case law retains the burden of production on the Objectors. Remarkably, they are correct. While the ordinance places the "burden of proof" on the Applicant as to the matter of detriment to health, safety and general welfare, "such a provision… merely places the persuasion burden on the Applicant. The Objectors still retain the initial presentation burden with respect to the general matter of detriment to health, safety and general welfare." Manor Healthcare Corp. v. Lower Moreland Twp. Zoning Hearing Bd., 590 A.2d 65, 70 (Pa. Commw. 1991). The objectors must "raise specific issues concerning the proposal's general detrimental effect on the community before the applicant is required to persuade the factfinder that the intended use would not violate

the health, safety and welfare of the community." Id. at 71, citing Appeal of R.C. Maxwell Co., Id. at 1303.

As with the other factors, Appellants and the other objectors present at the hearing raised numerous and specific issues concerning the proposal's general detrimental effect on the community.

The Court has already discussed the truck traffic, noise, and lighting. Such certainly is not consistent with the serene, pastoral setting of a RA district. It also will have a detrimental effect on the community. This area has rolling hills, a couple of streams and some wetlands. Transcript, 10/4/13, at 11-12. The proposed location of the well pad is below several of the resident's homes. By Mr. Irwin's own admission, this topography makes it more difficult to shield the residents from the noise and lights. Mr. Minium, who worked at a well pad in another county, testified that given the location of the well pad "down in that hole", the noise would echo up out away from the pad, and the lights would bring a glow so that nobody would be able to have a nice dark evening after Inflection starts drilling. Transcript, 11/4/13, at 45-47. Mr. Pentz also testified that with the trucks constantly running up and down Quaker State Road, the people wouldn't be able to sleep and the road would be all chewed up until Inflection was done. Id. at 45.

This is not the typical construction situation. It is common knowledge that when an individual hires contractors to build a house or a farm, the work typically is performed during daylight hours in the normal business week. In comparison, the construction and drilling for the

proposed use involves constant or near constant truck traffic, illumination and noise from trying to get through thousands of feet (likely about a mile) of rock formations at all hours of the day and night, seven days a week until the well is completed. This would be less of a concern, and perhaps not a concern at all, in a commercial or industrial area where people aren't trying to sleep. In a commercial area, the businesses likely would be closed at night. In an industrial area, if there is a second or third shift operating, those industrial uses will have their own noise and light and won't notice or won't be bothered by the noise and light involved in the construction of a well pad. Here, however, there are in excess of 125 homes whose residents likely will be adversely affected by Inflection's activities, especially the activities that occur during nighttime.

The residents also had concerns about the individuals who would be working near their homes. Mr. Irwin did not know if the numerous contractors working on the site required criminal background checks for its employees. Transcript, 10/7/13, at 78. Of the 400 people who would be working on the pad over the course of the project, 98 or 99% would not be Inflection employees. Id. Inflection's attorney stated, "We are hiring local, insured, licensed, respectable contractors." Transcript, 11/4/13, at 3. Later in the hearing a resident asked, "But do they have background checks?" Id. at 38. The attorney replied, "We don't know that." Id. When the resident indicated that she still had concerns, the attorney said "they do sign agreements that they're going to be law abiding and they're not going to commit any crimes." Id. at 39. Mr. Gillespie read a portion of an Inflection company policy into the record. The policy did state that

there was a conduct policy that all Inflection's employees, contractors and other persons engaged in company business are obligated to follow, which prohibited, among other things, engaging in criminal conduct or any action that is detrimental to Inflection's efforts to operate properly and lawfully. The policy, however, did not state that contractors or their employees who had prior criminal records would not be hired. Instead, it merely stated that the company "inquires into the background of all of its employees, including contractors." Id. at 56. Unlike the standard of conduct policy relating to future activities, the inquiries into backgrounds did not explicitly cover "other persons engaged in company business" or describe what type of inquiry is made. In other words, Inflection could hire Company X to engage in construction activities such as hauling water, stone or concrete to the site and investigate Company X, but not investigate the individuals actually driving the trucks onto the site or even know who those individuals are. The language quoted by Mr. Gillespie regarding background inquiries also could mean that Inflection just inquires about licensing, insurance and/or bonding (and not criminal background checks) as suggested by the statements of Inflection's attorney earlier in the hearing.

The residents raised concerns about radiation at both hearings. Inflection's testimony on this issue was again somewhat inconsistent. Mr. Gillespie testified that the radiation levels are checked because they are going down into a deep formation, a different formation than exists in the upper mile of the earth, and bringing drill cuttings of that deep formation up to the surface. Transcript, 11/4/13 at 22. "Because we are opening a hole up to something a mile down below the ground, everybody just wants to be sure you're not bringing

something up or opening up a pathway for additional radiation to come out with natural rocks." Id. at 22-23. Mr. Gillespie downplayed the residents' concerns by stating they have never detected anything in this region that is out of the ordinary background levels we see and radiation is in just about all the water in the region, including the residents' drinking water. Id. at 31. When asked if he was saying the residents' drinking water had just as high level of radium 226 (a radioactive element) as a mile down, however, Mr. Gillespie said, "I wouldn't say that, but there is no correlation between the depths of water you are looking at and the amount of any element within it." Id. When a resident said he thought there would be more radiation further down, Mr. Gillespie contradicted his earlier testimony and said, "The rock formations that are down there are related to and of the same system rock formations as the ones that are directly under your feet." Id.

The resident also cited a Duke University study which concluded that the waterways in Pennsylvania are now exceeding levels of appropriate radioactivity because of hydrofracking. Inflection, through both its attorney and Mr. Gillespie suggested that questions about the Duke University study challenged the process which is already permitted by DEP and went beyond what Mr. Gillespie was there to testify about. Inflection, however, did not refute the Duke study. Instead, Mr. Gillespie was "not ready to weigh in and say that the Duke people are right or wrong. It's not settled yet." Transcript, 11/4/13, at 36.

Stating that the process is already permitted by DEP begs the question. Merely because hydrofracking is regulated by DEP, certainly does not mean the activity should occur in

this particular residential area. Inflection acknowledged that there are in excess of 125 wells that supply water to the residents within 3000 feet of Inflection's proposed well pad. Transcript 10/4/13, at 23-24. The residents were concerned that the increased levels of radioactivity in the waterways would also show up in their water supply and they were pointing to the Duke study to show that placing a natural gas well in this residential zoning district would be detrimental to their health, safety and welfare.

The residents were also concerned that the well casings would fail and affect their health, safety and welfare. Inflection could not say that no casings had ever failed in the fracking process. It admitted that it was "very possible" that well casings "weren't installed properly in Lycoming County." Transcript, 11/4/13, at 29, 30. Inflection tried to downplay that by stating, "That is an installation, that's not a failure." The resident aptly replied, "Well the point is though installation or failure, it still could render someone's water undrinkable." Id. at 30.

In addressing the detriment question, Inflection merely stated that it "did not believe" that the proposed use would adversely affect the neighborhood or create any nuisance or hazards to people or pedestrians. Transcript, 10/7/13, at 20. A resident, however, noted that there is a blind hill coming out of the Pines Development. Id. at 39. Excessive truck traffic and a blind hill coming out of the development certainly could create a nuisance if not an actual hazard to people in the development.

Inflection cursorily stated that the proposed use would not have an adverse impact on health, safety or welfare of the public. Id. at 21. On additional questioning, Inflection could

only respond “okay” when advised that there is no evidence to support its claim of no adverse impact. Id. at 32. Without any supporting evidence or "meat”, Inflection stated that it would control the effects on health, safety and environment “at the site.” Id. at 33.

Brian Gorsline testified about citations and violations. Particularly, Inflection was cited on July 18, 2013 by DEP for failure to properly control or dispose of industrial or residual waste to prevent pollution of the Commonwealth waters. Over a period of approximately five years, out of 180 wells inspected in Lycoming County, there were 660 violations. Transcript, 11/4/13 at 40, 41.

Given all of the aforesaid evidence, the Court finds that the Appellant objectors presented substantial evidence that there is a high degree of probability that the use will adversely affect the health, welfare and safety of the neighborhood. Therefore, they met their burden of production. The burden of persuasion, however, was not met by Appellees and Intervenors. In fact, there is no evidence to support the Board’s conclusion that said burden was met, let alone substantial evidence.

While the Court appreciates the deference that the Board presumably was paying to the intent and mandates of the legislature through Act 13 of 2012, the Pennsylvania Oil and Gas Act, such deference cannot be in abrogation to the criteria of the ordinance.

As the Pennsylvania Supreme Court recently noted, the technique used to recover the natural gas contained in Marcellus shale “inevitably” does “violence to the landscape.” Robinson Township v. Commonwealth, 83 A.3d 901, 914 (Pa. 2014). One unconventional gas

well uses several million gallons of water. Id. at 915. "The Commonwealth's experience of having the benefit of vast natural resources [with] unrestrained exploitation…[has] led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life." Id. at 963. "By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children and future generations…perhaps rivaling the environmental effects of coal extraction." Id. at 976.

Fairfield Township has a substantial and immediate interest in protecting the environment and the quality of life within its borders. Id. at 919-920. This quality of life is a constitutional charge that must be respected by all levels of government. Id. at 952 (citing Franklin Twp. v. Commonwealth, 499 Pa. 162, 452 A.2d 718, 722 & n.8 (1982)). "When government acts, the action must, on balance, reasonably account for the environmental features of the affected locale." Id. at 953.

While the Court understands the constraints that the Board may have been operating under as a result of Act 13 and the litigation regarding its constitutionality, our Supreme Court has now ruled with respect to such, the citizens' rights cannot be ignored and must be protected. Neither the Applicant nor the Board explained how unconventional natural gas operations are compatible with the permitted uses in this residential district. Furthermore, the Board's findings were not supported by substantial evidence and, in some instances, were clearly in contravention of the evidence.

Appellant has raised several other issues in its appeal. In light of this Court's

findings with respect to the factors set forth in § 12.18, the Court sees no need to address the other issues. In fact, the Court deems it improper to do so. The Court should not and cannot address, for example, constitutional issues if they need not be addressed.

In conclusion, taking into account the respective burdens as well as the standard for this Court's review, and acknowledging the appropriate deference that should be given to the Board in connection with its decision, the Court nonetheless concludes that the Board's findings with respect to the § 12.18 factors are not supported by substantial evidence. Accordingly, the appeal of Appellants shall be granted and the decision and Order of the Board shall be vacated and set aside.

O R D E R

AND NOW, this ___ day of August 2014, for the reasons set forth herein, the Appeal of Appellants Gorsline and Batkowski is GRANTED. The decision of the Fairfield Township Board of Supervisors issuing a conditional use permit to Inflection Engergy, LLC to construct and operate an unconventional natural gas well pad on the Shaheen property is VACATED, SET ASIDE and REVERSED.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: J. Michael Wiley, Esquire
Joshua J. Cochran, Esquire
Mark Szybist, Esquire
8 W Market St, Suite 901, Wilkes-Barre, PA 18701

George Jugovic, Esquire
Citizen's for Pennsylvania's Future
200 First Ave, Suite 200, Pittsburgh PA 15222
Kevin M. Walsh, Jr.
85 Drasher Rd, Drums PA 18222
Gary Weber (Lycoming Reporter)
Judge Lovecchio (Attn: Elizabeth Gula, Intern)
Work File

TAB D

Notice of Appeal, *Delaware Riverkeeper Network v. Commonwealth*
(Pa. Envtl. Hearing Bd. filed Sept. 15, 2014) (No. 2014128)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

THE DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER; EARTHWORKS; and STEWARDS OF THE LOWER SUSQUEHANNA	:	
Appellants,	:	
v.	:	EHB Docket No. _____
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION;	:	ELECTRONICALLY FILED
Appellee,	:	
RANGE RESOURCES—APPALACHIA, LLC; and LAFARGE NORTH AMERICA INC.,	:	
Permittees.	:	

NOTICE OF APPEAL

NOTICE OF APPEAL FORM
APPEAL INFORMATION

1. Name, Address and Telephone Number of the Appellants:

   Delaware Riverkeeper Network and
   Maya van Rossum, the Delaware Riverkeeper
   925 Canal St. Suite 3701
   Bristol, PA 19007
   (215) 369-1188

   Earthworks
   P.O. Box 149
   Willow, NY 12495

   Stewards of the Lower Susquehanna, Inc.
   2098 Long Level Road
   Wrightsville, PA 17368

2. Subject of Appeal:

   a. Action of the Department for which Review is sought:

      The Delaware Riverkeeper Network, the Delaware Riverkeeper (collectively "DRN"), Earthworks, and Stewards of the Lower Susquehanna, Inc. appeal from the Department of Environmental Protection's Final Action dated August 16, 2014 granting Range Resources—Appalachia, LLC, and Lafarge North America Inc., a Residual Waste General Permit authorizing research and development activities to support the beneficial use or processing prior to beneficial use of drill cuttings for stabilized soil pavement. A copy of this Final Action is attached as Exhibit "A". The Final Action is found on page 3 under "General Permit Application No. WMGR097R025".

   b. The Department's Official who took the Action:

      Scott E. Walters, Chief, Permits Section, Division of Municipal and Residual Waste, Bureau of Waste Management.

   c. The location of the operation or activity which is the subject of the Department's action (municipality, county):

      The address of the well site is 725 Hickory Swale Road, Jersey Shore, Lycoming County, well # 5H in the Dog Run Hunting Club Unit.

   d. On what date and how you received Notice of the Department's action:

On August 16, 2014 Appellants received notice of DEP's action via publication in the Pennsylvania Bulletin. (Attached as Exhibit A)

3. *Objections to the Department's action in separate, numbered paragraphs.* The objections may be factual or legal and must be specific. If you fail to state an objection here, you may be barred from raising it later in your appeal. Attach additional sheets, if necessary.

   Please see attached sheets.

4. Specify any related appeal(s) now pending before the Board. If you are aware of any such appeal(s) provide that information.

   Appellants are not aware of any additional related Appeals now pending before the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

THE DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER; EARTHWORKS; and STEWARDS OF THE LOWER SUSQUEHANNA	:	
Appellants,	:	
v.	:	EHB Docket No. _____
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION;	:	ELECTRONICALLY FILED
Appellee,	:	
RANGE RESOURCES—APPALACHIA, LLC; and LAFARGE NORTH AMERICA INC.,	:	
Permittees.	:	

OBJECTIONS TO THE DEPARTMENT'S ACTIONS

Background

1. On January 10, 2014, Range Resources—Appalachia, LLC, and Lafarge North America Inc. ("Range" or "Applicant"), submitted a General Permit Application to the Pennsylvania Department of Environmental Protection ("DEP") for a General Permit to Operate Residual Waste Processing Facilities and the Beneficial Use of Residual Waste other than Coal Ash for the beneficial use of vertical drill cuttings for stabilized soil pavement for well pads and access roads.

2. Range sought registration to operate under General Permit No. WMGR097 for research and development activities to support the beneficial use or processing prior to beneficial use.
3. Range chose the Dog Run Hunting Club Well #5H as the site.
4. Notice of DEP's receipt of the application was published in the February 1, 2014 Pennsylvania Bulletin.
5. On April 1, 2014 at 10:06 am, Appellants and 10 other organizations electronically submitted comments on the application. A copy of this email is attached as Exhibit "B".
6. On August 16, 2014, as noticed in the Pennsylvania Bulletin, DEP approved Range's General Permit Application to Operate Residual Waste Processing Facilities and the Beneficial Use of Residual Waste other than Coal Ash.
7. The Comment and Response Document DEP prepared for this permit did not acknowledge or address the comments Appellants submitted. A copy of this document is attached as Exhibit "C".
8. The project site is approximately 6 acres.
9. Under its permit application, Range is seeking to construct half of a well pad using a mix of drill cuttings and Portland cement as a soil stabilizer while constructing the other half using only Portland cement, to use as a "control".
10. The project site is uphill from two streams designated as Exceptional Value, Larry's Creek and Dog Run Creek.
11. The project site's terrain has elevation changes in excess of 100 feet, making sediment runoff and sedimentation more likely. These onsite conditions necessitate proper erosion and sediment control and corrective action plans.

12. The permit as issued requires sample collection at 7, 14, and 28 days, 3 months, 6 months, and 1 year.
13. The permit as issued requires sample collection on the well pad only.
14. Range Resources has a substantial history of non-compliance, including residual waste violations at Dog Run Hunting Club well 4H.
15. Violations at Dog Run Hunting Club include: failure to properly store, transport, process or dispose of a residual waste; failure to properly control or dispose of industrial or residual waste to prevent pollution of the waters of the Commonwealth; failure to design and construct unconventional well site to prevent spills to the ground surface and off the well site; and failure to adopt pollution prevention measures required or prescribed by DEP by handling materials that create a danger of pollution.
16. Range did not disclose the above mentioned violations in its Form HW-C Compliance History.
17. The permit does not indicate from where the drill cuttings will originate or what the final mix design will be.
18. Range's application includes a waste characterization of drill cuttings from a different well than the well that will be used to supply drill cuttings for the project.
19. Range's application includes a plan for corrective action that only considers remediation of the well pad site and does not include other potentially affected areas.
20. The permit relies upon an outdated contingency plan that was created for the originally permitted well site, and which did not plan for the use of an experimental concrete mix.

General Permits for Beneficial Use of Residual Waste Other Than Coal Ash

21. Permit requirements for the beneficial use of residual waste other than coal ash are set out in 25 Pa. Code § 287.601 *et seq.*

22. An application for a general permit must contain "a description of the type of residual waste to be covered by the general permit, including physical and chemical characteristics of the waste." 25 Pa. Code § 287.621 (b)(1).

23. There must be a "sufficient number of samples…to accurately represent the range of physical and chemical characteristics of the waste type." 25 Pa. Code § 287.621 (b)(1).

24. An application for a general permit must contain "a detailed narrative and schematic diagram of the production or manufacturing process from which the waste to be covered by the general permit is generated." 25 Pa. Code § 287.621 (b)(3).

25. An application for a general permit must contain "proposed concentration limits for contaminants in the waste which is to be beneficially used, and a rationale for those limits." 25 Pa. Code § 287.621 (b)(4).

26. "If the waste is to be used as a construction material, soil substitute, soil additive, or antiskid material, or is to be otherwise placed directly onto the land, an evaluation of the potential for adverse public health and environmental impacts from the proposed use of the residual waste is required." 25 Pa. Code § 287.621 (b)(5)(iv).

27. DEP may not issue a general permit unless the applicant has affirmatively demonstrated that the proposed activity "will be conducted in a manner that will not harm or present a threat of harm to the health, safety or welfare of the people or environment of th[e] Commonwealth through exposure to constituents of the waste during the proposed beneficial use or processing activities and afterwards." 25 Pa. Code § 287.624 (2).

28. General permits issued by DEP must include, at a minimum, "a clear and specific description of the category of waste…eligible for coverage under the general permit." 25 Pa. Code § 287.631 (a)(1).

29. General permits issued by DEP must include, at a minimum, "limits on the physical and chemical properties of waste that may be beneficially used or processed." 25 Pa. Code § 287.631 (a)(4)(i).

30. General permits issued by DEP must include, at a minimum, "a requirement that the activities authorized by the general permit will not harm or present a threat of harm to the health, safety, or welfare of the people or environment of th[e] Commonwealth". 25 Pa. Code § 287.631 (a)(4)(iii).

31. "The use of the waste as an ingredient in an industrial process or as a substitute for a commercial product may not present a greater harm or threat of harm than the use of the product or ingredient which the waste is replacing." 25 Pa. Code § 287.631 (a)(4)(iii).

32. DEP may issue a general permit only when "[t]he wastes included in the category are generated by the same or substantially similar operations and have the same or substantially similar physical character and chemical composition." 25 Pa. Code § 287.611 (a)(1).

33. DEP may issue a general permit only when "[t]he activities in the category can be adequately regulated utilizing standardized conditions without harming or presenting a threat of harm to the health, safety, or welfare of the people or environment of th[e] Commonwealth." 25 Pa. Code § 287.611 (a)(3).

Objection 1: DEP Failed to Properly Consider and Address Public Comments.

34. DEP's action was unlawful and/or unreasonable because DEP failed to review and consider comments submitted by Appellants and possibly others.

35. Upon receipt of an application that is administratively complete, DEP is required to publish notice with a brief description of the procedures for public comment. 25 Pa. Code § 287.623 (b)(3).

36. The notice published in the Pennsylvania Bulletin stated that comments must be submitted within 60 days of the notice and may recommend revisions to, and approval or denial of the application.

37. Because DEP is required to accept comments, they must also respond and/or consider those comments or public participation is ineffectual.

38. Appellants submitted comments within the prescribed comment period; however these comments were not included or addressed in DEP's Comment and Response Document.

39. Meaningful public participation did not occur because DEP failed to properly consider and address Appellants' comments.

Objection 2: DEP Acted Contrary To Law Because Wastes Must be From the Same or Similar Operations, Have Substantially Similar Characteristics, and Must be Clearly and Specifically Described.

40. Upon information and belief, DEP failed to sufficiently demonstrate that the drill cuttings are generated by the same or substantially similar operations and have the same or substantially similar physical character and chemical composition. 25 Pa. Code § 287.611 (a)(1).

41. DEP failed to provide a clear and specific description of the type of residual waste to be covered by the permit, including physical and chemical characteristics of the waste. 25 Pa. Code § 287.631 (a)(1).

42. DEP failed to provide a detailed narrative and schematic diagram of the production or manufacturing process from which the waste to be covered by the general permit is generated. 25 Pa. Code §287.621 (b)(3).

43. Drill cuttings from a site other than the one used for Applicant's waste characterization will be used for this project. The permit does not indicate from where the drill cuttings will originate or from what rock formation, and the permit does not provide a narrative of the types of drilling muds and chemicals that will be used for the origin well.

Objection 3: DEP Acted Contrary to Law Because it Did Not Demonstrate That the Activities Create No Harm or Threat of Harm.

44. DEP failed to demonstrate that the activities in the category can be adequately regulated utilizing standardized conditions without harming or presenting a threat of harm to the health, safety or welfare of the people or environment of the Commonwealth. 25 Pa. Code § 287.611 (a)(3).

45. DEP's action was unlawful, unreasonable, and/or not supported by the facts because the permit's contingency plan and plan for corrective action are both inadequate for the protection of public health, public safety, and the environment. 25 Pa. Code §287.624 (2).

    a. The contingency plan does not account for the use of an experimental concrete mix.

    b. The corrective action plan only considers remediation of the well pad and not other areas of potential contamination.

46. DEP failed to provide proposed concentration limits for contaminants in the waste which is to be beneficially used, and a rationale for those limits. 25 Pa. Code § 287.621 (b)(4).

47. DEP's action was unlawful, unreasonable, and/or not supported by the facts because DEP did not demonstrate that the Erosion and Sediment Control General Permit and plan for Post-Construction Stormwater Management will function as intended with the use of a mix of drill cuttings and cement.

48. DEP failed to provide an evaluation of the potential for adverse public health and environmental impacts from the proposed residual waste. 25 Pa. Code §287.621 (b)(5)(iv).

49. DEP's action was unlawful, unreasonable, and/or not supported by the facts because the testing methodology is insufficient to protect public health and the environment. 25 Pa. Code §287.624 (2).

    a. The time period for sample collection is insufficient, as leaching will continue beyond the one year mark due to prolonged exposure to precipitation and freeze-thaw processes.

    b. Monitoring of the well pad only is insufficient as it will not allow for the proper identification of contaminant migration pathways.

Objection 4: DEP Acted Contrary to Law Because it Did Not Demonstrate That the Waste Presents No Greater Harm or Threat of Harm Than the Ingredient Which the Waste is Replacing.

50. DEP failed to adequately show that the use of the waste as an ingredient in an industrial process or as a substitute for a commercial product does not present a greater harm or threat of harm than the use of the ingredient which the waste is replacing. 25 Pa. Code §287.624 (2).

Objection 5: DEP Acted Contrary to Law Because as a Trustee it Shall Conserve and Maintain Public Natural Resources and They Have Failed to do so.

51. Department actions must comply with the Pennsylvania Constitution, including Article I, Section 27, which restricts DEP from issuing permits that allow "degradation, diminution, or depletion of our public natural resources." Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901, 957 (Pa. 2013); see also Pa. Const. Art. I, Sec. 27 ("As trustee of these resources, the Commonwealth *shall conserve and maintain* them for the benefit of all the people.") (emphasis added).
52. As a trustee of public natural resources, DEP must (among other obligations) consider and account for how its action will impact the right of present and future generations of Pennsylvanians to enjoy public trust resources.
53. These resources include exceptional value watersheds and the groundwater that feeds them, which "are resources essential to life, health, and liberty." Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901, 975.
54. By failing to analyze how its action would impact present and future generations' enjoyment of public trust resources, DEP is wholly unable to account for such impacts and to ensure that such impacts are minimized.
55. Indeed, DEP failed to conduct any analysis to determine what impacts would result from approving this beneficial use in this location, which creates a new opportunity for soil and water contamination, and degradation of quality of life.
56. DEP erred in issuing a permit without undertaking this analysis.
57. "[E]nvironmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with

immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term." Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901, 959.

58. In this case, DEP failed, among other things, to:

    a. analyze and address the long-term impacts of the project on the community and the natural resources it depends upon; and

    b. review and address the long-term and cumulative risks of groundwater and surface water contamination to Larry's Creek and Dog Run Creek.

WHEREFORE, the Appellants respectfully request that the Environmental Hearing Board reverse the DEP's approval of the Applicant's General Permit and/or mandate DEP compliance with the applicable provisions of the Pennsylvania Code.

By filing this Notice of Appeal with the Environmental Hearing Board, the undersigned hereby certify that the information submitted is true and correct to the best of our information and belief.

Respectfully submitted,

For Appellants Delaware Riverkeeper Network;
Maya van Rossum, the Delaware Riverkeeper;
Earthworks; and Stewards of the
Lower Susquehanna, Inc.

CURTIN & HEEFNER LLP

s/ Jordan B. Yeager
Jordan B. Yeager, Esq.
Bar No. 72947
jby@curtinheefner.com
Lauren M. Williams, Esq.
Bar No. 311369
1349053.1/45047

lmw@curtinheefner.com
Curtin & Heefner LLP
Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
(267) 898-0570 office

Date: September 15, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

THE DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER; EARTHWORKS; and STEWARDS OF THE LOWER SUSQUEHANNA	:	
Appellants,	:	
v.	:	EHB Docket No. _____
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION;	:	ELECTRONICALLY FILED
Appellee,	:	
RANGE RESOURCES—APPALACHIA, LLC; and LAFARGE NORTH AMERICA INC.,	:	
Permittees.	:	

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Notice Of Appeal was filed with the Pennsylvania Environmental Hearing Board and was served on the following on the date listed below:

Electronic Service Via the Board
Department of Environmental Protection
Office of Chief Counsel
Attention: Glenda Davidson
16th Floor Rachel Carson State Office Building
400 Market Street, P.O. Box 8464
Harrisburg, PA 17105-8464

Overnight Delivery
Scott E. Walters
Chief, Permits Section, Division of Municipal and Residual Waste
Bureau of Waste Management
P.O. Box 69170
Harrisburg, PA 17106-9170

Range Resources—Appalachia, LLC
100 Throckmorton Street, Suite 1200
Fort Worth, TX 76102

Lafarge North America, Inc.
20 Oak Hollow, Suite 260
Southfield, MI 48033

Respectfully submitted,

CURTIN & HEEFNER LLP

s/ Jordan B. Yeager
Jordan B. Yeager, Esq.
Curtin & Heefner LLP
Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
(267) 898-0570 office
jby@curtinheefner.com

Date: September 15, 2014

EXHIBIT A

[44 Pa.B. 5494]
[Saturday, August 16, 2014]

[Continued from previous Web Page]

LAND RECYCLING AND ENVIRONMENTAL REMEDIATION

UNDER ACT 2, 1995
PREAMBLE 3

The Department has taken action on the following plans and reports under the Land Recycling and Environmental Remediation Standards Act (35 P. S. §§ 6026.101—6026.907).

Section 250.8 of 25 Pa. Code and administration of the Land Recycling and Environmental Remediation Standards Act (act) require the Department to publish in the *Pennsylvania Bulletin* a notice of its final actions on plans and reports. A final report is submitted to document cleanup of a release of a regulated substance at a site to one of the remediation standards of the act. A final report provides a description of the site investigation to characterize the nature and extent of contaminants in environmental media, the basis of selecting the environmental media of concern, documentation supporting the selection of residential or nonresidential exposure factors, a description of the remediation performed and summaries of sampling methodology and analytical results which demonstrate that the remediation has attained the cleanup standard selected. Plans and reports required by the act for compliance with selection of remediation to a site-specific standard, in addition to a final report, include a remedial investigation report, risk assessment report and cleanup plan. A remedial investigation report includes conclusions from the site investigation; concentration of regulated substances in environmental media; benefits of reuse of the property; and, in some circumstances, a fate and transport analysis. If required, a risk assessment report describes potential adverse effects caused by the presence of regulated substances. If required, a cleanup plan evaluates the abilities of potential remedies to achieve remedy requirements. A work plan for conducting a baseline remedial investigation is required by the act for compliance with selection of a special industrial area remediation. The baseline remedial investigation, based on the work plan, is compiled into the baseline environmental report to establish a reference point to show existing contamination, describe proposed remediation to be done and include a description of existing or potential public benefits of the use or reuse of the property. The Department may approve or disapprove plans and reports submitted. This notice provides the Department's decision and, if relevant, the basis for disapproval.

For further information concerning the plans and reports, contact the environmental cleanup program manager in the Department regional office under which the notice of the plan or report appears. If information concerning a final report is required in an alternative form, contact the community relations coordinator at the appropriate regional office. TDD users may telephone the Department through the AT&T Relay Service at (800) 654-5984.

The Department has received the following plans and reports:

Northcentral Region: Environmental Cleanup & Brown- fields Program Manager, 208 West Third Street, Williamsport, PA 17701

T.B. Disposal, I-80 @ Exit 13W, Muncy Creek Township, **Lycoming County**. Northridge Group Inc., P. O. Box 231, Northumberland, PA 17857, on behalf of T.B. Disposal submitted a Final Report concerning the remediation of site soils contaminated with Benzene, Toluene, Ethylbenzene, Isopropylbenzene, Napthalene, 1,3,5-Trimethylbenzene, 1,2,4-Trimethylbenzene, Methyl Tertiary Butyl Ether, Lead, Benzo(a) anthracene. The Final Report demonstrated attainment of the Statewide Health Standard, and was approved by the Department on July 25, 2014.

Northeast Region: Eric Supey, Environmental Cleanup and Brownfields Program Manager, 2 Public Square, Wilkes-Barre, PA 18701-1915.

Szymanski Residence, 132 Meadowridge Acres Road, Milford, PA 18337, Delaware Township, **Pike County**, Kevin D. Orabone, Applied Service Corp., has submitted a Notice of Intent to Remediate and a Final Report on behalf of his clients, James Szymanski & Elisabeth Cologne, 132 Meadowridge Acres Road, Milford, PA 18337, concerning the remediation of soil due to removal of corroded Underground Storage Tank. The applicant proposes to remediate the site to meet the Residential Statewide Health Standards for soil. The report documented attainment of the Statewide Health Standards for soils and was approved on July 30, 2014.

Southcentral Region: Environmental Cleanup and Brownfields Program Manager, 909 Elmerton Avenue, Harrisburg, PA 17110. Phone 717.705.4705.

Diana Herbst Property, 20 Barto Road, Barto, PA, Washington Township, **Berks County**. Reliance Environmental, Inc., 235 North Duke Street, Lancaster, PA 17602, on behalf of Diana Herbst, 20 Barto Road, Barto, PA 17504, submitted a Final Report concerning the remediation of soils contaminated with No. 2 fuel oil. The Final Report demonstrated attainment of the Residential Statewide Health Standard, and was approved by the Department on July 31, 2014.

Christian Thorne Property, 3 Poplar Avenue, Temple, PA 19560, Alsace Township, **Berks County**. Liberty Environmental, Inc., 50 North Fifth Street, 5th Floor, Reading, PA 19601, on behalf of Christian Thorne, 3 Poplar Avenue, Temple, PA 19560, submitted a Final Report concerning the remediation of site soils contaminated with No. 2 fuel oil. The Final Report demonstrated attainment of the Residential Statewide Health standard, and was approved by the Department on July 15, 2014.

Walmar Manor, LLC, 6 Walmar Manor, Dillsburg, PA 17019, Franklin Township, **York County**. EP&S of Vermont, Inc., 5100 Paxton Street, Harrisburg, PA 17111, on behalf of Walmar Manor, LLC, 125 Walmar Manor, Dillsburg, PA 17019 and Raynor Environmental Enterprises, 1006 Hammond Bend Road, Chapel Hill, NC 27517, submitted a Final Report concerning remediation of site soils contaminated with No. 2 fuel oil. The Final Report demonstrated attainment of the Residential Statewide Health Standard, and was approved by the Department on July 29, 2014.

Northwest Region: Environmental Cleanup & Brown- fields Program Manager, 230 Chestnut Street, Meadville, PA 16335-3481

Erie County Convention Center Authority Bayfront Site (Former GAF Materials Corporation), 218 West Bayfront Parkway, City of Erie, **Erie County**. AMEC Environmental & Infrastructure, Inc., 800 N. Bell Avenue, Suite 200, Pittsburgh, PA 15106, on behalf of Erie County Convention Center Authority, submitted a Final Report concerning the remediation of site soil contaminated with arsenic, anthracene, benzo[a]anthra- cene, benzo[a]pyrene, benzo[b]fluoranthene, benzo[k]- fluoranthene, benzo[g,h,i]perylene, carbazole, chrysene, dibenzo(a,h)anthracene, dibenzofuran, indeno[1,2,3-cd]- pyrene, 2-methylnaphthalene, fluoranthene, 4-methyl- phenol[p-cresol], naphthalene, 4-nitroanaline, and 1,3,5-trimethylbenzene and site groundwater contaminated with iron, aluminum, 2-methylnaphthalene, anthracene, benzo[a]anthracene, benzo[a]pyrene, benzo[b]fluoran- thene, benzo[g,h,i]perylene, benzo[k]fluoranthene, chry- sene, 2,4-dichlorophenol, dibenzo(a,h)anthracene, fluoran- thene, indeno[1,2,3-cd]pyrene, phenanthrene, pyrene, 4-methylphenol[p-cresol], naphthalene, and benzene. The Report was disapproved by the Department on July 30, 2014.

OMG Americas, 240 Two Mile Run Road, Sugarcreek Borough, **Venango County**. Civil & Environmental Consultants, Inc., 333 Baldwin Road, Pittsburgh, PA 15205, on behalf of OMG Americas, Inc., 240 Two Mile Run Road, Franklin, PA 16323, submitted a Final Report concerning the remediation of site soil contaminated with Lead and site groundwater contaminated with Benzene and Naphthalene. The Final Report demonstrated attainment of the Site-Specific standard, and was approved by the Department on July 30, 2014.

Southwest Region: Environmental Cleanup & Brown- field Development Program Manager, 400 Waterfront Drive, Pittsburgh, PA 15222-4745

Range Resources-Appalachia, LLC. Yeager Well Pad, McAdams Road, Amwell Township, **Washington County**. Civil & Environmental Consultants, Inc., 333 Baldwin Road, Pittsburgh, PA 15205 on behalf of Range Resources, 3000 Town Center Blvd., Canonsburg, PA 15317 submitted a Final Report concerning the remediation of site soils contaminated with drilling fluid/mud. The Final Report demonstrated attainment of the residential Statewide Health Standard for soils and was approved by the Department on August 1, 2014.

HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

Permits issued under the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003) and Regulations to Operate a Hazardous Waste Treatment, Storage, or Disposal Facility.

Southeast Region: Regional Solid Waste Manager, 2 East Main Street, Norristown, PA 19401

PAD002387926. Merck Sharp & Dohme Corp, 770 Sumneytown Pike, West Point PA 19486. This application is for the 10-year permit renewal to continue operation of the solid waste permit (PAD002387926) of the RCRA Part B Permit and the Class 1 permit modification reflecting a corporate reorganization from "Merck & Company, Inc." to "Merck Sharp & Dohme Corporation" for the captive hazardous waste storage facility located at Merck Sharp & Dohme Corporation's West Point facility in Upper Gwynedd Township, **Montgomery County**. The permit was issued by the Southeast Regional Office on July 29, 2014.

HAZARDOUS WASTE ACTION

Proposed action on an application for a permit under the Solid Waste Management Act and regulations to operate a hazardous treatment, storage or disposal waste facility.

Intent to Renew Permit

Southwest Region: Regional Waste Program Manager, 400 Waterfront Drive, Pittsburgh, PA 15222-4745.

Permit No. PAD982576258. Safety-Kleen Systems, Inc., West Mifflin Service Center, 650 Noble Drive, West Mifflin, PA 15122. Operation of a hazardous waste storage facility located in West Mifflin Borough, **Allegheny County**. The application for the renewal of a permit to store hazardous waste was considered for intent to approve by the Regional Office on August 4 2014.

Persons wishing to comment on the proposed action are invited to submit a statement to the Regional Office indicated as the office responsible, within 45 days from the date of this public notice. Comments received within this 45-day period will be considered in the formulation of the final determination regarding this application. Responses should include the name, address and telephone number of the writer; and concise statement to inform the Regional Office of the exact basis of any comment and the relevant facts upon which it is based. A public hearing may be held if the Regional Office considers the public response significant.

Following the 45-day comment period and/or public hearing, the Department will make a final determination regarding the proposed permit action. Notice of this determination will be published in the *Pennsylvania Bulletin* at which time this determination may be appealed to the Environmental Hearing Board.

RESIDUAL WASTE GENERAL PERMITS

Permit(s) Amended Under the Solid Waste Management Act; the Municipal Waste Planning, Recycling and Waste Reduction Act (53 P. S. §§ 4000.101—4000.1904); and Residual Waste Regulations for a General Permit to Operate Residual Waste Processing Facilities and the Beneficial Use of Residual Waste other than Coal Ash.

Central Office: Division of Municipal and Residual Waste, Rachel Carson State Office Building, 14th Floor, 400 Market Street, Harrisburg, PA 17105-8472.

General Permit Number WMGR019. General Permit Number WMGR019 authorized beneficial use of waste foundry sand for use as roadway construction material, a component or ingredient in the manufacturing of concrete or asphalt products, a soil additive or soil substitute and for non-roadway construction activity. On January 13, 2014, a request was received from Donsco Inc., 124 N Front St, PO Box 2001, Wrightsville, PA 17368-0040 to amend General Permit Number WMGR019 to include beneficial use of system dust, slag and refractory generated by ferrous metal foundries. The general permit was amended by Central Office on July 29, 2014.

Persons interested in reviewing the general permit may contact Scott E. Walters, Chief, Permits Section, Division of Municipal and Residual Waste, Bureau of Waste Management, P. O. Box 69170, Harrisburg, PA 17106-9170, 717-787-7381. TDD users may contact the Department through the Pennsylvania Relay service, (800) 654-5984.

RESIDUAL WASTE GENERAL PERMITS

Permit Issued under the Solid Waste Management Act, the Municipal Waste Planning, Recycling and Waste Reduction Act and Residual Waste Regulations for a General Permit to Operate Residual Waste Processing Facilities and the Beneficial Use of Residual Waste other than Coal Ash.

Central Office: Division of Municipal and Residual Waste, Rachel Carson State Office Building, 14th Floor, 400 Market Street, Harrisburg, PA 17106-9170.

General Permit Application No. WMGR097R025, Range Resources—Appalachia, LLC, 100 Throck-morton Street, Fort Worth, TX 76102. The registration to operate under General Permit Number WMGR097R025 is for research and development activities to support the beneficial use or processing prior to beneficial use. The project involves the beneficial use of vertical drill cutting from natural gas wells as an aggregate in a stabilized soil pavement for construction of Marcellus Shale and Utica well pads and access roads. The registration was issued by Central Office on August 1, 2014.

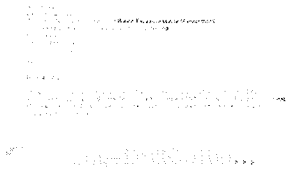
Persons interested in reviewing a general permit should be directed to Scott E. Walters at 717-787-7381, Chief, Permits Section, Division of Municipal and Residual Waste, Bureau of Waste Management, P. O. Box 69170, Harrisburg, PA 17106-9170. TDD users may contact the Department through the Pennsylvania Relay service, (800) 654-5984.

EXHIBIT B

Nadia Steinzor <nsteinz [illegible] nworksaction.org> Apr 1

To whom it may concern:
Please accept the attached comments letter regarding General Permit WMGR097025 for research and development activities using drill cuttings from natural gas operations. I am submitting this letter on behalf of several environmental, legal, and citizens organizations.

Thank you.



From: **Nadia Steinzor** <nsteinzor@earthworksaction.org>
Date: Tue, Apr 1, 2014 at 10:06 AM
Subject: Comments on General Permit Number WMGR097R025
To: ra-epbenuseall@pa.gov

To whom it may concern:

Please accept the attached comments letter regarding General Permit WMGR097025 for research and development activities using drill cuttings from natural gas operations. I am submitting this letter on behalf of several environmental, legal, and citizens organizations.

Thank you.

Nadia Steinzor

Eastern Program Coordinator, Oil & Gas Accountability Project, Earthworks
202-887-1872, ext. 109
nsteinzor@earthworksaction.org
skype: nadia.steinzor-ewa
twitter: earthworksrocks

EXHIBIT C

Comment and Response Document

Range Resources – Appalachia, LLC

Permit Approved/General Permit Number WMGR097R025

Cummings Township, Lycoming County

Public Comment Period Dates: February 1, 2014 – April 1, 2014

Commentators

	Name	Company
1.	Dylan Weiss	Citizen
2.	Audrey Gozdiskowski	Citizen
3.	Matt Miskie	Citizen
4.	Kevin G. O'Neill	Citizen
5.	Walter Tsou	Phila. Physicians for Social Resp.
6.	Diane Force	Bala House Montessori
7.	Frank Tarquinio	Citizen
8.	J. Chestnut	Citizen
9.	John Oakes	Citizen
10.	Joe Brady	Citizen
11.	Daniel F. Shearer	Citizen
12.	Jeff Koenig	Citizen
13.	Rosalyn Robitaille	Citizen
14.	Michael Balash	Citizen
15.	Marja Kaisla	New Sweden Alliance
16.	Nathan Sullenberger	Citizen

17.	Lisa Ladd-Kidder	Citizen
18.	Paul Roden	Citizen
19.	Janet Cavallo	Citizen
20.	Emily Boris	Citizen
21.	Mark M. McClellan	Evergreen Environmental
22.	Paulette (Hubans) Osborne	Citizen

Comments

1. Comment:

The commentators are concerned the drill cuttings will be harmful to anyone exposed to them and will cause long term issues to soil, surface water, and waterways when drill cutting are used in the stabilization of well pads and access roads. (1), (2), (3), (4), (5), (6), (9), (20), (22)

Response:

The approved general permit application includes the use of drill cuttings in the construction of well pads and access roads. The drill cuttings are chemically characterized and then used in lieu of natural aggregate in a mixture of native soils and pozzolanic agents, including cement, to produce a stabilized soil. The stabilized soil is then chemically and physically characterized after construction and, for well pad construction, compared to a well pad using natural aggregate instead of drill cuttings in the mixture. Testing after construction includes both physical and chemical characterization of the stabilized soil to demonstrate that the activity has no adverse public health, safety or environmental impacts. In addition, General Permit WMG097 requires distance restrictions from streams, exceptional value wetlands, occupied dwellings, perennial streams, property lines, water sources and school, parks and playgrounds.

2. Comment:

The commentator would like to see a study performed by the Environmental Protection Agency or a related agency to report actual elements which make up drill cuttings before they are stabilized in soil. (7)

Response:

The drill cuttings will have been chemically, physically and radiologically characterized prior to use in the stabilized soil mixture. The results will be available as part of the recordkeeping process described in the application.

3. Comment:

The commentator is concerned of the use of fracking wastes to build oil and gas infrastructure. Stating fracing wastes from oil and gas operations are known to pollute and should not be used. (8), (11), (18)
Response:
Range Resources has not proposed the use of fracking waste in this research and development general permit. Only vertical drill cuttings from the vertical bore hole of natural gas well will be used as part of the stabilized soil mixture.

4. Comment:

The commentator is concerned about the use of drill cuttings to pave roads and recommends the application to be denied. There is a proven way to build roads that are both safe and effective. (10), (17), (19)
Response:

The stabilized soil will be used to construct access roads within the area approved under the Erosion and Sediment Control General Permit (ESGP-2). The access road construction component is designed to demonstrate that the use of vertical drill cuttings in the stabilized soil mixture achieves the desired engineering properties in a manner that protects public health, safety or the environment.

5. Comment:

The commentator is concerned the permit will allow the applicant will dump, spread or spray fracking waste, drill cuttings, flowback on state roads and unknown chemicals, radioactive substances, carcinogens of all varieties with enter streams, river, and groundwater. (11), (12), (13), (14), (15)

Response:

The approved general permit application is limited the use application is limited to the use of vertical drill cuttings from the vertical bore hole of natural gas well, as part of a stabilized soil mixture to construct pads and access roads. In addition, General Permit WMG097 requires distance restrictions from streams, exceptional value wetlands, occupied dwellings, perennial streams, property lines, water sources and school, parks and playgrounds.

6. Comment:

The commentator believes that application is not administratively and technically adequate to accept this application for approval. (21)

Response:
The Department determined the application was administratively complete and the approved application is sufficient to perform the proposed research and development activities.

TAB E

Notice of Appeal at 13-14, *Delaware Riverkeeper Network v. Commonwealth* (Pa. Envtl. Hearing Bd. filed Oct. 13, 2014) (No. 2014142)

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK; CLEAN AIR COUNCIL; DAVID DENK; JENNIFER CHOMICKI; ANTHONY LAPINA; AND JOANN GROMAN	)	
Appellants,	)	EHB Docket No._____
v.	)	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	ELECTRONICALLY FILED
Appellee,	)	
and R.E. Gas Development, LLC,	)	
Permittee.	)	

NOTICE OF APPEAL

NOTICE OF APPEAL FORM
APPEAL INFORMATION

1. Name, address, telephone number, and email address (if available) of Appellant:

Delaware Riverkeeper Network
925 Canal St., Suite 3701
Bristol, PA 190074

David Denk
1017 Marsh Drive
Valencia, PA 16059

Jennifer Chomicki
1015 Marsh Drive
Valencia, PA 16059

Anthony Lapina
2019 Eagle Ridge Drive
Valencia, PA 16059

Joann Groman
129 Forsythe Drive
Valencia, PA 16059

All Appellants above may be contacted via counsel at 267-898-0570.

Clean Air Council
135 South 19th Street, Suite 300
Philadelphia PA, 19103
(215) 567-4004

2. Describe the subject of your appeal:

(a) What action of the Department do you seek review?
(NOTE: If you received written notification of the action, you must attach a copy of the action to this form.)

Well Permits for the Geyer Unit 1H-6H (Attached as Exhibit A – received by Appellants on 10/2/14)

1H: 37-019-22243-00-00
2H: 37-019-22244-00-00
3H: 37-019-22241-00-00
4H: 37-019-22242-00-00
5H: 37-019-22239-00-00

6H: 37-019-22240-00-00

(b) Which Department official took the action?

S. Craig Lobins, Regional Oil and Gas Program Manager

(c) What is the location of the operation or activity which is the subject of the Department's action (municipality, county)?

Middlesex Township, Butler County

(d) How, and on what date, did you receive notice of the Department's action?

The Department issued the well permits on or about September 12, 2014. Appellants learned of the Department's actions at various times after the permits were issued. The earliest any of the Appellants learned of permit issuance was September 12, 2014. Appellants did not receive any of the well permit documents from the Department until October 2, 2014, with additional documents arriving on October 10, 2014.

3. Describe your objections to the Department's action in separate, numbered paragraphs. (NOTE: The objections may be factual or legal and must be specific. If you fail to state an objection here, you may be barred from raising it later in your appeal. Attach additional sheets if necessary.)

See attached additional sheets.

4. Specify any related appeal(s) now pending before the Board. If you are aware of any such appeal(s) provide that information.

None.

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK; CLEAN AIR COUNCIL; DAVID DENK; JENNIFER CHOMICKI; ANTHONY LAPINA; AND JOANN GROMAN	)	
Appellants,	)	EHB Docket No._____
v.	)	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	ELECTRONICALLY FILED
Appellee,	)	
and R.E. Gas Development, LLC,	)	
Permittee.	)	

OBJECTIONS TO THE DEPARTMENT'S ACTIONS

Background

1. On or about April 3, 2014, R.E. Gas Development (hereinafter Permittee) submitted applications for permits to drill and operate six (6) unconventional gas wells in Middlesex Township, Butler County Pennsylvania.
2. Permittee's proposed wellpad would be located in a farmfield bordered on two sides by residential development.
3. Along the southern side of the site, which abuts Denny Road, the proposed wellpad is merely a few hundred feet from residential homes and water wells.

4. Along the eastern side of the site, which abuts a residential development, the proposed wellpad is approximately 1500 feet from the homes of Appellants Denk, Chomicki, and Lapina.
5. There is only one entrance and exit road to the residential development, which is approximately 500-600 hundred feet from the proposed wellpad.
6. The residential development is already slated for expansion, which would place new homes within 100-200 feet of the proposed wellpad. (Exhibit C).
7. The proposed wellpad is also between a half mile to a mile from the Mars Area School District campus, where these three Appellants' children attend school currently, will soon attend school, and/or play sports.
8. The campus houses the district's elementary, middle, and high schools, the district's sports fields, and the Mars Home for Youth.
9. There are approximately 3200 children who attend the Mars Area School District campus; this number does not include school employees and administration, or those at the Mars Home for Youth.
10. The proposed wellpad access road entrance (in Adams Township) for the proposed wellpad is located a few hundred feet from the entrance and exit to the Mars Area Middle School.
11. At the time Permittee applied for permits from the Department, Middlesex Township's zoning did not allow gas development on the property on which Permittee proposed to develop the wells.
12. The property is in a Residential Agriculture (R-AG) District, in which (at that time) only residential, agricultural, and some institutional uses were allowed.

13. Appellants and others advised the Department of the Township's ordinance and the Department's obligations under Acts 67 and 68.
14. The Department proceeded with its permitting reviews anyway.
15. Appellants and others also repeatedly advised the Department that placing unconventional gas development less than a mile from the District's schools and even closer to residential homes was dangerous.
16. This conclusion is based on established research, actual evacuation zones from gas well accidents and explosions (including statements from the Department's own secretary) and other data.
17. The Department chose to permit the wells anyway.
18. In addition, the Township wanted to allow Permittee's gas development to move forward in violation of the existing zoning, including by citing the fact that the Permittee had already applied for permits from the Department.
19. After Appellants and others repeatedly pointed out to the Township that it was going to allow an activity in violation of the existing zoning ordinance, which it could not do even if the Department proceeded with its reviews, the Township abruptly revised its ordinance in August 2014 to allow gas development nearly everywhere in the Township where there is a lease, including on the property where Permittee had proposed the six (6) wells.
20. Within a month of the Township's zoning change, the Department approved the six (6) wells that are the subject of this Appeal. (Exhibit A).

21. The Department claimed in a September 12, 2014 letter that because the Township approved the well's location, and no municipality raised objections, it would not override that decision. Letter at p. 6 (Attached as Exhibit B)
22. This is despite the fact that the Department knew that the Township was doing everything it could to allow the Geyer wellsite to move forward. (Exhibit C)
23. The Department also washed its hands of the research and other data Appellants presented (examples attached as Exhibit F) as to why it should disapprove of the permits, including Appellants' well-founded concerns regarding evacuation of an entire school campus, as well as a residential neighborhood whose only entrance and exit could easily be blocked by an explosion from the wellpad development. (Exhibit B).
24. The Department then incredibly claimed, after rejecting Appellants' research and information, that Appellants must prove health effects to the Department. Exhibit B, at 3.
25. The Department cited its own out-of-date regulations repeatedly to justify approving wells in a site that is simply irrational. (Exhibit B).
26. The Department also washed its hands of Appellants' concerns about air quality and impacts on children, which concerns were backed up by current scientific research. (Exhibit B).[1]
27. The Department, in dismissing Appellants' concerns, cited its own air studies, which have been repeatedly shown to be inaccurate, incomplete, and/or improperly conducted;[2]

[1] The Department also appears to have limited Appellants' concerns to methane gas, when Appellants' concerns were far broader than methane.

[2] Group Against Smog and Pollution ("GASP"), "What We Can Learn from Pennsylvania DEP's Marcellus Air Monitoring Studies," February 8, 2011, http://gasp-pgh.org/wp-content/uploads/2011/02/GASP-on-PADEP-Marcellus-Air-Studies.pdf (explaining Southwest Study's limitations, including technology used, short-term view of exposure, *minimum detection limits that were well above the short-term health standard*, and ability of operators to know when DEP was testing); Brown, et al., "Understanding Exposure from Natural Gas Drilling Puts Current Air

and which *the Department itself has admitted are inaccurate, were improperly conducted, or stated improper conclusions*, including conclusions on acute health effects made by people *unqualified to make them*.[3] Exhibit B, at 3-4, 6-7.

28. In particular, the Department has specifically said about its Southwest Study that no one qualified to make a health impacts assessment reviewed its data (which was incomplete), and yet it concluded there were no acute health impacts based on its faulty data.[4]
29. Despite all this, and its *own acknowledgements*, the Department *continues to cite its faulty studies* to tell citizens of the Commonwealth, including Appellants, that there are no acute health effects from natural gas drilling operations. (Exhibit B, at 3-4, 6-7).
30. The Department also chose to rely on the Township's approval of the gas well to absolve itself of any obligation to conduct its own analysis of whether it made sense to place a shale gas wellsite development near so many homes and so near the District's schools.

Appellants

31. Appellants David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman are all members of Appellants Delaware Riverkeeper Network and Clean Air Council.
32. Appellants Denk, Chomicki, and Lapina all reside in Weatherburn, less than a quarter of a mile from the proposed Geyer wellpad development.

Standards to the Test," Reviews on Environmental Health, March 2014
http://www.degruyter.com/view/j/reveh.ahead-of-print/reveh-2014-0002/reveh-2014-0002.xml?format=INT

[3] Plaintiffs' Response to Range Resources' Motion to Compel Entry Upon Land, Haney, et al., v. Range Resources – Appalachia, LLC et al. (Case No. 2012-3534) & Haney, et al. v. Solmax International, Inc. (Case No. 2012-7402), Washington County Court of Common Pleas, pp. 11-18 (describing Department documents and depositions of Department officials that show that the Department's Southwest Air Study was based on incomplete data and assessments, failures to make assessments, lack of any data or analysis on long-term exposure, and purported conclusions about health effects made by a person not qualified to make such assessments) (Response attached as Exhibit D – exhibits omitted due to length).

[4] Id.

33. All have young children who would be exposed to emissions and other risks from the proposed Geyer wellpad site both at school and at home.
34. Ms. Chomicki's daughters play soccer on the fields at the School District's campus, and Mr. Denk's daughters may also become involved in soccer.
35. The Weatherburn development has only one entrance and exit, raising significant concerns about the impact of an industrial accident at the Geyer wellpad on the ability of residents like Mr. Denk, Ms. Chomicki, and Mr. Lapina to evacuate.
36. None of the Citizens ever expected that moving into a residential and agricultural area near a school campus and so many homes would mean they would be living next to an industrial site, or even in a Township that has been approved for conversion into an industrial zone.
37. Joann Groman is a long-time Township resident, and a member of DRN and the Council.
38. She lives approximately a mile and a half from the proposed Geyer wellpad development, and approximately 1.2 miles from one of the horizontal wellbores from the pad.
39. A proposed gathering line that would connect the Geyer wellpad to another wellpad in the Township would run directly behind her property, with the right-of-way for the proposed line being merely feet off the back line of her property.
40. She relies on well water for drinking and other household purposes.
41. She is greatly concerned for the integrity of her well water and the value of her property with the proliferation of gas development in the Township.
42. She and her husband have invested extensively in their property, and their retirement is dependent on the value of their home.

43. The Council is a tax-exempt non-profit organization started in 1967 under the laws of Pennsylvania, with a mission to protect everyone's right to breathe clean air.
44. The Council has members and supporters throughout the Commonwealth.
45. The Council fights to improve air quality across Pennsylvania through public education, community organizing, and litigation.
46. The Council is a founding member of Protect Our Children, a coalition of parents, concerned citizens, and advocacy organizations, dedicated to protecting school children from the health risks of shale gas drilling and infrastructure.
47. The Council's interests are negatively impacted by the Deparment's approvals because, inter alia, those approvals threatens to undo improvements in air quality that the Council has fought for, and also threaten the interests of Council members.
48. DRN is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats.
49. DRN was integral to the Pennsylvania Supreme Court's decision in Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth, which recognized the significant rights protected under Article I, Section 27 of the Pennsylvania Constitution and reaffirmed that all citizens have a right to a clean and healthy environment that the Commonwealth and local governments may not unreasonably infringe upon.
50. DRN established a new initiative, The Generations Project, to: 1) ensure that the Pennsylvania Environmental Rights Amendment is further strengthened in the wake of the PA Supreme Court Decision; 2) pursue and secure constitutional protection of environmental rights in states across the nation; 3) pursue and secure recognition of environmental rights at the federal level through constitutional amendment; and 4) ensure

governments at the local level, state level, and federal level honor the rights of all people to pure water, clean air and healthy environments in the laws they enact, the decisions they make, and the actions they pursue.

51. As a result, DRN works with and supports local groups such as the Mars Parent Group who are fighting to protect their communities and their rights under Section 27 to a clean and healthy place in which to live.

52. DRN's interests are negatively impacted the Department's approvals because inter alia, those approvals threaten water quality, the health of the local community, and constitutionally-protected environmental rights, all of which DRN fights for on behalf of itself and its members.

Objections

Objection #1: The Department failed to consider local conditions, zoning and planning in violation of Article I, Section 27 of the Pennsylvania Constitution and in violation of Acts 67, 68, and 127.

53. Acts 67, 68, and 127 amended the Municipalities Planning Code to require consideration of local zoning and planning by state agencies during permitting.

54. In particular, Section 619.2 states that "[w]hen a county adopts a comprehensive plan . . . and any municipalities therein have adopted comprehensive plans and zoning ordinances . . . , Commonwealth agencies ***shall consider*** and ***may rely upon*** comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." 53 P.S. § 10619.2(a) (emphasis added).

55. The property on which the proposed operation would be sited is zoned Residential-Agriculture (R-AG).

56. At the time the Department was considering the permits for the Geyer wells, the local zoning *did not allow* the proposed operation.

57. The Department ignored this fact and proceeded with its review even though the wellsite was proposed for a district not planned or zoned for the operation at that time.

58. In addition, the purpose of the R-AG District remains as follows:

> to provide for agricultural uses, low-density residential development and planned higher density development in areas where the general character is defined by rural areas which are in close proximity to major roads, infrastructure and areas near existing concentrated residential development and to provide for ***compatible*** public, semipublic and accessory uses as conditional uses or uses by special exception.

§ 175-243, Zoning Ordinance (emphasis added).

59. An unconventional well complex is not compatible with "concentrated residential development" or agriculture; it converts agricultural land to industrial use, harms the investments in and enjoyment of surrounding agricultural and residential properties, and exposes denser residential areas to industrial-level risks including accidents and explosions, truck traffic, and air emissions.

60. By failing to even consider the purpose of the R-AG District, the Department violated Acts 67, 68, and 127.

61. Further, the Department cannot simply defer to the Township's unconstitutional zoning ordinance in order to meet the Department's obligations under these statutes and cannot do so as a means to comply with its obligations under Article I, Section 27 of the Pennsylvania Constitution.

62. Appellants have challenged the substantive validity of the Township's ordinance and have appealed the Township's approval of the Geyer wellsite development. (Challenge and Appeal attached as Exhibit E).

63. Appellants incorporate their substantive validity challenge and zoning appeal by reference.

Objection #2: The Department violated its independent obligation under Article I, Section 27 to confirm that an operation is suitable in the proposed location.

64. The Department cannot simply rely on a Township's decision to allow gas development in a location that clearly is not a proper site for industrial development. In order to meet its trustee obligations under Section 27, and in order to avoid infringing on neighbors' environmental and property rights, the Department has an independent obligation to confirm that a proposed location of an operation is suitable.

65. In addition, even if the Department was inclined to rely on the Township, it was on notice from information local citizens provided that the Township was failing to consider local impacts of the proposed development on local citizens' rights, as well as their health and safety. (Exhibit C).

66. Thus, the Department was well aware that reliance on any determination by the Township was unreasonable.

67. Section 27 prevents the Department from unreasonably infringing on Appellants' environmental rights.

68. Section 27 also prevents the Department from performing its obligations as a trustee unreasonably.

69. While a trustee may rely on determinations of others, including other trustees such as the Township, it cannot simply relinquish its duty to another trustee, especially when the delegating trustee has information that puts it on notice that the other trustee is not properly performing its obligations. See Robinson Twp., Delaware Riverkeeper Network, at al., v. Com., 83 A.3d 901, 956-57, 967, 977-78 (Pa. 2013)(discussing that all branches and levels of government are trustees under Section 27).

70. For example, the Uniform Trust Act states:

> A trustee may delegate duties and powers to another trustee if the delegating trustee reasonably believes that the other trustee has greater skills than the delegating trustee with respect to those duties and powers and the other trustee accepts the delegation. The delegating trustee shall not be responsible for the decisions, actions or inactions of the trustee to whom those duties and powers have been delegated ***if*** the delegating trustee ***has exercised reasonable care, skill and caution*** in establishing the scope and specific terms of the delegation and ***in reviewing periodically the performance of the trustee*** to whom the duties and powers have been delegated and that trustee's compliance with the scope and specific terms of the delegation.

20 Pa. C.S. § 7777(e) (emphasis added); see also 20 Pa.C.S. § 7206(e), Robinson Twp., 83 A.3d at 959 n.45 ("Although the Environmental Rights Amendment creates an express trust that is presumptively subject to the Uniform Trust Act, *see* 20 Pa.C.S. §§ 7702, 7731, the 'ultimate power and authority to interpret' the constitutional command regarding the purposes and obligations of the public trust created by Section 27 'rests with the Judiciary, and in particular with this Court.' *Mesivtah*, 44 A.3d at 7.").

71. The Department was on notice that the Township was not performing its trustee obligations reasonably. See Exhibit C.

72. Despite this, the Department relied on the Township's determination, failed to conduct its own inquiry, and therefore breached its fiduciary obligations to local citizens, including Appellants, under Section 27.

Objection #3: The Department violated its obligations under the Administrative Code, the Oil and Gas Act, and the Pennsylvania Constitution by *inter alia* permitting a nuisance and an activity inconsistent with the purposes of the Oil and Gas Act.

73. The Department has the power and the *duty* to "protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the department." 71 P.S. § 510-17(1).

74. Thus, the Department may not permit an operation that would likely result in a public or private nuisance.

75. A "public nuisance" is an "unreasonable interference with a right common to the general public," such as clean water. Section 821B, Restatement Second of Torts; Article I, Section 27; Machipongo Land & Coal Co., Inc., 799 A.2d 751, 774 (Pa. 2002).

76. A "private nuisance" occurs when a neighbor's use of his property unreasonably interferes with the plaintiff's private right to the use and enjoyment of her property. See Butts v.Southwestern Energy Prod. Co., 3:12-cv-01330-RDM-MM (M.D. Pa.).

77. Permitting an operation that causes such unreasonable interferences with clean water, clean air, safety and security in their home, and the use and enjoyment of their property violates the Administrative Code.

78. It also violates the Oil and Gas Act. See 58 Pa.C.S. § 3259(2)(ii).[5]

[5] In Permittee's submission to the Township, it incredibly claims it cannot possibly endanger public health, safety, and welfare simply because it would comply with the Oil and Gas Act and its regulations. The Oil and Gas Act does not even support Permittee's contention, considering that the Act specifically states that a person may not conduct

79. Permitting an operation that will result in a nuisance to neighbors infringes on the neighbors' property rights under Article I, Section 1 of the Pennsylvania Constitution.

80. There is no question that conducting unconventional gas operations 1500 feet from someone's home allows a nuisance, not just now, but in the future whenever the Permittee decides to drill and frack more wells, or re-frack existing wells.

81. Also, in no way is the Department's action consistent with the purpose of Chapter 32 of the Oil and Gas Act, which states, in part, that the Act seeks to "***[p]rotect the safety and property rights of persons*** residing in areas where mining, exploration, development, storage or production occurs." 58 Pa. C.S. § 3202(3)(emphasis added); compare Solebury School v. DEP, EHB Docket No. 2011-136-L, at pp.38-39 (Adjudication, July 31, 2014) (discussing Noncoal Act).

82. In Solebury School, the Board rescinded a noncoal approval issued by the Department that would have allowed continued sinkholes to develop from continued quarrying.

83. In examining the purposes of the Noncoal Act, the Board stated:

> [T]he Noncoal Act was not intended to elevate the right to mine above the right of the mine's neighbors to the quiet enjoyment of their property. . . . [T]he Act expresses the opposite intent. Through no fault of its own, Solebury School is now constrained in

---

an activity contrary to the Act and its regulations, *cause a public nuisance, or "adversely affect public health, safety, welfare or the environment*." 58 Pa.C.S. § 3259(2)(emphasis added). The Act itself recognizes that the conditions surrounding an operation matter – not just the words of the statute and the regulations. Further, in other communities, oil and gas operators have been offering negatively-impacted landowners "nuisance easements," demonstrating that approving oil and gas operations in the wrong location present a nuisance that infringes on neighbors' rights to clean air and pure water, as well as the use and enjoyment of their property. Naveena Sadasivam, "Aggressive Tactic on the Fracking Front," ProPublica, July 2, 2014, http://www.propublica.org/article/aggressive-tactic-on-the-fracking-front; see also http://www.eenews.net/stories/1060002897. The Pennsylvania Supreme Court and Commonwealth Court's decisions in Robinson Township v. Commonwealth equally undermine Permittee's claims, as both emphasize that local conditions matter and that an industrial operation next to a house or in a water supply zone is quite a different matter than an industrial operation in a proper location. See, e.g. Robinson Twp. v. Com., 52 A.3d 463, 481-82, 484, & n.21 (Pa. Commw. Ct. 2012) aff'd in part, rev'd in part by 83 A.3d 901 (Pa. 2013) (discussing the "pig in the parlor" and nuisances). The Pennsylvania Supreme Court's decision also makes clear that the Department's mere compliance with statutes and regulations does not relieve it of further inquiry necessary to meet constitutional obligations.

> the lawful use of its property as an educational institution for children. There is no support in the law for the Department's decision to allow this situation to go forward.

Solebury School v. DEP, EHB Docket No. 2011-136-L, at pp. 53-54 (Adjudication, July 31, 2014).

84. Likewise, the Oil and Gas Act does not elevate someone's right to develop six (6) shale gas wells above the neighbors' constitutionally-protected rights to enjoy their property, including the investments they have made in their properties.

85. "If the current level of risk is unacceptable . . . the Department has an obligation not to perpetuate it and enable it." Solebury School v. DEP, EHB Docket No. 2011-136-L, at pp. 46 (Adjudication, July 31, 2014).

86. This is directly in line with Section 27.

87. It is unacceptable, unreasonable, and not in accordance with the law to permit an industrial operation and specifically an unconventional gas wellsite:

    a. that could easily block Appellants Denk, Chomicki, and Lapina's sole exit road should an explosion or other accident occur that requires evacuation. This risk is completely known to the Department considering, *inter alia*, that it evacuated a half-mile radius around a Greene County wellpad explosion;

    b. within 1500 feet of Appellants Denk, Chomicki, and Lapina's homes[6] when research shows this is too close,[7] will expose these Appellants and their children

[6] Notably, there are homes along Denny Road who are approximately 300-400 feet from the wellpad development. Further, the Weatherburn development is primarily home to families with young children, increasing the amount of young children would be exposed to the operation.

[7] Md. Inst. for Applied Envtl. Health, Sch. of Pub. Health, Univ. of Md., Potential Public Health Impacts of Natural Gas Development and Production in the Marcellus Shale in Western Maryland xxvi (July 2014); Exhibit C; Concerned Health Professionals of NY, "Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction), July 10, 2014,

to chemicals, degradation of air quality, round-the-clock noise and light, and the potential for future such nuisances whenever the company decides to drill or frack again on the pad, as well as stress of worrying about their children's health even if they keep them indoors;[8]

c. within a 0.5 to 0.75 miles of an entire School campus, necessitating evacuation of scores of residents, schoolchildren, school employees, and others, including Appellants' Denk and Lapina's children, and Appellant Chomicki's who play soccer at the schools' fields;

d. in a location 100-200 feet from approved future residential development, which would place homes absurdly close to the wellpad (Exhibit C);

e. without analyzing any information on whether the so-called sound abatement walls proposed by the Permittee would actually do anything to prevent a nuisance from noise and vibrations generated by the operations in this location, which is a currently quiet, residential and agricultural area, despite Permittee's submission that clearly states, "It is important to remember that all examples can change dependent on environmental variables and *are directly linked to site specific ambient sound levels*. This makes it difficult to provide a canned solution to an issue." (emphasis added);

---

http://concernedhealthny.org/wp-content/uploads/2014/07/CHPNY-Fracking-Compendium.pdf (sent to the Department by the Mars Parent Group).

[8] Brown, et al., "Understanding Exposure from Natural Gas Drilling Puts Current Air Standards to the Test," Reviews on Environmental Health, March 2014, pp.9-10 http://www.degruyter.com/view/j/reveh.ahead-of-print/reveh-2014-0002/reveh-2014-0002.xml?format=INT

f. by completely ignoring the wealth of research presented to the Department on the dangers of exposing children to chemicals known to be emitted by unconventional gas well operations (Exhibit C);

g. by ignoring that many chemicals emitted from these operations are not known, and their effects *in combination* particularly on children *are not known*; and

h. by relying on the Department's air studies that are faulty, incomplete, and contain health conclusions made by unqualified personnel, which the Department itself has acknowledged, to claim that no one need worry themselves about health impacts.

Because of the Department's actions and inactions as set forth above, the Department did not impose adequate protections and its issuance of six (6) well permits to Permittee was unlawful and beyond its authority, including in violation of the Administrative Code, the Oil and Gas Act, its own regulations, and Article I, Sections 1 and Section 27 of the Pennsylvania Constitution.

By filing this Notice of Appeal with the Environmental Hearing Board, the undersigned hereby certify that the information submitted is true and correct to the best of our information and belief.

Date: October 13, 2014

s/ Lauren M. Williams

Jordan B. Yeager, Esq.
PA ID No. 72947

Joseph Otis Minott, Esq.
Executive Director & Chief Counsel

Lauren M. Williams, Esq.
PA ID. No. 311369
Curtin & Heefner LLP
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
Tel.: 267-898-0570
jby@curtinheefner.com
lmw@curtinheefner.com

Counsel for Delaware Riverkeeper Network, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman

Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
Tel: (215) 567-4004
joe_minott@cleanair.org
ajs@cleanair.org

Counsel for Clean Air Council

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK; CLEAN AIR COUNCIL; DAVID DENK; JENNIFER CHOMICKI; ANTHONY LAPINA; AND JOANN GROMAN	)	
Appellants,	)	EHB Docket No._____
v.	)	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	ELECTRONICALLY FILED
Appellee,	)	
and R.E. Gas Development, LLC,	)	
Permittee.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Notice Of Appeal was filed with the Pennsylvania Environmental Hearing Board and was served on the following on the date listed below:

Electronic Service Via the Board
Department of Environmental Protection
Office of Chief Counsel
Attention: Glenda Davidson
16th Floor Rachel Carson State Office Building
400 Market Street, P.O. Box 8464
Harrisburg, PA 17105-8464

Overnight Delivery
Northwest Regional Office
Attention: S. Craig Lobins
230 Chestnut Street
Meadville, PA 16335-3481

R.E. Gas Development, LLC
Attn: Jennifer McDonough
366 Walker Drive
State College, PA 16801

Respectfully submitted,

CURTIN & HEEFNER LLP

s/ Lauren M. Williams
Lauren M. Williams, Esq.
Curtin & Heefner LLP
Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
(267) 898-0570 office
lmw@curtinheefner.com

Date: October 13, 2014

TAB F

Petition for a Writ of Certiorari, *Alec L. v. McCarthy*, 135 S. Ct. 774 (2014)
(No. 14-405)

No. _____

In The
Supreme Court of the United States

ALEC L., *et al*.,

Petitioners,

v.

GINA McCARTHY, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697
(949) 824-7722
echemerinsky@law.uci.edu

PHILIP L. GREGORY
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Rd.
Burlingame, CA 94010
(650) 697-0577
pgregory@cpmlegal.com

JULIA A. OLSON
WILD EARTH ADVOCATES
2985 Adams St.
Eugene, OR 97405
(541) 344-7066
juliaaolson@gmail.com

THOMAS J. BEERS
BEERS LAW OFFICES
234 E. Pine St.
Missoula, MT 59807
(406) 728-8445
blo@montana.com

October 3, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This Court and other Circuits of the United States Court of Appeals have previously determined that the public trust doctrine applies to the federal government. Petitioners' Complaint alleged that the federal Respondents violated obligations imposed by the public trust doctrine. The Court of Appeals, however, held the public trust doctrine does not apply to the federal government and therefore it had no jurisdiction to consider Petitioners' claims. This holding was based on an incorrect interpretation of this Court's opinion in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), and is in direct conflict with the decisions of this Court and the Eighth, Ninth, and Tenth Circuits.

The questions presented are:

1. Does the public trust doctrine apply to the federal government?

2. Do Article III courts have jurisdiction to enforce the public trust against the federal government?

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Alec L., by and through his Guardian *Ad Litem* Victoria Loorz; Victoria Loorz; Madeleine W., by and through her Guardian *Ad Litem* Janet Wallace; Janet Wallace; Garrett S., by and through his Guardian *Ad Litem* Valerie Serrels; Grant S., by and through his Guardian *Ad Litem* Valerie Serrels; Valerie Serrels; Zoe J., by and through her Guardian *Ad Litem* Nina Grove; Nina Grove; Kids vs. Global Warming, a project of Earth Island Institute, a non-profit organization; and WildEarth Guardians, a non-profit organization.

Respondents (appellees below) are Gina McCarthy in her official capacity as Administrator of the United States Environmental Protection Agency; Sally Jewell in her official capacity as Secretary of the United States Department of the Interior; Thomas James Vilsack in his official capacity as Secretary of the United States Department of Agriculture; Penny Pritzker in her official capacity as Secretary of the United States Department of Commerce; Ernest Moniz in his official capacity as Secretary of the United States Department of Energy; Chuck Hagel in his official capacity as Secretary of the United States Department of Defense; the United States Environmental Protection Agency; the United States Department of Interior; the United States Department of Agriculture; the United States Department of Commerce; the United States Department of Energy; and the United States Department of Defense.

PARTIES TO THE PROCEEDING – Continued

Intervenors in support of Respondents are National Association of Manufacturers; Delta Construction Company, Inc.; Dalton Trucking, Inc.; Southern California Contractors Association, Inc.; California Dump Truck Owners Association; and Engineering & Utility Contractors Association.

Amici curiae in support of appellants below are Law Professors: William H. Rodgers, Jr., Joseph Sax, Erwin Chemerinsky, Michael Blumm, John Davidson, Gerald Torres, Mary Christina Wood, Burns Weston, Kevin J. Lynch, Maxine Burkett, Erin Ryan, Timothy P. Duane, Deepa Badrinarayana, Stuart Chinn, Ryke Longest, Jacqueline P. Hand, Zygmunt Plater, James Gustave Speth, Charles Wilkinson, Patrick C. McGinley, Eric T. Freyfogle, Craig Anthony Arnold, Patrick Parenteau, Federico Cheever, Mark S. Davis, James R. May, Denise Antolini, Edith Brown Weiss, Alyson C. Flournoy, David Takacs, Michael Robinson-Dorn, Karl Coplan, Oliver Houck, Douglas L. Grant, Randall Abate, Lorie Graham, Diane Kaplan, Sarah Krakoff, Colette Routel, and Elizabeth Kronk Warner; Climate Scientists and Experts: James Hansen, David Beerling, Paul J. Hearty, Ove Hoegh-Guldberg, Pushker Kharecha, Valérie Masson-Delmotte, Camille Parmesan, Eelco J. Rohling, Makiko Sato, Pete Smith, Lise Van Susteren, and Michael MacCracken; Brigadier General Steve Anderson, USA (ret.); Vice Admiral Lee Gunn, USN (ret.); Rear Admiral David W. Titley, USN (ret.); National Congress of American

PARTIES TO THE PROCEEDING – Continued

Indians; Alaska Inter-Tribal Council; Forgotten People, Inc.; Indigenous Peoples Climate Change Working Group; National Native American Law Student Association; Akiak Native Community; Texas State Representative Lon Burnam; Montgomery County Councilman Marc Elrich; Missoula Mayor John Engen; Eugene Mayor Kitty Piercy; Interfaith Moral Action on Climate; Interfaith Power and Light; The Green Zionist Alliance; Institute Leadership Team of the Sisters of Mercy of the Americas; The Sisters of Mercy of the Americas Northeast Community Leadership Team; The Sisters of Mercy Northeast Justice Council; WITNESS; Global Kids, Inc.; Earth Guardians; Boston Latin School Youth Climate Action Network; Kids Against Fracking; 350.org; Labor Network for Sustainability; Granny Peace Brigade; International Council of Thirteen Indigenous Grandmothers; HelpAge International; HelpAge USA; Protect Our Winters; and Kent Environment and Community Network.

Amici curiae in support of appellees below is the American Tort Reform Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioners state:

(a) WildEarth Guardians is a 501(c)(3) non-profit corporation that has no parent corporation. There are no publicly held companies that have a 10 percent or greater ownership interest in WildEarth Guardians.

(b) Kids vs. Global Warming ("KvGW") is a project of Earth Island Institute, a 501(c)(3) non-profit corporation. KvGW has no parent corporation, and there are no publicly held companies that have a 10 percent or greater ownership interest in KvGW.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit (App. 1-4) is reported at *Alec L. v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014). The opinion of the United States District Court for the District of Columbia granting Respondents' and Intervenor Respondents' motions to dismiss (App. 20-34) is published at *Alec L. v. Jackson,* 863 F. Supp. 2d 11 (D.D.C. 2012). The opinion of the United States District Court for the District of Columbia denying Petitioners' motion for reconsideration (App. 5-19) is reported at *Alec L. v. Perciasepe,* 2013 WL 2248001 (D.D.C. 2013).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 5, 2014. App. 1-4. On August 21, 2014, The Chief Justice extended the time within which to file a petition for certiorari to and including October 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

INTRODUCTION

The public trust doctrine imposes obligations on sovereign entities to protect essential public resources and has long been recognized in American law and in the laws of nations around the world. Petitioners alleged in their Complaint that the federal government is a sovereign entity subject to the public trust doctrine. Petitioners further alleged that the federal Respondents violated their obligations under that doctrine. Petitioners sought declaratory and injunctive relief ordering Respondents to protect the atmosphere, an essential national public resource, by developing a comprehensive climate recovery plan. Petitioners asserted federal question jurisdiction under 28 U.S.C. § 1331.

Respondents argued that the federal government, unlike other sovereign entities, is not subject to the public trust doctrine. Respondents further argued that *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), held that the public trust doctrine does not apply to the federal government and, therefore, the Complaint failed to present a federal question under

28 U.S.C. § 1331. Respondents moved for dismissal for lack of subject matter jurisdiction.

The district court recognized "this is a very important case, this is an important issue, and it raises serious questions." Tr. of Mot. Hearing at 89: 12-14, No. 11-2235 (D.D.C. May 11, 2012). The district court, however, granted Respondents' and Intervenor Respondents' motions to dismiss, finding this Court had determined in *PPL Montana* that the public trust doctrine does not apply to the federal government. App. 27-28. The D.C. Circuit affirmed. App. 2-3.

The question of whether the public trust doctrine applies to the federal government was not before the Court in *PPL Montana*. In *PPL Montana,* the State of Montana argued that denying the State title to certain riverbeds would undermine the public trust doctrine as applied to the State. 132 S. Ct. at 1234. In rejecting this argument, *PPL Montana* held that the State did not hold title to the riverbeds at issue. The Court also stated that whether the public trust doctrine applied to the State under the circumstances of that case was not a federal law issue. *Id.* at 1234-35. *PPL Montana* did not hold or imply that the public trust doctrine does not apply to the federal government. To the contrary, *PPL Montana* vigorously affirmed the common law underpinnings for imposing trust obligations on all sovereigns. 132 S. Ct. at 1234-35. In the course of this affirmation the Court specifically cited David C. Slade, *Putting The Public Trust Doctrine To Work* 3-8, 15-24 (1990), which states that

the public trust doctrine applies both to state governments and to the federal government. *Id.* at 4.

This Court has long recognized the public trust doctrine applies to sovereigns, including the States. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 457-58 (1892). This Court has also recognized that the federal government has trust obligations with respect to public domain resources. *United States v. Beebe*, 127 U.S. 338, 342 (1888) ("The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation. . . ."). The Court of Appeals for the Ninth Circuit has also recognized that the federal government has trust obligations with respect to public domain resources. *United States v. CB & I Constructors, Inc.,* 685 F.3d 827, 836 (9th Cir. 2011) ("In the public lands context, the federal government is more akin to a trustee that holds natural resources for the benefit of present and future generations. . . ."). This Court should grant certiorari to resolve the conflict between the D.C. Circuit's decision and the rulings of this Court and of other Circuits in this nationally important case.

STATEMENT OF THE CASE

A. Factual Background

Petitioners alleged that Respondents' actions and inactions with respect to global climate change are

causing harm to public trust resources, including the atmosphere upon which Petitioners depend for their life, liberty, and property. Am. Compl. ¶¶ 3, 27-65, No. 11-2203 (N.D. Cal. July 27, 2011). Respondents have both permitted and participated in carbon emissions to the atmosphere that are causing the earth to heat at a pace that is accelerating towards a "tipping point," which threatens human existence as we know it. *Id*. ¶¶ 6, 10. Ocean acidification, melting icecaps and ice sheets, biodiversity loss, and extreme weather events all impact essential public resources that Respondents have a duty to protect under the public trust doctrine. *Id*. ¶¶ 10, 94-103, 111, 114. Climate change also threatens land-based food systems and has multiple, severe implications for human health. *See id.*, ¶¶ 109, 112, 113.

Unless Respondents are ordered to comply with their obligations as public trustees and prepare a comprehensive climate recovery plan to protect the atmosphere from global climate change, Petitioners (and future generations) will suffer catastrophic and irreparable harm. *Id*. ¶¶ 3, 6, 9-22, 53-65, 72, 145-50.

Respondents did not dispute these facts below. Rather, Respondents argued that, even if these facts are true, Article III courts do not have jurisdiction to consider claims against Respondents because Respondents are not subject to the public trust doctrine.

In the three years since Petitioners filed their complaint, atmospheric carbon dioxide levels have risen from 390 parts per million (ppm) to 397 ppm,

and those levels are still rising. *See* Am. Compl. ¶ 76. The maximum level of carbon dioxide the earth's atmosphere can tolerate if there is to be any hope of reversing catastrophic global warming is 350 ppm. Am. Compl. ¶¶ 8, 15, 17, 122-24.[1]

The world's top climate scientists advised the D.C. Circuit that "the best available current science establishes that today's atmospheric CO_2 level is already into the 'dangerous zone.'" Br. of Amici Curiae Scientists at 18, No. 13-5192 (D.C. Cir. Nov. 12, 2013). These experts concluded that further delay "would consign our children and their progeny to a very different planet, one far less conducive to their survival." *Id.* at 25; *see also id.* at 8-9.

According to the World Bank, "[c]limate change has direct implications for the right to life."[2] The United Nations Human Rights Council confirms this conclusion: "A number of observed and projected effects of climate change will pose direct and indirect

---

[1] "Atmospheric CO_2 concentrations passed the level that Amici Scientists consider a safe initial target [of 350 ppm] in, approximately, 1988." Br. of Amici Curiae Scientists at 8, No. 13-5192 (D.C. Cir. Nov. 12, 2013). Pre-industrial CO_2 concentrations were 280 ppm Am. Compl. ¶ 76.

[2] Siobhán McInerney-Lankford, et al., *Human Rights and Climate Change: A Review of the International Legal Dimensions*, 13 (2011); *see also* UN Human Rights Council Resolution 10/4, *Human Rights and Climate Change*, UN Doc. A/HRC/10/L.11 (May 12, 2009) ("[C]limate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life . . . .").

threats to human lives[,]" including "an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts."[3] The 2014 International Panel on Climate Change Report confirmed the tremendous and increasing threat of harm from global climate change.[4]

B. The District Court Proceedings

On July 27, 2011, Petitioners filed an Amended Complaint in the United States District Court for the Northern District of California, claiming the federal government has public trust obligations with respect to the atmosphere pursuant to its sovereignty and several provisions of the U.S. Constitution. Am.

---

[3] UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, ¶ 22 (Jan. 15, 2009).

[4] Intergovernmental Panel on Climate Change ("IPCC"), *IPCC Fifth Assessment Report: Climate Change 2013*, 1.3.3, 17 (2013) ("Warming of the climate system is unequivocal . . . ."); *see also* U.S. Global Change Research Program, *Climate Change Impacts in the United States*: *Third National Climate Assessment* 7 (2014), *available at* http://nca2014.globalchange.gov/downloads ("Evidence for climate change abounds . . . . Taken together, this evidence tells an unambiguous story: the planet is warming, and over the last half century, this warming has been driven primarily by human activity."); Am. Assn. for the Advancement of Sci. ("AAAS"), *What We Know: The Reality, Risks and Response to Climate Change*, The AAAS Climate Science Panel 3 (March 2014), *available at* http://whatweknow.aaas.org/wp-content/uploads/2014/07/whatweknow_website.pdf.

Compl., ¶¶ 137-41 (Due Process, Equal Protection, and Commerce). The Amended Complaint stated that the district court had federal question subject-matter jurisdiction under 28 U.S.C. § 1331.

Petitioners submitted expert declarations in support of their allegations from Pushker Kharecha, Ph.D.; Kevin Trenberth, Ph.D.; Ove Hoegh-Guldberg, Ph.D.; Sivan Kartha, Ph.D.; Camille Parmesan, Ph.D.; Steven Running, Ph.D.; Jonathan T. Overpeck, Ph.D.; Stefan Rahmstorf, Ph.D.; David B. Lobell; Paul Epstein, M.D.; Lise Van Susteren, M.D.; Arjun Makhijani, Ph.D.; and James Gustave Speth.

On December 6, 2011, the District Court for the Northern District of California ordered that the case be transferred to the District of Columbia because of the national scope of the case and for the convenience of Respondents.

On November 14, 2011, Climate Scientist James Hansen, then-director of NASA Goddard Institute for Space Studies, filed a motion to file an *amicus curiae* brief in support of Petitioners. On December 7, 2011, twenty-two law professors filed a motion to file an *amicus curiae* brief in support of Petitioners. The district court never ruled on these motions.

On April 2, 2012, the district court heard and granted motions to intervene filed by National Association of Manufacturers and Delta Construction Company, *et al*.

On May 31, 2012, the district court granted Respondents' and Intervenor Respondents' motions to dismiss, holding that *PPL Montana* determined the public trust doctrine does not apply to the federal government and therefore the district court had no jurisdiction to consider Petitioners' claims. App. 27-29.

On June 28, 2012, Petitioners moved for reconsideration, arguing that *PPL Montana* does not foreclose federal question jurisdiction in this case and that Petitioners alleged a claim under the Constitution.

On May 22, 2013, the district court issued its decision denying Petitioners' motion for reconsideration, holding that the standard for reconsideration had not been met. App. 19.

C. Appellate Court Proceedings

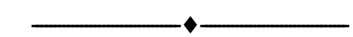
Petitioners appealed the district court's decisions to the United States Court of Appeals for the D.C. Circuit. Petitioners argued that the district court erred in relying on *PPL Montana*. Petitioners also argued the district court did not address Petitioners' constitutional claim.

On November 12, 2013, law professors, scientists, faith groups, government leaders, national security experts, supporters of Native Nations and human rights, youth, and conservation organizations filed seven *amicus curiae* briefs in support of Petitioners.

On June 5, 2014, the D.C. Circuit affirmed the district court's orders dismissing the case and denying

Petitioners' motion for reconsideration based on *PPL Montana*. App. 2-3.

This Petition followed.



REASONS FOR GRANTING THE WRIT OF CERTIORARI

The D.C. Circuit's ruling that the public trust doctrine does not apply to the federal government creates a deep conflict with opinions of this Court and other Circuits of the United States Court of Appeals. As explained below, had the appeal in this case been decided in the Eighth, Ninth, or Tenth Circuits, the outcome would have been markedly different because each of these Circuits has recognized that the public trust doctrine applies to the federal government. A writ of certiorari should be granted to resolve this conflict among the Circuits, and to correct the D.C. Circuit's misreading of *PPL Montana*.

A writ of certiorari also should be granted because this case involves issues of the utmost national importance. Global climate change threatens the economy, national security, and general welfare of the United States. Global climate change is accelerating at an alarming pace that will soon escape the reach of corrective measures. The Complaint alleges Respondents have the power and obligation to address this catastrophic deterioration of the nation's atmosphere, but have refused to do so.

It is the unique role of the judiciary to enforce trust obligations. The D.C. Circuit's opinion that the public trust doctrine does not apply to the federal government has great national consequences in limiting the power of the United States government in the future. Moreover, the opinion forecloses all public trust claims, regardless of facts, and ensures that there will be no check by Article III courts upon the federal government's power as trustee over national public domain resources.

The D.C. Circuit's opinion that Article III courts do not have jurisdiction to consider public trust claims against the federal government did not address the opinions of this Court and other Circuits recognizing that the federal government has trust powers and responsibilities over public domain resources. The D.C. Circuit also did not address the fact that only Article III courts can enforce the public trust doctrine.

I. The D.C. Circuit's Opinion Conflicts With Decisions Of This Court And Those Of The Eighth, Ninth And Tenth Circuits.

This Court has recognized that the public trust clothes the federal government with the power and authority to protect the public's natural resources from trespass and unlawful appropriation. *United States v. Missouri, K. & T. Ry. Co*., 141 U.S. 358, 381 (1891); *Beebe*, 127 U.S. at 342. The federal government, in turn, has affirmatively employed the public

trust in this nation's courts to protect public lands, wildlife, and timber resources and to recover damages for losses to those resources. *See, e.g.*, *CB & I Constructors, Inc.*, 685 F.3d 827; *Conner v. U.S. Dep't of Interior*, 73 F. Supp. 2d 1215, 1219 (D. Nev. 1999); *United States v. Burlington N. R.R.*, 710 F. Supp. 1286 (D. Neb. 1989); *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980). The D.C. Circuit's opinion, and its misreading of *PPL Montana*, is fundamentally contrary both to this Court's opinions recognizing federal trust powers and to the federal government's own past use of those powers.

A. The Public Trust Doctrine's Contract Between Citizens And Sovereign Has Long Been Recognized By This Court.

The Institutes of Justinian described the basic concept of the public trust between citizen and sovereign as early as the sixth century:

> By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings . . .

J. Inst. 2.1.1 (T. Sanders trans., 4th ed. 1867). This ancient recognition of the public nature of certain natural resources emerged in English common law after the passage of the Magna Charta. Michael C. Blumm & Mary Christina Wood, *The Public Trust*

Doctrine in Environmental and Natural Resources Law 12-13 (2013); *see also* Matthew Hale, De Jure Maris, Harg. Law Tracts, reprinted in Stuart Moore, *A History of the Foreshore and the Law Relating Thereto* (3d ed. 1888); 2 William Blackstone, Commentaries on the Laws of England 4 (1766) ("[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . . Such (among others) are the elements of light, air, and water. . . .").

In the United States, early Supreme Court jurisprudence established that "ownership" of public resources by the original states remained burdened with the same public rights and government fiduciary duties to protect those rights that burdened the King's ownership. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 413-14 (1842) ("[I]n the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them are held by the Crown.").

Subsequently admitted states acquired this same ownership and fiduciary duty under the "equal footing" doctrine. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). The governments of the states held title to these properties not for their own beneficial use, but in trust for present and future generations. Except for very limited types of property, such as government

vehicles and buildings, governments continue to hold public property in trust for its citizens and not for itself. *See CB & I Constructors, Inc.*, 685 F.3d at 836 (rejecting litigants' attempts to analogize the federal government to a private corporation) (citing *Beebe,* 127 U.S. at 342).

In the foundational public trust case, *Illinois Central R.R. v. Illinois*, the Court described the nature of the sovereign's obligation over public trust resources as one that cannot be abdicated. 146 U.S. at 453. The Court found that the navigable waters of the Chicago harbor, and the land under them, is "a subject of concern to the whole people of the state" and must be "held by the people in trust for their common use and of common right, as an incident of their sovereignty." *Id.* at 455, 459-60. The Court, therefore, invalidated any legislative attempt to cede sovereignty and dominion over public trust resources to private parties and at the same time validated the legislature's repudiation of a contract with a private railroad company conveying property "in disregard of a public trust, under which he was bound to hold and manage it." *Id*. at 459-60 (citing *Newton v. Commissioners*, 100 U.S. 548 (1879)).

The public trust doctrine has evolved over time to include, not only public lands and submerged lands, but also wildlife, wetlands, water rights, beaches, groundwater, and the atmosphere. *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 286-87 (2014); David C. Slade, *The Public Trust Doctrine in Motion:*

Evolution of the Doctrine 1997-2008 23 (2008); *see generally* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (2013). The unifying thread running through American public trust jurisprudence, however, is that it is the role of the judiciary to enforce the trust relationship between sovereign and citizen as to essential natural resources.

B. Judicial Opinions From This Court, As Well As Courts Across The Country And Around The World Confirm That The Federal Government Is Subject To The Public Trust Doctrine.

This Court has long recognized that the federal government is subject to public trust obligations. *See, e.g.*, *Beebe*, 127 U.S. at 342 ("The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation."). This Court has also recognized that the federal government has both the authority and the obligation as a trustee of public resources to protect public property from trespass and unlawful appropriation. *See, e.g., Light v. United States*, 220 U.S. 523, 537 (1911); *Missouri, K. & T. Ry. Co.*, 141 U.S. at 381; *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *Beebe*, 127 U.S. at 342; *Germania Iron Co. v. United States*, 58 F. 334, 336 (8th Cir. 1893), *aff'd*, 165 U.S. 379 (1897). Although

some opinions applying the public trust doctrine have approved of federal activities protecting trust resources, as *Beebe* makes clear, the doctrine is a source of both sovereign power and sovereign obligation.

The D.C. Circuit's decision conflicts with this principle, which is well established by this Court. Moreover, the decision conflicts with numerous rulings in other Circuits. The Eighth, Ninth and Tenth Circuits have also recognized that the federal government acts as a trustee with respect to public domain resources.

Following *Beebe*, the Eighth Circuit held that the United States had an absolute right to recover for theft or damages to the public domain "in pursuance of the trust reposed in it as a sovereign to preserve and protect the public domain for the people." *United States v. Miller*, 28 F.2d 846, 850-51 (8th Cir. 1928). The Eighth Circuit concluded: "The right asserted is solely in the public interest, is an attribute of governmental sovereignty, and cannot be defeated by the general statutes of limitation of a state." *Id.* at 851; *see also Germania Iron Co.*, 58 F. at 336 ("As has been frequently declared, in substance, the government is clothed with a trust in respect to the public domain. It is charged with the duty of protecting it from trespasses and unlawful appropriation . . . .").

The Ninth Circuit similarly held that the United States' status as a trustee over natural resources

"held in trust for this and future generations" gave it a right to recover for damages to those resources. *CB & I Constructors, Inc.*, 685 F.3d at 836 (internal quotations omitted). "In the public lands context, the federal government is more akin to *a trustee that holds natural resources for the benefit of present and future generations*." *Id.* (emphasis added).

The Ninth Circuit has described the constitutional underpinnings to the federal government's trust responsibility:

> This [equity-policy] principle is a corollary to *the constitutional precept that public lands are held in trust by the federal government for all of the people*. U.S. Const. art. IV, § 3. Thus, while one may be sympathetic with the landowners in this case, we must not be unmindful that the land involved belongs to all the people of the United States. Therefore, even if the landowners had proven all the elements necessary for estoppel, they would additionally need to demonstrate such equities which, on balance, ***outweigh those inherent equitable considerations which the government asserts as the constitutional trustee on behalf of all the people***.

United States v. Ruby Co., 588 F.2d 697, 704-05 (9th Cir. 1978) (emphasis added) (internal citations omitted).

The Tenth Circuit has recognized that "[a]ll public lands of the United States are held by it in trust for the people of the United States." *Davis v.*

Morton, 469 F.2d 593, 597 (10th Cir. 1972) (citing *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916)); *see also Massachusetts v. Andrus,* 594 F.2d 872, 890 (1st Cir. 1979) (recognizing that the Secretary of Interior is "the guardian of the people of the United States").

The D.C. Circuit's decision is in direct conflict with the rulings in these other Circuits. In fact, the D.C. Circuit's decision even conflicts with its own precedent. In *United Church of Christ v. FCC*, 707 F.2d 1413, 1427-28 (D.C. Cir. 1983), the D.C. Circuit held that federal awards of air broadcasting permits were subject to a "public trust," consistent with this Court's decision in *United States v. Causby*, 328 U.S. 256, 261, 266 (1946), holding that there can be no private ownership of the air space, over which "only the public has a just claim." *See also United Church of Christ*, 707 F.2d at 1428 n.38 ("Certainly the 'public trust' model has long been accepted by this court.").

None of these courts would have categorically refused to consider claims that the federal government violated its public trust obligations, as did the D.C. Circuit in this case. The panel of the D.C. Circuit that addressed Petitioners' claims below held there is no federal public trust doctrine, quoting this Court's statement that "'the public trust doctrine remains a matter of state law' and that 'the contours of that public trust do not depend upon the Constitution.'" App. 2 (quoting *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012)). The D.C. Circuit based

its decision solely on this Court's opinion in *PPL Montana*, and concluded that this Court "directly and categorically rejected any federal constitutional foundation for that [public trust] doctrine, without qualification or reservation." App. 3.

The D.C. Circuit's opinion also conflicts with the public trust principles expressed in decisions by State Courts of last resort and by High Courts of other nations. These courts have all consistently held that public trust obligations inhere to the sovereign and cannot be abdicated absent the destruction of the sovereign. In fact, Petitioners' research has found no high court in any country that has determined the public trust doctrine does not apply to a sovereign entity.

In *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania recently explained "'the concept that certain rights are inherent to mankind, and thus secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.'" 83 A.3d 901, 948 n.36 (Pa. 2013) (plurality opinion) (quoting *Driscoll v. Corbett*, 69 A.3d 197 (Pa. 2013)). The *Robinson* court went on to clarify that the people's public trust rights "are inherent in man's nature and *preserved rather than created* by the Pennsylvania Constitution." *Id.* at 948 (emphasis added). These rights include the right to natural resources:

> The Commonwealth, prior to the adoption of Article I, Section 27 [Pennsylvania's Environmental Rights Amendment] "possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment. . . ."

Id. at 947 n.35 (quoting *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973)).

Other state courts of last resort have held or affirmed that a public trust responsibility attaches to the sovereign and extends beyond navigable waters to other public natural resources like wildlife and air. *See, e.g.*, *In re Water Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (The public trust is "an inherent attribute of sovereign authority that the government 'ought not, and ergo, . . . cannot surrender.'"); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. . . . The Legislature cannot by legislation destroy the constitutional limits on its authority."); *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 712 (Cal. 1983) ("[T]he

core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."); *State v. Cent. Vt. Ry.*, 571 A.2d 1128, 1132 (Vt. 1989), *cert. denied*, 495 U.S. 931 (1990) ("[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.").

International agreements and the laws and practices of other nations, while not binding, are relevant to this Court's inquiry here. *Graham v. Florida*, 560 U.S. 48, 81-82 (2010). In another case about the rights of young people, this Court considered international law on the "inherent right to life" of every human being as instructive on the constitutional rights of children and stated:

> The *opinion of the world community*, while not controlling our outcome, *does provide respected and significant confirmation for our own conclusions*. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Roper v. Simmons, 543 U.S. 551, 578 (2005) (emphasis added). International opinion on the sovereign trust obligation, while not controlling, underscores the importance of the public trust.

The 1992 United Nations Framework Convention on Climate Change ("UNFCCC"), ratified by the United States Senate and 194 other nations, was executed to "protect the climate system *for the benefit of present and future generations of humankind*," and evidences an "overwhelming weight" of support for protection of the atmosphere under the norms and principles of intergenerational equity, the same principles recognized in U.S. law by the public trust doctrine. UNFCCC, Art. 3 (emphasis added). *See Roper*, 543 U.S. at 576-78 (noting the "overwhelming weight of international opinion" evidenced by international agreements).

High courts around the world affirm the trust obligations of sovereigns to preserve essential natural resources for the benefit of present and future generations. The Supreme Court of India, for example, has repeatedly held that the public trust doctrine is part of the law of the land.

> [India's] legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The [Nation-]State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests, and ecologically fragile lands. The [Nation-]State as a trustee is under a legal duty to protect the natural resources.

M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388 (Dec. 13, 1996) (India); *see also Fomento Resorts & Hotels Ltd. v. Minguel Martins*, (2009) 3 S.C.C. 571, ¶ 40 (India) (Natural resources are "held by the [Nation-]-State as a trustee on behalf of the people and especially the future generations . . . and the Court can invoke the public trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural ecosystems.").

The Supreme Court of the Philippines has explained public trust rights and the sovereign trust obligation as the highest natural law belonging to "a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind." *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792, 805 (July 30, 1993) (Phil.); *see also Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, 574 S.C.R.A. 661 (Dec. 18, 2008) (Phil.).

The High Court of Kenya has stated that the "essence of public trust is that the state, as trustee, is under a fiduciary duty to deal with trust property, being the common natural resources, in a manner that is in the interests of the general public." *Waweru*

v. Republic, (2006) 1 K.L.R. 677 (Kenya). Relying on two Pakistani cases concerning that country's right to life provision, the High Court declared that implicit in the Kenyan constitutional right to life was the public trust doctrine.

> In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures, including man. It is inherent from the act of creation, the recent restatement in the Statutes and Constitutions of the world notwithstanding.

Id.

The Supreme Court of Sri Lanka held that "[h]uman kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability." *Watte Gedera Wijebanda v. Conservator General of Forests,* (2009) 1 S.L.R. 337, 358 (Apr. 5, 2007) (Sri Lanka). Opinions of the high courts of Pakistan, Uganda, and Canada articulate similar holdings on the sovereign public trust. *See In re Human Rights Case (Environment Pollution in Balochistan*), (1994) 46 PLD (SC) 102 (1992) (Pak.); *Shehla Zia v. WAPDA*, (1994) 46 PLD (SC) 693 (Pak.) (implicit application of the public trust doctrine); *Advocates Coal. for Dev. & Env't v. Att'y Gen.*, Misc. Cause No. 0100 of 2004 (July 11, 2005) (Uganda); *British Columbia v. Canadian Forest Prods., Ltd.*, [2004] 2 S.C.R. 74 (Can.).

The D.C. Circuit's absolute statement that the federal government is not subject to the public trust doctrine does not even address, much less distinguish, the opinions of this Court, other Circuits, State Supreme Courts, and the highest Courts of other countries, all recognizing that the public trust doctrine applies to sovereign entities. This Court should grant review to resolve the conflict between the D.C. Circuit's decision and the rulings of this Court and of other Circuits.

C. The D.C. Circuit's Opinion Misinterprets *PPL Montana, LLC v. Montana* And Significantly Departs From Relevant Decisions Of This Court.

The D.C. Circuit based its opinion below on a misconstruction of *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012). The D.C. Circuit stated: "*PPL Montana*, however, repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." App. 3 (citing *PPL Mont., LLC*, 132 S. Ct. at 1234-35).

The question of whether the public trust doctrine applies to the federal government was not at issue in *PPL Montana*. In *PPL Montana,* the State of Montana argued that denying the State title to certain riverbeds would undermine the State's public trust doctrine. 132 S. Ct. at 1234. In rejecting this argument, this Court noted that, unlike the equal footing

doctrine: "the public trust doctrine remains a matter of state law"; and "the contours of *that* public trust do not depend upon the Constitution." *Id.* at 1235 (emphasis added). While the Court thus held that *states* were not subject to a *federal* public trust doctrine, it did not hold that the *federal* government was not subject to the federal public trust doctrine.

To the contrary, the Court's decision in *PPL Montana* affirmed the doctrine's underpinnings for imposing trust obligations on all sovereigns. 132 S. Ct. at 1234-35. In the course of this affirmation, the decision specifically cited David C. Slade, *Putting The Public Trust Doctrine To Work* 3-8, 15-24 (1990). 132 S. Ct. at 1235. The Slade treatise discusses both the state public trust doctrine and the federal public trust doctrine. David C. Slade, *Putting The Public Trust Doctrine To Work* 4 (1990).

The *PPL Montana* opinion also affirmed the foundational public trust decision of *Illinois Central R.R. v. Illinois.* 132 S. Ct. at 1234-35. While this Court has explained that *Illinois Central* was "necessarily a statement of Illinois law," it has also emphasized that "the general [sovereign public trust] principle and the exception have been recognized the country over." *Appleby v. City of New York*, 271 U.S. 364, 395 (1926); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997). This Court has long and consistently recognized that the public trust doctrine is an adjunct of sovereignty. *See*, *e.g.*, *Ill. Cent. R.R.*, 146 U.S. at 455-60.

In *Shively v. Bowlby*, for example, this Court held that states were vested with all the rights from the crown, including the public trust, subject to the rights surrendered to the national government, which includes public trust rights over national resources:

> The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; and, upon the American Revolution, all the rights of the crown and of parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States.

152 U.S. 1, 14-15 (1894); *see also Ill. Cent. R.R.*, 146 U.S. at 456.

This Court's jurisprudence also makes clear the propriety and necessity of Article III courts assuming jurisdiction to decide which natural resources are subject to state sovereignty, federal sovereignty, or dual sovereignty. *Causby*, 328 U.S. at 261, 266; *United States v. California*, 332 U.S. 19, 29-30, 34-36 (1947); *see also Coeur d'Alene Tribe*, 521 U.S. at 283-84 (State sovereignty arises out of the Constitution itself, and the ancient principles of public trust are uniquely tied to sovereign interests and the rights of the people to access, use, and have their public

resources protected by their sovereign.); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (Since the admission of a state to the Union is a federal act, it is a federal question as to what lands and waters were transferred into the sovereign dominion of the state.).

When it comes to the atmosphere, there can be no question that the federal government has control over that resource, and therefore carries public trust obligations with respect to the atmosphere. This Court has held and Congress has codified that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1); *see also Causby*, 328 U.S. at 260-61 ("[T]he air is a public highway" of which the U.S. government is sovereign.). In the 1958 Air Commerce and Safety Act, Congress defined the "United States" as "the several States, the District of Columbia, and the several Territories and possessions of the United States, ***including*** the territorial waters and ***the overlying airspace thereof***." Pub. L. No. 85-726, § 101(33), 72 Stat. 731, 740 (1958) (emphasis added). A writ of certiorari should issue to resolve the conflict among the Circuits and to correct the D.C. Circuit's misreading of *PPL Montana*.

II. Whether The Public Trust Doctrine Applies To The Federal Government Is A Nationally Important Issue That Needs To Be Resolved By This Court.

This petition presents the critical issue of whether the federal government is subject to the public trust doctrine. The issue is uniquely presented here as entirely a question of law, making it the ideal vehicle to resolve the question. The narrow window of time left to address global climate change and the significant consequences to the welfare of our nation's children and future generations add urgency to the legal issue. The D.C. Circuit's complete refusal to recognize the public trust doctrine turns a blind eye to the federal government's responsibility to future generations *and* undermines the federal government's ability to assert its public trust authority in the future to conserve public resources.

The public trust doctrine, as enforced by courts, is an important check on how the political branches of government manage public trust assets. As the district court stated, "[u]ltimately, this case is about the fundamental nature of our government and our constitutional system, just as much – if not more so – than it is about emissions, the atmosphere or the climate." App. 33. Intervenor Respondents also argued before the D.C. Circuit that its "opinion resolved a question of nationwide importance by calling attention to the fact that there is no such thing as a federal public trust doctrine – let alone a public trust in the

atmosphere." Mot. to Publish at 1, No. 13-5192 (D.C. Cir. July 3, 2014).

According to one court, "Just as private trustees are accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust. . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (citation omitted). By holding that there is no federal public trust doctrine, the D.C. Circuit eliminated the ability of Article III courts to act as a check on the fiduciary actions of the political branches and to address abuses of executive power.

Seven years ago, this Court acknowledged "the unusual importance" of global climate change in *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). In the intervening years, the unusual importance has increased and the urgency and quality of the federal government's response has reached a new threshold of significance, warranting this Court's grant of certiorari. Our nation's best climate scientists warn that urgent action to reduce carbon emissions is crucial and the failure to act will consign our youngest generation to a very different planet, far less conducive to their survival. Br. of Amici Curiae Scientists at 24-25, No. 13-5192 (D.C. Cir. Nov. 12, 2013).

In *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011), the Court also acknowledged the

importance of global warming, but found that Congress, through the Clean Air Act, had displaced common law rules regulating private conduct that contributed to global warming. Here, of course, the federal government is not a regulated-party defendant but a trustee charged with violating its obligations under the public trust doctrine. Only Article III courts can enforce that doctrine as to the federal government.

In denying the federal public trust authority and obligation, the D.C. Circuit's decision runs contrary to previous legislative declarations that the federal government is a trustee. In the National Environmental Policy Act, for example, Congress declared that the federal government has an obligation to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1). In the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Congress declared that the federal government, the fifty States, and Indian Tribes are "trustees for natural resources" and directed these sovereigns to act on behalf of the public beneficiaries of natural resources under their management and control. 42 U.S.C. § 9607(f)(1); *see also* 33 U.S.C. § 2706 (Oil Pollution Act).

Pursuant to congressional direction, the President designated agencies of the United States, including the Departments of Agriculture, Commerce, Defense, Energy, and Interior, "to act on behalf of the public as trustees for natural resources. . . . ***Natural***

resources means land, fish, wildlife, biota, ***air***, water, ground water, drinking water supplies, and other such resources belonging to, managed by, ***held in trust by***, appertaining to, ***or otherwise controlled (referred to as 'managed or controlled') by the United States*** (including the resources of the exclusive economic zone)." 40 C.F.R. § 300.600(a) (emphasis added); *see* 42 U.S.C. § 9607(f)(2)(A).

In circumstances with concurrent sovereignty and trusteeship, Congress has directed: "Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities." 40 C.F.R. § 300.615(a).[5]

The federal government argued in *In re Steuart Transportation Co.* that it has public trust authority to protect wildlife, including migratory birds. 495 F. Supp. at 39-40. The district court agreed, holding: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people" under the public trust doctrine. *Id.* at 40.

---

[5] "State trustees shall act on behalf of the public as trustees for natural resources, including their supporting ecosystems, within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state." 40 C.F.R. § 300.605.

Other federal courts have held that where there is dual sovereignty over a resource, the federal and state governments have concurrent public trust authority and duties as co-trustees. *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 123-25 (D. Mass. 1981) (affirming the "paramount rights of the federal government to administer its trust with respect to matters within the federal power," *id.* at 124). In instances where "the trust impressed upon [ ] property is governmental and administered jointly by the state and federal governments by virtue of their sovereignty, neither sovereign may alienate this [property] free and clear of the public trust." *Id.* at 124.

Similarly, in *United States v. Burlington Northern Railroad*, the court found that the United States' public trust obligations appear similar to the States, allowing the sovereign to maintain an action to recover for damages to its natural resources, including wildlife. 710 F. Supp. at 1287 (denying defendants motion for summary judgment).

While limiting the federal government's authority to protect public resources, the lower court's opinion also eliminates an important limitation on the federal government's actions not to alienate or allow for the substantial impairment of essential national public resources.

This case arises in a particularly critical context, but ultimately it is about a basic legal issue: does the public trust doctrine apply to the United States

government? This is an issue of great national significance and requires resolution by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697
(949) 824-7722
echemerinsky@law.uci.edu

PHILIP L. GREGORY
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Rd.
Burlingame, CA 94010
(650) 697-0577
pgregory@cpmlegal.com

JULIA A. OLSON
WILD EARTH ADVOCATES
2985 Adams St.
Eugene, OR 97405
(541) 344-7066
juliaaolson@gmail.com

THOMAS J. BEERS
BEERS LAW OFFICES
234 E. Pine St.
Missoula, MT 59807
(406) 728-8445
blo@montana.com

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5192 **September Term, 2013**
FILED ON: JUNE 5, 2014

ALEC L., BY AND THROUGH HIS GUARDIAN AD LITEM VICTORIA LOORZ, ET AL.,

APPELLANTS

v.

GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-02235)

Before: GARLAND, *Chief Judge,* SRINIVASAN, *Circuit Judge,* and GINSBURG, *Senior Circuit Judge*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded the issues full consideration and has

determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the district court's orders filed May 31, 2012 and May 22, 2013 be affirmed.

Relying on the public trust doctrine, the plaintiffs in this case filed a one-count complaint alleging that the federal defendants are trustees of essential natural resources pursuant to various provisions of the Constitution, and that the defendants have abdicated their trust duty to protect the atmosphere from irreparable harm. The plaintiffs invoked the federal question statute, 28 U.S.C. § 1331, as the basis for subject matter jurisdiction over their claim.

The plaintiffs point to no case, however, standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or laws of the United States, as would be necessary to establish federal question jurisdiction. *See id.* To the contrary, the Supreme Court recently reaffirmed that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Mont., LLC v. Montana,* 132 S. Ct. 1215, 1235 (2012); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 284-88 (1997) (treating the public trust doctrine as a matter of state law); *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 473-76 (1988) (similar). The plaintiffs contend that *PPL Montana* contemplated only the *state* public

trust doctrine and thus casts no doubt on the potential existence of any *federal* public trust doctrine. The Supreme Court in *PPL Montana,* however, repeatedly referred to "the" public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation. *See PPL Montana,* 132 S. Ct. at 1234-35; *see also United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cnty., Cal.,* 683 F.3d 1030, 1037-38 (9th Cir. 2012) (relying on *PPL Montana* in holding that "the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution"). Accordingly, the district court correctly dismissed the plaintiffs' suit for lack of subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper . . . when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'") (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida,* 414 U.S. 661, 666 (1974)).

Pursuant to D.C. CIR. R. 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

SUMMARY MEMORANDUM OPINION; NOT FOR PUBLICATION IN THE OFFICIAL REPORTERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al.*, Plaintiffs, v. **BOB PERCIASEPE, *et al.*,** Defendants, and **NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,** Intervenors.	Civil Action No. 11-cv-2235 (RLW)

MEMORANDUM OPINION[1]

The Plaintiffs in this lawsuit – five teenage citizens and two non-profit organizations, "Kids vs.

[1] This unpublished memorandum opinion is intended solely to inform the parties and any reviewing court of the basis for the instant ruling, or, alternatively, to assist in any potential future analysis of the *res judicata,* law of the case, or preclusive effect of the ruling. The Court has designated this opinion as "not intended for publication," but this Court cannot prevent or prohibit the publication of this opinion in the various and sundry electronic and legal databases (as it is a public document), and this Court cannot prevent or prohibit the citation of this opinion by counsel. *Cf.* FED. R. APP. P. 32.1. Nonetheless, as stated in the operational handbook adopted by our Court of Appeals, "counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition." D.C. Circuit Handbook of Practice and Internal Procedures 43 (2011).

Global Warming" and "WildEarth Guardians" – brought this action seeking declaratory and injunctive relief based on the defendants' alleged failure to reduce greenhouse gas emissions. Plaintiffs advanced a novel theory in support of the relief they sought, arguing that each of the defendants, as the heads of various federal agencies and as officers of the federal government, violated their supposed fiduciary obligations "to protect the atmosphere" under the so-called federal public trust doctrine.[2] (Am. Compl. at ¶ 18; *see*

[2] Specifically, Plaintiffs sued: (1) Lisa P. Jackson in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), (2) Kenneth L. Salazar in his official capacity as Secretary of the Interior, (3) Thomas J. Vilsack in his official capacity as Secretary of Agriculture, (4) Gary L. Locke in his official capacity as Secretary of Commerce, (5) Steven Chu in his official capacity as Secretary of Energy, and (6) Leon Panetta in his official capacity as Secretary of Defense. (*See generally* Am. Compl.). By operation of law, however, the following individuals have been automatically substituted as defendants in this action pursuant to Federal Rule of Civil Procedure 25(d): Bob Perciasepe as Acting Administrator of the EPA, Sally Jewell as Secretary of the Interior, Rebecca Blank as Acting Secretary of Commerce, Ernest Moniz as Secretary of Energy, and Chuck Hagel as Secretary of Defense. *See* FED. R. CIV. P. 25(d). As Secretary Vilsack remains in office, he remains a defendant in this action. The Court collectively refers to these defendants as the "Federal Defendants."

The Court also allowed two groups to intervene in this action: the National Association of Manufacturers ("NAM"), as well as a collection of several California companies and trade associations. The California entities, all of which owned and operated (or had members who owned and operated) vehicles and/or equipment that emitted greenhouse gases into the atmosphere, included: California Dump Truck Owners Association, Dalton

(Continued on following page)

id. at ¶¶ 136-153). On May 31, 2012, the Court dismissed this case with prejudice, concluding that Plaintiffs failed to establish a basis for federal jurisdiction because the public trust doctrine, upon which their claims hinged, is a creature of state common law and not federal law. *See Alec L. v. Jackson,* 863 F. Supp. 2d 11, 15-17 (D.D.C. 2012). In so holding, the Court relied substantially on the U.S. Supreme Court's then-recent decision in *PPL Montana, LLC v. Montana,* wherein Justice Kennedy, writing for a unanimous Court, explained that "the public trust doctrine remains a matter of state law" and that its "contours . . . do not depend upon the Constitution." *See id.* at 15 (quoting PPL Montana, ___ U.S. ___, 132 S. Ct. 1215 (2012)). This Court also explained that, even if the public trust doctrine had been grounded in federal common law at some point in time, Congress plainly displaced any such doctrine, at least in this context, through its passage of the comprehensive and field-occupying Clean Air Act. *Id.* at 15-16 (quoting *Am. Elec. Power Co. v. Connecticut,* ___ U.S. ___, 131 S. Ct. 2527, 2537 (2011)). Consequently, following full briefing and lengthy argument from the parties during a three-hour hearing, the Court ultimately concluded that it lacked jurisdiction over Plaintiffs' claims and dismissed this action as a result.

Trucking, Inc., Delta Construction Company, Inc., Southern California Contractors Association, Inc., and United Contractors f/k/a Engineering Utility Contractors Association (the "CA Intervenors").

Plaintiffs now seek reconsideration of the Court's decision pursuant to Federal Rule of Civil Procedure 59(e). (Dkt. No. 175 ("Pls.' Mem.")). Through this motion, Plaintiffs press three arguments that they insist warrant the extraordinary relief they seek: (1) that the Court failed to provide Plaintiffs with a sufficient opportunity to address the Supreme Court's decision in *PPL Montana*; (2) that the Court wrongly found that Plaintiffs' complaint "[did] not allege that the defendants violated any specific federal law or constitutional provision"; and (3) that the Court improperly construed and applied the Supreme Court's decision in *American Electric Power Co.* (*Id.*). Defendants and Intervenors oppose Plaintiffs' motion for reconsideration, rejoining that "Plaintiffs' response to the Court's decision – a Rule 59(e) motion rearguing their flawed legal theories and attempting to raise new ones – must be rejected." (Dkt. No. 177 ("Fed. Defs.' Opp'n") at 2; *see also* Dkt. No. 178 ("Intervenors' Opp'n")). The Court concurs.

Therefore, upon review of Plaintiffs' motion and the parties' respective briefing, along with the entire record in this action, the Court concludes that Plaintiffs' Motion for Reconsideration must be **DENIED** for the reasons set forth herein.

ANALYSIS

A. Standard of Review

Motions to alter or amend under Rule 59(e) are disfavored, "and relief from judgment is granted

only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus,* 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (citing *Anyanwutaku v. Moore,* 151 F.3d 1053, 1057 (D.C. Cir. 1998)). As our Circuit has explained, a Rule 59(e) motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower,* 439 F.3d 755, 758 (D.C. Cir. 2006); *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996). Consequently, "a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously." *Kattan by Thomas v. District of Columbia,* 995 F.2d 274, 276 (D.C. Cir. 1993). Nor is a Rule 59 motion a means by which to "reargue facts and theories upon which a court has already ruled," *New York v. United States,* 880 F. Supp. 37, 38 (D.D.C. 1995), or "a chance . . . to correct poor strategic choices," *SEC v. Bilzerian,* 729 F. Supp. 2d 9, 15 (D.D.C. 2010).

B. Plaintiffs Establish No Entitlement To Relief Under Rule 59(e)

As summarized above, Plaintiffs advance three arguments in seeking reconsideration under Rule 59(e). Notably, however, Plaintiffs do not point to any intervening change in law, or any newly-discovered evidence, that they contend compels a different result. Instead, Plaintiffs strictly argue that the Court committed several "clear errors" in its prior analysis.

In so arguing, however, Plaintiffs either repackage arguments the Court already considered and rejected, or they attempt to mount new attacks that they could and should have raised previously.

First, Plaintiffs insist they are entitled to relief because they were not afforded the opportunity to address the Supreme Court's decision in *PPL Montana*. They argue that "[t]he fact that this Court based its decision to dismiss Plaintiffs' claims on the very case the Court refused to let Plaintiffs brief constitutes a manifest injustice." (Dkt. No. 175 at 28). This line of argument is wholly unconvincing, and, in suggesting that they were denied a chance to brief or otherwise address the impact of PPL Montana on their claims, Plaintiffs distort the procedural history of this case. While true that the Court denied Plaintiffs' request to submit additional briefing in response to the Amicus Brief of Law Professors, (*see* Dkt. No. 165), that hardly served as their one and only opportunity to address PPL Montana. The Supreme Court handed down its decision in that case on February 22, 2012. Several weeks later – as Plaintiffs themselves point out – the Court held a telephonic status conference on March 5, 2012, and asked the parties whether they felt the need to submit any supplemental briefing on the Federal Defendants' or NAM's motions to dismiss, which were both fully-briefed before the case was transferred to the undersigned from the Northern District of California. While Plaintiffs now fault Defendants and Intervenors for not mentioning *PPL Montana* during that status conference, Plaintiffs fail

to recognize that they bypassed the same opportunity and did not ask to submit any additional briefing themselves; to the extent they felt the need to distinguish a newly-issued Supreme Court decision dealing with the public trust doctrine, Plaintiffs could and should have sought to do so at that time. Thereafter, Plaintiffs squandered another opportunity to brief their views on *PPL Montana* in opposing the Delta Intervenors' dismissal motion on April 16, 2012. (*See* Dkt. No. 160). The *PPL Montana* decision was nearly two months old at that point, and Plaintiffs indisputably could have addressed the case and argued that – at least in their view – it had no bearing on this matter. But they failed to discuss or even mention *PPL Montana* in their briefing altogether. Accordingly, Plaintiffs' suggestion that "the first opportunity [they] had to address *PPL Montana*" was through their proposed brief on May 2, 2012, (*see* Dkt. No. 175 at 3), is disingenuous and lacks merit.[3]

[3] Of course, along with the Supreme Court's discussion in *PPL Montana,* the Court's conclusion that the public trust doctrine sounds in state, and not federal, law was also based upon persuasive dicta from the D.C. Circuit in *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077 (D.C .Cir. 1984), wherein the Court of Appeals explained that "the public trust doctrine has developed *almost exclusively as a matter of state law,*" and expressed concerns that a federal common-law public trust doctrine would be displaced by federal legislation. *Id.* at 1082, 1085, n.43 (emphasis added). Plaintiffs cannot credibly complain that they had no opportunity to address the *Air Florida* case, given that their earlier briefing expressly urged this Court to discount

(Continued on following page)

Furthermore, and perhaps more significantly, Plaintiffs also had ample opportunity to present their arguments regarding *PPL Montana* during the Court's three-hour hearing on May 11, 2012, and Plaintiffs took full advantage of that opportunity, making many of the same arguments to the Court that they attempt to re-litigate now – i.e., that the *PPL Montana* Court did not characterize the public trust doctrine as a purely state-law issue, and that the discussion regarding the public trust doctrine therein was dicta in any event. (*See generally* Dkt. 171 ("5/11/12 Transcript")). This fact alone undercuts the notion that Plaintiffs were somehow stymied from responding to or otherwise addressing Defendants and Intervenors' arguments regarding *PPL Montana. Cf. Acumed LLC v. Stryker Corp.,* 551 F.3d 1323, 1331-32 (Fed. Cir. 2008) (finding no abuse of discretion in denial of motion to strike reply brief that assertedly contained new arguments and evidence, where "it [was] clear that the court gave [defendant] an opportunity to present its rebuttal arguments to [the plaintiff's] new evidence orally" during the subsequent hearing); *CIBC World Mkts., Inc. v. Deutsche Bank Sec., Inc.,* 309 F. Supp. 2d 637, 645 n.21 (D.N.J. 2004) ("In citing [new authority] in a Reply Brief to support a position clearly taken in the Moving Brief . . . the Moving Defendants did not make a newly minted argument, but rather merely explained a position in the initial

---

the D.C. Circuit's statements as dicta. (*See, e.g.,* Dkt. No. 106 at 5).

brief that the respondent had refuted. Furthermore, because oral argument was heard on this motion, Plaintiff had sufficient opportunity to respond. . . .”). Therefore, as shown, Plaintiffs clearly had many opportunities to present their views on *PPL Montana* and to respond to any arguments to the contrary, and the Court already considered Plaintiffs’ arguments and found them unconvincing. As such, their contention that the Court committed “clear error” in denying their request to submit additional briefing on *PPL Montana* is thus unavailing and does not warrant relief under Rule 59(e).[4]

Second, Plaintiffs argue that the Court “committed clear legal error by summarily discounting [their] constitutional claims.” (Pls.’ Mem. at 15). They assert that the so-called federal public trust doctrine is “constitutionally enshrined” and “embodied in the sovereign’s reserved powers, as well as the due process, equal protection, and commerce clauses of the Constitution.” (*Id.* at 12-13). But throughout their briefing

[4] It also bears noting that, since this Court handed down its decision and dismissed Plaintiffs’ action, at least two other courts have similarly interpreted the *PPL Montana* Court’s discussion of the public trust doctrine as affirmation that the doctrine is one of state law, and not federal law. *See United States v. 32.42 Acres of Land,* 683 F.3d 1030, 1038 (9th Cir. 2012) (“ ‘[T]he public trust doctrine remains a matter of state law,’ the contours of which are determined by the states, not by the United States Constitution.”); *Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands,* 866 F. Supp. 2d 1082, 1088 (D.N.D. 2012) (“The United States Supreme Court recently made clear that the public trust doctrine is a matter of state law.”).

in this case, Plaintiffs staunchly maintained that the public trust doctrine, in and of itself, provided the basis for federal jurisdiction. (*See* Dkt. No. 106 ("Pls.' Opp'n to Fed. Defs.' Mtn.") at 2-7; Dkt. No. 160 ("Pls.' Opp'n to CA Intervenors' Mtn.") at 12-22). More specifically, Plaintiffs previously made clear that their "claim in this case is *based solely on the Public Trust Doctrine,* which exists independent of statutes, finding its foundation in an inherent and inalienable attribute of sovereignty and imposing a fiduciary obligation on the trustee that cannot be abdicated." (Pls.' Opp'n to CA Intervenors' Mtn. at 20) (emphasis added). Now, however, Plaintiffs appear to be arguing that, through their alleged violations of their so-called federal public trust obligations, the Federal Defendants committed freestanding, independent violations of the Constitution under the Due Process Clause, the Equal Protection Clause, and the Commerce Clause. (*Id.* at 15-24). According to Plaintiffs, they were deprived of an opportunity to fully brief these theories before the Court dismissed their case, and they insist that they are entitled to Rule 59(e) relief as a result. The Court disagrees.

To be sure, Plaintiffs had plenty of chances to clearly delineate the nature and extent of their claims – both through the many rounds of briefing and during the three-hour hearing the Court held on the various motions to dismiss. While Plaintiffs suggest that the constitutional aspects of their claims were never raised or fleshed out during the briefing process, this assertion is belied by the record. At a minimum, as

NAM points out, these issues were squarely teed up through its motion to dismiss, wherein NAM argued as follows:

> Plaintiffs do not and cannot claim any violations of the constitutional provisions they cite in their complaint other than through the asserted violations of the public trust doctrine. The Commerce Clause is a grant of power authorizing Congress to regulate, not a requirement that Congress enact particular regulations. *See Gonzales v. Raich,* 545 U.S. 1, 17 (2005). The Fourteenth Amendment "applies only to the states," not to the federal government. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). The Due Process clause is a limitation on the government's power to act, and does not impose affirmative duties. *Collins v. City of Harker Heights,* 503 U.S. 115, 126 (1992) (language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm.").

(*See* Dkt. No. 67 ("NAM Mtn.") at 17 n.9). Indeed, NAM made these arguments before Plaintiffs filed any briefing whatsoever on the various motions to dismiss. So even setting aside the fact that Plaintiffs could and should have clearly spelled out the contours of their claims independently, to the extent they sought to assert constitutional claims, Plaintiffs certainly had an obligation to respond to these direct arguments – i.e., that the conclusory constitutional references in their Amended Complaint did not provide

an independent jurisdictional hook for this action. Plaintiffs failed to do so. And to the extent that Plaintiffs now wish they had briefed these issues differently, or otherwise presented their arguments more directly, they cannot take refuge under Rule 59(e).

In addition, Plaintiffs' present argument on this point runs completely counter to their position during the hearing, when counsel confirmed – in response to direct questioning from the Court on this precise issue – that Plaintiffs were not alleging any specific constitutional violations through their claims:

> THE COURT: All right. Here you're saying that there's no constitutional violation that's found first, though. Right?
>
> MS. OLSON: We argue that the Public Trust Doctrine is – because it's an attribute of sovereignty and it vested when the federal government was created, that it is constitutionally embedded in the vesting clauses that give the legislature and the executive branch authority over national interests.
>
> THE COURT: I understand that. But you're not saying that somehow what the federal government is doing is unconstitutional, are you?
>
> MS. OLSON: We argue that –
>
> THE COURT: Why didn't you bring a Section 1983 claim or a *Bivens* claim or whatever?

> MS. OLSON: Yes, Your Honor, we argue that they are violating their fundamental duties as trustees of the federal Public Trust resources. That is the claim. So it's not brought under a Section 1983 claim, that's correct.
>
> THE COURT: So yes or no, are you arguing that there's a constitutional violation or not?
>
> MS. OLSON: Not in the sense that you're speaking of, Your Honor.

(5/11/12 Transcript at 65:15-66:12). Thus, at best, Plaintiffs failed to cleanly present these arguments when they had the chance. At worst, in doubling back on their theory, Plaintiffs are completely contradicting their prior representations to the Court.[5] But in

---

[5] Indeed, another exchange with Plaintiffs' counsel confirms that Plaintiffs are now pressing an entirely different theory than they argued previously. In an effort to ascertain Plaintiffs' basis for invoking federal question jurisdiction under 28 U.S.C. § 1331, the Court asked counsel during the hearing to identify the specific law or laws of the United States upon which their claims were premised:

> THE COURT: If I were to find that [your claim] arose under the laws of the United States, under what laws would I look to to find that it arises under?
>
> MS. OLSON: Your Honor, I think you can go to the Supreme Court decisions in *Geer* and *Illinois Central* that establish that the Public Trust Doctrine is a fundamental attribute of sovereignty, and then look to the fact that when the states created the U.S. Constitution, they gave sovereignty to a federal government over natural resources. And the Public Trust case law from the Supreme Court, through state law and

(Continued on following page)

either event, Plaintiffs are not entitled to relief under Rule 59(e).

Third, Plaintiffs argue that the Court misinterpreted and misapplied the Supreme Court's decision in *American Electric Power Co. v. Connecticut.* Simply stated, however, this line of attack completely rehashes arguments that Plaintiffs advanced previously, and the Court already considered and rejected Plaintiffs' efforts to distance this case from *American Electric Power Co.* as "distinctions without a difference." *Alec L.,* 863 F. Supp. 2d at 16. The Court will not indulge Plaintiffs' improper reliance on Rule 59(e) by devoting any additional analysis to these recycled arguments at this stage.

Finally, along with their request for relief under Rule 59(e), Plaintiffs also ask the Court for leave to amend their complaint under Federal Rule of Civil Procedure 15(a)(2). As the D.C. Circuit has repeatedly held, however, "once a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent

---

> federal case law, all consistently finds that the Public Trust obligation and duty is a fundamental attribute of sovereignty that cannot be abridged. It can't be abdicated by the sovereign, whether it's a federal sovereign or a state sovereign.

(Dkt. No. 171 at 46:21-47:10). Other than their generalized reliance on the so-called federal public trust doctrine, Plaintiffs failed to invoke – or even reference – any particular constitutional provision or law underpinning their claims.

standard' for setting aside that judgment." *Ciralsky v. CIA,* 355 F.3d 661, 673 (D.C. Cir. 2004) (quoting *Firestone,* 76 F.3d at 1208. Insofar as Plaintiffs fail to establish any entitlement to relief under Rule 59(e), their request for leave to amend under Rule 15(a) is therefore denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Reconsideration is **DENIED**. Plaintiffs either presented all of these arguments previously, or they failed to seize the opportunity to do so when they should have. And despite Plaintiffs' apparent misconceptions, Rule 59(e) does not operate as a judicial mulligan. Rule 59(e) offers relief only in narrowly-circumscribed and extraordinary circumstances – circumstances that cannot be found here. At this juncture, Plaintiffs' recourse, if any, lies with the Court of Appeals.

An appropriate Order accompanies this Memorandum Opinion.

Date: May 22, 2013 /s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al*., Plaintiffs, v. Lisa P. JACKSON, *et al*., Defendants, and National Association of Manufacturers, *et al*., Intervenors.	Civil Action No. 1:11-cv-02235 (RLW)

MEMORANDUM OPINION

Five young citizens and two organizations, Kids vs. Global Warming[1] and Wildearth Guardians[2], bring this action seeking declaratory and injunctive relief

[1] Kids vs Global Warming is a non-profit organization whose membership includes thousands of youth from around the country "who are concerned about how human-made climate change is affecting and will continue to affect them and their future." (Am. Compl. at ¶ 48). Kids vs Global Warming has brought this action on behalf of its members. *Id.*

[2] Wildearth Guardians is a non-profit conservation organization that is dedicated to "protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding Earth's climate and air quality." (Am. Compl. at ¶ 49). Wildearth Guardians has brought this action on its own behalf and on behalf of its adversely affected members. *Id.*

for Defendants' alleged failure to reduce greenhouse gas emissions. The Plaintiffs allege that Defendants have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine. Plaintiffs' one-count complaint does not allege that the defendants violated any specific federal law or constitutional provision, but instead alleges violations of the federal public trust doctrine.

Plaintiffs bring this suit against Lisa P. Jackson in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), Kenneth L. Salazar in his official capacity as Secretary of the U.S. Department of the Interior, Thomas J. Vilsack in his official capacity as Secretary of the U.S. Department of Agriculture, Gary F. Locke in his official capacity as Secretary of the U.S. Department of Commerce, Steven Chu in his official capacity as Secretary of the U.S. Department of Energy, and Leon E. Panetta in his official capacity as Secretary of the U.S. Department of Defense. Plaintiffs allege that each of the Defendants, as agencies and officers of the federal government, "have wasted and failed to preserve and protect the atmosphere Public Trust asset." (Am. Compl. ¶¶ 138, 146). Two parties claiming an interest in this action have intervened.[3]

---

[3] Two groups have been allowed to intervene in this action: The National Association of Manufacturers, who represents small and large manufacturers in industrial sectors around the country; and several California companies and trade associations

(Continued on following page)

This matter is before the Court on Defendants' and the Defendant-Intervenors' Motions to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Defendants and Defendant-Intervenors move for dismissal arguing, *inter alia,* that because Plaintiffs' lone claim is grounded in state common law, the complaint does not raise a federal question to invoke this Court's jurisdiction and, therefore, warrants dismissal on jurisdictional grounds. Having considered the full briefing on these motions, and for the reasons set forth below, Defendants and Defendant-Intervenors' motions are granted and Plaintiffs' Amended Complaint is dismissed with prejudice.

I. BACKGROUND

A. Public Trust Doctrine

The public trust doctrine can be traced back to Roman civil law, but its principles are grounded in English common law on public navigation and fishing rights over tidal lands. *PPL Montana, LLC v. Montana,* 565 U.S. ___, 132 S. Ct. 1215, 1234 (2012). "At common law, the title and dominion in lands flowed

---

who own and operate, or whose members own and operate, numerous vehicles, engines and equipment that emit greenhouse gases into the atmosphere. Both groups claim that the relief requested by Plaintiffs would adversely affect them and their constituents and were permitted to intervene pursuant to Fed. R. Civ. P. 24(a).

by the tide water were in the King for the benefit of the nation . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders." *Phillips Petroleum v. Mississippi,* 484 U.S. 469, 473 (1988) (quoting *Shively v. Bowlby,* 152 U.S. 1 (1894)). Upon entry into the Union, the states received ownership of all lands under waters subject to the ebb and flow of the tide. *Id.* at 476. The states' right to use or dispose of such lands, however, is limited to the extent that it would cause "substantial impairment of the interest of the public in the waters," and the states' right to the water is subject to "the paramount right of [C]ongress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." *Ill. Cent. R.R. Co. v. Illinois,* 146 U.S. 387, 435 (1892). Thus, traditionally, the doctrine has functioned as a restraint on the states' ability to alienate submerged lands in favor of public access to and enjoyment of the waters above those lands.

More recently, courts have applied the public trust doctrine in a variety of contexts. *See e.g. District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1083 (D.C. Cir. 1984) (noting that "the doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of

flora and fauna indigenous to public trust lands.").[4] And while Plaintiffs have cited authority for the application of the doctrine in numerous natural resources, including "groundwater, wetlands, dry sand beaches, non-navigable tributaries, and wildlife" (Pls.' Opp. at 17-18), they have cited no cases, and the Court is aware of none, that have expanded the doctrine to protect the atmosphere or impose duties on the federal government. Therefore, the manner in which Plaintiffs seek to have the public trust doctrine applied in this case represents a significant departure from the doctrine as it has been traditionally applied.

B. The Relief Requested by Plaintiffs

Plaintiffs seek a variety of declaratory and injunctive relief for their public trust claim.[5] First, Plaintiffs ask the Court to declare that the atmosphere is a public trust resource and that the United

---

[4] Some states have recognized the doctrine as imposing an affirmative duty on the state. *See e.g. National Audubon Soc'y v. Superior Court of Alpine Cnty.,* 33 Cal.3d 419, 441, 189 Cal.Rptr. 346, 360-61, 658 P.2d 709, 725 (1983) (noting that the public trust doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ").

[5] Based upon the scope of the relief requested by Plaintiffs, Defendants have raised separation of powers and political question doctrine defenses. These defenses are clearly implicated by the totality of the relief sought by the Plaintiffs. However, to the extent that the Court, in its equitable discretion, may fashion a less expansive remedy, these doctrines would not be implicated. Therefore, the Court rules on alternative grounds.

States government, as a trustee, has a fiduciary duty to refrain from taking actions that waste or damage this asset. Plaintiffs also ask the Court to declare that, to date, Defendants have violated their fiduciary duties by contributing to and allowing unsafe amounts of greenhouse gas emissions into the atmosphere. In addition, Plaintiffs ask the Court to further define Defendants' fiduciary duties under the public trust by declaring that the six Defendant federal agencies have a duty to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during this century.

With respect to injunctive relief, Plaintiffs have asked this Court to issue an injunction directing the six federal agencies to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013. Plaintiffs also ask the Court to order Defendants to submit for this Court's approval: annual reports setting forth an accounting of greenhouse gas emissions originated by the United States and its citizens; annual carbon budgets that are consistent with the goal of capping carbon dioxide emissions and reducing emissions by six percent per year; and a climate recovery plan to achieve Plaintiffs' carbon dioxide emission reduction goals.[6]

---

[6] Plaintiffs also request that the Court retain jurisdiction over the action to ensure Defendants' compliance with the injunctive relief requested.

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, with the ability to hear only the cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. *See, e.g., Beethoven.com LLC v. Librarian of Congress,* 394 F.3d 939, 945 (D.C. Cir. 2005); *Hunter v. District of Columbia,* 384 F. Supp. 2d 257, 259 (D.D.C. 2005). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court has jurisdiction. *See Brady Campaign to Prevent Gun Violence United with the Million Mom March v. Ashcroft,* 339 F. Supp. 2d 68, 72 (D.D.C. 2004). Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court may dispose of the motion on the basis of the complaint alone, or it may consider materials beyond the pleadings "as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Board of Elections & Ethics,* 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see Lopez v. Council on American-Islamic Relations Action Network, Inc.,* 741 F. Supp. 2d 222, 231 (D.D.C. 2010).

When determining whether a district court has federal question jurisdiction pursuant to Article III and 28 U.S.C. § 1331, the jurisdictional inquiry "depends entirely upon the allegations in the complaint" and asks whether the claim as stated in the complaint "arises under the Constitution or laws of the United States." *Carlson v. Principal Fin. Group,* 320 F.3d 301, 306 (2d Cir. 2003); *see also Caterpillar*

Inc. v. Williams, 482 U.S. 386, 392 (1987). If a federal claim has been alleged, the district court has subject matter jurisdiction unless the purported federal claim is clearly "immaterial and made solely for the purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous." *Carlson,* 320 F.3d at 306 (quoting *Bell v. Hood,* 327 U.S. 678, 682-83 (1946)).

III. ANALYSIS

Plaintiffs assert that this Court has jurisdiction to review this case under the federal question statute, 28 U.S.C. § 1331, because the public trust doctrine arises from federal law. Defendants contend that the public trust doctrine does not provide a federal cause of action and, therefore, this Court lacks subject matter jurisdiction to adjudicate Plaintiffs' claim. Thus, the key question here is whether Plaintiffs' public trust claim is a creature of state or federal common law.

The central premise upon which Plaintiffs rely to invoke the Court's jurisdiction is misplaced. Plaintiffs contend that the public trust doctrine presents a federal question because it "is not in any way exclusively a state law doctrine." (Pl.'s Opp. at 13). The Supreme Court's recent decision in *PPL Montana, LLC v. Montana,* appears to have foreclosed this argument. *PPL Montana, LLC v. Montana,* 565 U.S. ___, 132 S. Ct. 1213, 1235 (2012). In that case, the Court while distinguishing the public trust doctrine from the equal footing doctrine, stated that "the

public trust doctrine *remains a matter of state law*" and its "contours . . . *do not depend upon the Constitution.*" *Id.* at 1235 (emphasis added). The Court went on to state that the public trust doctrine, as a matter of state law, was "subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power." *Id.*

The parties disagree as to whether the Supreme Court's declaration regarding the public trust doctrine is part of the holding or, as Plaintiffs urge, merely dictum. The Court, however, need not resolve this issue because "'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" *Overby v. Nat'l Ass'n of Letter Carriers,* 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting *United States v. Dorcely,* 454 F.3d 366, 375 (D.C. Cir. 2006)). Thus, dicta or not, the Court's statements regarding the public trust doctrine would nonetheless be binding on this Court.

Even if the Supreme Court's declaration was not binding, the Court finds it persuasive. Likewise, dictum from this Circuit is also persuasive. The D.C. Circuit has had occasion to state, albeit in dictum, that "[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law*" and that "the doctrine has functioned as a constraint on states' ability to alienate public trust lands." *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1082 (D.C. Cir. 1984) (emphasis added). The Court also expressed its concerns that a *federal*

common-law public trust doctrine would possibly be displaced by federal statutes. *Id.* at 1085 n.43.

Thus, it appears that Plaintiffs have not raised a federal question to invoke this Court's jurisdiction under § 1331.[7] As Plaintiffs' complaint alleges no other federal cause of action to invoke this Court's original jurisdiction, there is no basis to exercise the Court's supplemental jurisdiction over Plaintiffs' state-law common law claim under 28 U.S.C. § 1367.

Alternatively, even if the public trust doctrine had been a federal common law claim at one time, it has subsequently been displaced by federal regulation, specifically the Clean Air Act. In *American Electric Power Company v. Connecticut,* the Supreme Court held that: "the Clean Air Act and the EPA actions it authorizes displace *any* federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Amer. Elec. Power Co. v. Connecticut,* 131 S. Ct. 2527, 2537 (2011) (emphasis added).

The Plaintiffs attempt to escape the holding in the *Amer. Elec. Power Co.* by arguing that its holding

---

[7] Where no federal question is pleaded, the federal court may nevertheless have diversity jurisdiction. However, the Court lacks diversity jurisdiction in this case, as "[i]t is well established . . . that the United States is not a citizen for diversity purposes and that 'U.S. agencies cannot be sued in diversity.'" *Commercial Union Ins. v. U.S.,* 999 F.2d 581, 584 (D.C. Cir. 1993) (quoting *General Ry. Signal Co. v. Corcoran,* 921 F.2d 700, 703 (7th Cir. 1991)).

should be limited to common law nuisance claims, while Plaintiffs are proceeding here under a common law public trust theory. Plaintiffs also attempt to distinguish the *Amer. Elec. Power Co.* case because that case was brought against four private companies and the Tennessee Valley Authority, a federally owned corporation, as opposed to the federal agency defendants in this case. Plaintiffs argue that this distinction is significant because, in Plaintiffs' view, the fiduciary duties of the public trust doctrine can only be imposed on the states and the federal government. According to Plaintiffs, because the plaintiffs in the *Amer. Elec. Power Co.* case could not bring a public trust claim against the defendants in that case, the holding in that case should be limited to those facts.

The Court views these as distinctions without a difference. The particular contours of the public nuisance doctrine did not in any way affect the Supreme Court's analysis in *Amer. Elec. Power Co.,* Indeed, the Court's holding makes no mention of the public nuisance doctrine at all, as the Court clearly stated that *any* federal common law right was displaced. *Id.* Further, there is nothing in the Court's holding to indicate that it should be limited to suits against private entities. Indeed, the Court described in great detail the process under which federal courts may review the action, or inaction, of federal agencies with respect to their statutory obligations under the Clean Air Act. *Id.* at 2539.

Moreover, the question at issue in the *Amer. Elec. Power Co.* case is not appreciably different from the

question presented here – whether a federal court may make determinations regarding to what extent carbon-dioxide emissions should be reduced, and thereafter order federal agencies to effectuate a policy of its own making. The *Amer. Elec. Power. Co.* opinion expressed concern that the plaintiffs in that case were seeking to have federal courts, in the first instance, determine what amount of carbon-dioxide emissions is unreasonable and what level of reduction is practical, feasible and economically viable. *Amer. Elec. Power Co.,* 436 U.S. at 2540. The Court explained that "the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* The Court further explained that Congress designated the EPA as an agency expert to "serve as primary regulator of greenhouse gas emissions" and that this expert agency "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 2539. The Court, in holding that the federal common law cause of action was displaced by the Clean Air Act, concluded that federal judges may not set limits on greenhouse gas emissions "in the face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action arbitrary, capricious, . . . or otherwise not in accordance with the law." *Id.*

In the present case, Plaintiffs are asking the Court to make similar determinations regarding carbon dioxide emissions. First, in order to find that there is a violation of the public trust – at least as the

Plaintiffs have pled it – the Court must make an initial determination that current levels of carbon dioxide are too high and, therefore, the federal defendants have violated their fiduciary duties under the public trust. Then, the Court must make specific determinations as to the appropriate level of atmospheric carbon dioxide, as determine whether the climate recovery plan sought as relief will effectively attain that goal. Finally, the Court must not only retain jurisdiction of the matter, but also review and approve the Defendants' proposals for reducing greenhouse gas emissions. Ultimately, Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress.

These are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the "primary regulator of greenhouse gas emissions." *Id.* at 2539. The emissions of greenhouse gases, and specifically carbon dioxide, are subject to regulation under the Clean Air Act. *Massachusetts v. E.P.A.,* 549 U.S. 497, 528-29 (2007). Thus, a federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Act. *Id.* at 2537 (noting that the test for legislative displacement is whether the statute "speaks directly to the question at issue"). Therefore, even if Plaintiffs allege a public trust claim that could be construed as sounding in

federal common law, the Court finds that that cause of action is displaced by the Clean Air Act.

IV. CONCLUSION

Ultimately, this case is about the fundamental nature of our government and our constitutional system, just as much – if not more so – than it is about emissions, the atmosphere or the climate. Throughout history, the federal courts have served a role both essential and consequential in our form of government by resolving disputes that individual citizens and their elected representatives could not resolve without intervention. And in doing so, federal courts have occasionally been called upon to craft remedies that were seen by some as drastic to redress those seemingly insoluble disputes. But that reality does not mean that every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem. While the issues presented in this case are not ones that this Court can resolve by way of this lawsuit, that circumstance does not mean that the parties involved in this litigation – the plaintiffs, the Defendant federal agencies and the Defendant-Intervenors – have to stop talking to each other once this Order hits the docket. All of the parties seem to agree that protecting and preserving the environment is a more than laudable goal, and the Court urges everyone involved to seek (and perhaps even seize) as much common ground as courage, goodwill and wisdom might allow to be discovered.

For the foregoing reasons, the Defendants' and Defendant-Intervenors' motions to dismiss are granted. The Plaintiffs' First Amended Complaint is hereby dismissed.

SO ORDERED.[8]

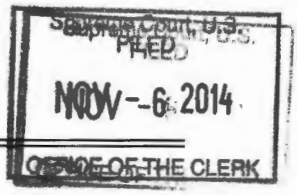
Date: May 31, 2012 /s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

[8] An order will be issued contemporaneously with this memorandum opinion granting the Defendants' and Defendant-Intervenors' motions to dismiss Plaintiffs' Amended Complaint.

TAB G

Brief of Climate Scientists as Amici Curiae Supporting Petitioners,
Alec L. v. McCarthy, 135 S. Ct. 774 (No. 14-405)

No. 14-405



In The

Supreme Court of the United States

ALEC L., et al.,

Petitioners,

v.

GINA McCARTHY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF CLIMATE SCIENTISTS AS *AMICI CURIAE* SUPPORTING PETITIONERS

DANIEL M. GALPERN
2760 Onyx Street
Eugene, OR 97403
(541) 968-7164
dan.galpern@gmail.com

CHARLES M. TEBBUTT
Counsel of Record
941 Lawrence Street
Eugene, OR 97401
(541) 344-3505
charlie.tebbuttlaw@gmail.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*[1]

Amici are climate scientists with an interest in promoting effective action to preserve Earth's climate system. *Amici* filed an *amicus* brief in support of Petitioners when this matter was before the D.C. Circuit Court of Appeals.

James E. Hansen is director of the Climate Science, Awareness and Solutions Program at Columbia University's Earth Institute, and the former director of the NASA Goddard Institute for Space Studies.

David Beerling is a palaeobiologist in the Department of Animal and Plant Sciences, University of Sheffield, UK.

Paul J. Hearty is Research Associate Professor at the University of North Carolina at Wilmington.

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. A monetary contribution covering the cost of preparation and submission of this brief will be provided by Climate Science, Awareness and Solutions, Inc. (CSAS), a non-profit, tax-exempt organization headed by *Amicus* Dr. James E. Hansen. Aside from CSAS, no entity or person made any monetary contribution for the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for the parties received timely notice of the intent to file this brief, and their letters consenting to the filing of this brief have been filed with the Clerk.

Ove Hoegh-Guldberg is Professor of Marine Studies and Director of the Global Change Institute, at the University of Queensland in Brisbane, Australia.

Pushker Kharecha is Deputy Director of the Climate Science, Awareness and Solutions Program at Columbia University's Earth Institute.

Valérie Masson-Delmotte is Senior Climate Scientist and head of the "climate dynamics and archives" research group of Laboratoire des Sciences du Climat, Gif-sur-Yvette, France, at the French National Research Center, Atomic Energy Agency, University of Versailles-St Quentin and Institut Pierre Simon Laplace.

Camille Parmesan is a Professor and National Aquarium Chair in the Public Understanding of Oceans and Human Health in the Marine Institute, Plymouth University (UK), and Senior Research Fellow, Environmental Science Institute, University of Texas at Austin.

Eelco J. Rohling is Professor (Ocean and Climate Change) at the Research School of Earth Sciences, at The Australian National University.

Makiko Sato is Senior Research Scientist with the Climate Science, Awareness and Solutions Program at Columbia University's Earth Institute.

Pete Smith is Professor of Soils and Global Change at the Institute of Biological and Environmental Sciences at the University of Aberdeen

(Scotland, UK), Science Director of the Scottish Climate Change Centre of Expertise (ClimateXChange), and Director of Food Systems for the Scottish Food Security Alliance-Crops.

Lise Van Susteren is a board certified general and forensic psychiatrist practicing in Washington D.C., and Advisory Board Member, Center for Health and the Global Environment, Harvard School of Public Health.

The D.C. Circuit's decision implicates important considerations of law and the public interest, in particular whether persons with standing will be able to effectively challenge federal action, or inaction, on the basis of its conflict with government's fundamental duty to preserve essential natural resources. *Amici* retain an especially strong interest in ensuring that the U.S. government recognizes and fulfills its fundamental trust duty to undertake timely and effective action with respect to emissions that are altering the composition of the atmosphere and causing a dangerous disruption of Earth's climate system. *Amici* believe that the decision below may undermine the federal government's full assumption of its obligation to safeguard the climate system for our children, future generations, and the natural world.

REASONS FOR GRANTING THE PETITION

In the underlying decision, the D.C. Circuit determined that the doctrine of public trust does not sound in federal law. Unless reversed, that decision removes a potentially effective check on the federal government's perpetuation of business as usual at the moment of truth. Propelled by the burning of fossil fuels, the present concentration of atmospheric carbon dioxide ("CO_2") is now well into the dangerous zone. Time is not on our side, as further delay of effective action presses Earth's climate system towards tipping points beyond which there is no reasonable prospect of return. The D.C. Circuit's opinion derived from its misreading of this Court's decision in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), and on that basis, the court elected not to consider the federal government's fundamental violation of the public trust that Petitioners sought to challenge. Judicial inaction in the face of the gravest threat to our children and their progeny must not be so cavalierly based. *Amici* Climate Scientists accordingly urge this Court to grant certiorari.

I. The underlying decisions are based on an overbroad reading of *PPL Montana*, and the basis for federal application of the public trust doctrine should be reaffirmed.

In their decisions, the D.C. Circuit and the United States District Court for the District of Columbia relied on dicta by this Court in *PPL Montana*

and, on that basis, held that the public trust doctrine provides no basis for subject matter jurisdiction. Pet. App. 2-3, 27-29. The D.C. Circuit opined that this Court had "categorically rejected any federal constitutional foundation" for the public trust doctrine "without qualification or reservation." Pet. App. 3. The district court also undertook no contextual analysis of the *PPL Montana* public trust language and determined that, even if this Court's statements in *PPL Montana* were dicta, they nonetheless were binding. Pet. App. 28.

Regrettably, the lower courts over-read this Court's discussion in *PPL Montana* and ignored its specific context. As Petitioners rightly observed, this Court was not, in *PPL Montana*, considering whether the public trust doctrine applies to the federal government. Pet. at 25. Here, *Amici* consider more precisely what this Court was attempting to do.

Specifically, this Court sought to show why Montana's invocation of the public's right to recreational uses of river waters within the state provided no support for its claim to title of certain disputed riverbeds. *PPL Mont., LLC*, 132 S. Ct. at 1235. The public trust doctrine at issue in *PPL Montana*, accordingly, was not one governing the federal administration of natural resources, but rather that applicable to waters and submersible lands conveyed to a newly admitted state. Accordingly, this Court observed that "federal law determines riverbed title under the equal-footing doctrine," while state law – subject to the federal Commerce Clause and admiralty

power – determines the right of access to such "waters within [a state's] borders." *Id.* This Court in *PPL Montana* was describing a two-step decision tree: (1) federal constitutional law is considered to determine the scope of a state's title to riverbeds received upon statehood, and thus, the borders of a state's waters; (2) state law, per that public trust doctrine whose scope the state retains "residual power to determine," governs the public's access to such waters. *Id.* As the *PPL Montana* Court then noted, "the contours of *that* public trust," namely the set of public trust duties that burden a state's receipt of title to navigable waters and their beds, "do not depend on the [U.S.] Constitution." *Id.* (emphasis added). Instead, as the Court correctly noted in passing, those contours depend on development of the state's own law. *Id.*

Under *PPL Montana*, the "contours" of the trust – that is, factors governing public access to state waters – are provided by each individual state's laws, while the "borders" of those state waters are decided by federal law. The title issue in *PPL Montana* was fully resolved by consideration of those borders alone, as determined by the equal-footing doctrine and corollary concepts of navigability for title. The Court's statement that the public trust doctrine was a matter of state law simply elaborated on the federalist scheme for determining ownership and use of state submersible lands and waters. In that context, according to well-settled precedent, the state public trust plays an important role.

The D.C. Circuit, however, rejected Petitioners' contention that *PPL Montana* "contemplated only the state public trust doctrine." Pet. App. 2-3. Instead, it stated that the *PPL Montana* Court had "repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation" for it. Pet. App. 3. However, every use by this Court in *PPL Montana* of the phrase "*the* public trust doctrine" refers to the set of state-defined obligations to the public that applied to the state's administration of waters whose borders are determined pursuant to federal constitutional law.

Moreover, as Petitioners also pointed out, this Court in *PPL Montana* "affirmed the doctrine's underpinnings for imposing trust obligations on all sovereigns [and] in the course of this affirmation" cited to the work of David C. Slade, which discussed not only the state public trust doctrine but also the federal doctrine. Pet. at 26; *PPL Mont., LLC*, 132 S. Ct. at 1235 (citing David C. Slade, *Putting the Public Trust Doctrine to Work* 3-8, 15-24 (1990)).

In that work, Slade observed – similar to this Court's subsequent writing in *PPL Montana*, 132 S. Ct. at 1235 – that "[i]n the United States, each State has the authority and responsibility for applying the Public Trust Doctrine to trust lands and waters 'within its borders according to its own views of justice and policy.'" Slade, *supra*, at 4 (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)). Accordingly, Slade observed, there is "no single 'Public Trust Doctrine.' Rather, there are over fifty different

applications of the doctrine, one for each State, Territory or Commonwealth, *as well as the federal government.*" *Id.* (emphasis added). "Nevertheless," Slade concluded, "a common core of principles remains, forming the foundation for how the Doctrine is applied. . . ." *Id.* Slade also discussed the "dual-sovereign nature of the public trust." *Id.* at 309; *see also* David C. Slade, *Putting the Public Trust Doctrine to Work* 307-317 (2d ed. 1997) (concurrent federal and state authority of public trust resources); Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* 129-136 (2014) (defining the public trust as "a fundamental attribute of sovereignty" and describing state and federal governments as "co-trustees").

Other *amici* have developed a compelling argument that, in light of its reserved powers underpinnings, the public trust doctrine articulated in this Court's foundational decision, *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), was a function of federal, and not state, constitutional law. *See* Br. of *Amici Curiae* Law Professors, No. 14-405 (forthcoming Nov. 2014). The *Illinois Central* Court determined the state's title to land underlying Chicago Harbor could not be fully alienated because its title was bound up with the duty of "management and control" of those public trust lands. *Ill. Cent. R.R.*, 146 U.S. at 453. Describing the trust obligation as one "*devolving* upon the state for the public," the Court determined the state could "no more abdicate its trust over property in which the whole people are interested . . . than

it can abdicate its police powers. . . ." *Id.* (emphasis added). To do so would be an attempt to diminish the authority of a "succeeding legislature [that] possesses the same jurisdiction and power as its predecessor[s]." *Id.* at 459.

The *Illinois Central* Court's strong statement of the reserved powers doctrine appears to be based in federal law, but the question whether there is a federal public trust doctrine does not turn on that point. The Court may determine that a claim under the public trust doctrine sounds in federal law even if *Illinois Central* was "necessarily a statement of Illinois law," *PPL Mont., LLC*, 132 S. Ct. at 1235 (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997)). Admittedly, *Amici* find it difficult to comprehend how public trust obligations could have "devolve[ed]" to Illinois upon that state's assumption of title to navigable waterbeds if those obligations were not first held by the federal government (the "devolver"). Nonetheless, the critical point is that the reserved powers underpinning of *Illinois Central* applies equally well to consideration of the federal government's obligations with respect to natural resources over which it necessarily retains primary "management and control." *See, e.g.*, Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 Ariz. St. L.J. 849, 877-881 (2001). This is particularly true where the environmental harm is to an essential resource held by the nation as a whole – harm that is "likely to be objectionable to a future legislature but

not reparable by it within a reasonable time." *Id.* at 880. In that context, the public trust is held by the federal government or, at least, concurrently by it and the states. *See United States v. Beebe*, 127 U.S. 338, 342 (1888) ("The public domain is held by the government as part of its trust."); *United States v. CB & I Constructors, Inc.,* 685 F.3d 827, 836 (9th Cir. 2011) (The federal government is "more akin to a trustee that holds natural resources for the benefit of present and future generations. . . ."); *United States v. 1.58 Acres of Land,* 523 F. Supp. 120, 122 (D. Mass. 1981) (The public trust "is administered by both the federal and state sovereigns."); David C. Slade, *Putting the Public Trust Doctrine to Work* 307-315 (1990).

Amici turn, now, to consider whether recognition of the federal government's public trust obligation to manage, control, and reverse harm to the atmosphere is necessary to preserve the ability of succeeding legislatures to provide for the protection and welfare of the public.

II. Preservation of a habitable climate system requires immediate effective action.

A. Humanity's use of fossil fuels has pressed the climate system to the brink.

More than twenty years have passed since the United States agreed to limit fossil fuel emissions in

order to avoid dangerous human-made climate change, but U.S. emissions have climbed[2] and the rate of global emissions growth increased from 1.5% per year during 1980-2000 to 3% per year in 2000-2013, mainly because of the increased use of coal. James E. Hansen, et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8(12) PLoS ONE 1, 1-2 (2013) [hereinafter *Young People*].[3] The increased emissions are reflected, in part, in the rising concentration of atmospheric CO_2, now approaching 400 parts per million ("ppm"), over forty percent more than the pre-industrial level. Moreover, the average annual increase in CO_2 concentration has doubled in the last half-century to two ppm per year.[4]

Increasing levels of atmospheric CO_2 and other greenhouse gases ("GHGs") operate to reduce Earth's heat radiation to space, thus causing an energy imbalance with less energy going out than coming in. The imbalance causes Earth to heat up until it again radiates as much energy to space as it absorbs from

---

[2] *See* U.S. Envt'l Prot. Agency, *Overview of Greenhouse Gas Emissions* (July 2, 2014), *available at* http://www.epa.gov/climatechange/ghgemissions/gases/co2.html#Trends.

[3] *Available at* http://www.ncbi.nlm.nih.gov/pubmed/24312568.

[4] *See* U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Earth System Research Laboratory, Global Monitoring Division, *Trends in Atmospheric Carbon Dioxide* (Oct. 7, 2014), *available at* http://www.esrl.noaa.gov/gmd/ccgg/trends/global.html; App., Chart 2.

the sun. In fact, warming of Earth caused by the increasingly thick CO_2 "blanket" persisted even during the recent five-year solar minimum of 2005-2010. Had changes in insolation been the dominant forcing, the planet would have had a negative energy balance in that period, when solar irradiance was at its lowest level in the period of accurate data, i.e., since the 1970s. Instead, even though much of the GHG forcing had been expended in causing the observed 0.8°C global warming, the residual positive forcing overwhelmed the negative forcing due to unusually low solar irradiance. This illustrates, unequivocally, that it is human activity, and not the sun, that is the dominant driver of recent climate change.[5]

Earth's warming to approximately 0.8°C above the pre-industrial level is now close to, and probably slightly above, the prior maximum of the Holocene – the period of the most recent 10,000 years during which Earth's climate was characterized by a reasonably constant global mean temperature conducive to the development of civilization. *Young People*, *supra*, at 4. That constancy enabled the Greenland and Antarctic ice sheets to remain in near mass balance, sea levels to be relatively stable, species to flourish, and civilization to develop.

---

[5] *See* Adam Volland, *Earth's Energy Budget Remained Out of Balance Despite Unusually Low Solar Activity*, NASA's Earth Science News (Jan. 30, 2012), *available at* www.nasa.gov/topics/earth/features/energy-budget.html.

The current warming increases Earth's radiation to space, thus reducing Earth's energy imbalance. However, because of the ocean's great thermal inertia, it requires centuries for the climate system to reach a new equilibrium consistent with a changed atmospheric composition. Due to that thermal inertia, a similar amount of additional warming is "in the pipeline" before Earth reaches energy balance at the present atmospheric CO_2 concentration. *Id.* Averaged over the entire planet, the energy imbalance is approximately 0.75 W/m^2. In total, the planet's present energy surplus is approximately 375 trillion joules per second, the equivalent of more than 500,000 Hiroshima-sized atomic explosions per day, every day.[6]

Examination of the paleoclimate record provides insight as to global temperature sensitivity to external forcings such as added CO_2; sea level sensitivity to global temperature; and quantitative information about so-called "slow" feedback processes, such as melting ice sheets and lessened surface reflectivity attributable to the darker surfaces resulting from the melting ice sheets and reduced area of sea ice. *Young People*, *supra*, at 4.

The average global surface temperature record of the last 65 million years is summarized in Chart 1,

---

[6] Calculations from *Amicus Curiae* James E. Hansen (Nov. 3, 2014) (on file with the Climate Science, Awareness and Solutions Program at Columbia University's Earth Institute).

based on high-resolution ice core data covering the most recent several hundred thousand years and ocean cores on time scales of millions of years. App. 1. Two conclusions may be drawn. *First*, the mechanisms that accounted for the relatively rapid oscillations between cold and warm climates over the historical period were the same as those operating today. While those oscillations were initiated not by fossil fuel burning, but by slow insolation changes attributable to perturbations of Earth's orbit and spin axis tilt, the mechanisms that caused these historical climate changes to be so large were two powerful amplifying feedbacks: the planet's surface albedo (its reflectivity, literally its whiteness) and atmospheric CO_2. *Second*, the longer paleoclimate record shows that warming coincident with atmospheric CO_2 concentrations as low as 450-500 ppm may have been enough to melt most of Antarctica.[7] Our emissions have *already* driven up the CO_2 concentration in the atmosphere to about 400 ppm.[8] Recent analyses establish that, absent a major change from current policy and practice, the atmospheric CO_2 concentration is likely to exceed 700 ppm by the end of this century.[9]

---

[7] James E. Hansen, et al., *Climate Sensitivity, Sea Level and Atmospheric Carbon Dioxide*, 371 Phil Trans. R. Soc. 1, 9, Fig. 4 (2013) [hereinafter *Climate Sensitivity*], *available at* http://rsta.royalsocietypublishing.org/content/371/2001/20120294.

[8] NOAA, *supra* note 4.

[9] M. Collins, et al., *Long-term Climate Change: Projections, Commitments and Irreversibility*, *in* Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the

(Continued on following page)

Amici Climate Scientists conclude that the present concentration of CO_2 and its warming, both realized and latent, are already in the dangerous zone, that we are now in a period of carbon overshoot, and that the consequences will become severe unless urgent action is undertaken to restore energy balance at a lower atmospheric CO_2 concentration.

B. Warming to date serves as a harbinger of far worse to come, absent effective action.

Global warming to date measures "only" 0.8°C above the pre-industrial period, yet that level of warming has already led to a reduction of more than one-third of Arctic sea ice cover at the end of the melt season, and an even faster decline in sea ice thickness. *Young People*, *supra*, at 4. Mountain glaciers, the source of fresh water to major rivers during dry seasons, are receding rapidly. Glaciers in iconic Glacier National Park, for example, appear to be in full retreat. In 1850, Glacier had 150 glaciers measuring

---

Fifth Assessment Report of the Intergovernmental Panel on Climate Change, 1103 (2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_Chapter12_FINAL.pdf; MIT Joint Program on the Science and Policy of Global Change, *2014 Energy and Climate Outlook*, 11 (2014), *available at* globalchange.mit.edu/Outlook2014 (projecting a corresponding increase in global temperature of 3.3 to 5.6°C above the 1901-1951 mean).

larger than twenty-five acres. Today, it has just twenty-five.[10]

Tropospheric water vapor and heavy precipitation events have increased. A warmer atmosphere holds more moisture, enabling heavier precipitation and more extreme flooding. *Young People*, *supra*, at 8. Higher temperatures, on the other hand, increase evaporation and can intensify droughts when they occur, as can the expansion of the subtropics, yet another consequence of global warming. *Id.* More than ninety percent of California and half of Oklahoma, to take two notable examples, are now blanketed in severe to exceptional drought.[11]

Ocean and terrestrial ecosystems are stressed. Coral reef systems, harboring more than 1,000,000 species as the "rainforests" of the ocean, are impacted by a combination of ocean warming, acidification from rising atmospheric CO_2, and other human-caused stresses, resulting in a 1-2% annual decline in geographic extent. *Young People*, *supra*, at 7. Polar and mountain species are under increasing stress due to physical constraints on their ability to migrate poleward or upward and their evolutionary adaptation to conditions now melting at their feet, including

---

[10] USGS, Northern Rocky Mountain Science Center, *Retreat of Glaciers in Glacier National Park* (May 2013), *available at* http://nrmsc.usgs.gov/research/glacier_retreat.htm.

[11] National Drought Mitigation Center, *U.S. Drought Monitor* (Oct. 30, 2014), *available at* http://droughtmonitor.unl.edu.

Arctic species dependent on year-round sea ice. *Id.* Altered climate zones also expand the range of vector-borne diseases. World health experts have concluded with "very high confidence" that climate change already contributes to the global burden of disease and premature death through the expansion of infectious disease vectors. *Id.* at 8.

Subtropical climate belts have expanded, contributing to more intense droughts, summer heat waves, and devastating wildfires. Further, summer mega-heatwaves, such as those in Europe in 2003, the Moscow area in 2010, Texas and Oklahoma in 2011, Greenland in 2012, and Australia in 2013 have become more widespread with the increase demonstrably linked to global warming. The probability of such extreme heat events has increased by several times because of global warming, and the probability will grow even further if emissions are not abated. *Id.* at 4.

Recent projections of sea level rise for 2100 have been on the order of one meter, which is higher than earlier assessments. However, these estimates still in part assume linear relations between warming and sea level rise. It is possible that continued business-as-usual CO_2 emissions will spur a nonlinear response, with a multi-meter sea level rise realized *this century*. *Id.* at 6. Our nation is not close to being prepared for that.

A pulse of CO_2 injected into the air decays by half in about twenty-five years, as CO_2 is taken up by the

ocean, biosphere, and soil, but nearly one-fifth remains in the atmosphere after 500 years. App., Chart 2. Indeed, that estimate is likely optimistic, in light of the nonlinearity in ocean chemistry and saturation of carbon sinks, implying that the airborne fraction probably will remain larger for a century and more.[12] It requires hundreds of millennia for the weathering of rocks to deposit all of an initial CO_2 pulse on the ocean floor as carbonate sediments. Much of the carbon from fossil fuel burning remains in the atmosphere and affects the climate system for many millennia, ensuring that over time sea level rise of many meters will occur – tens of meters if most of the fossil fuels are burned. That order of sea level rise would result in the loss of hundreds of historical coastal cities worldwide, with incalculable economic consequences. It would also create hundreds of millions of global warming refugees and likely exacerbate international conflict. *Young People*, *supra*, at 6.

To be clear: uncertainty about sea level rise remains, but that uncertainty is not about whether continued CO_2 emissions will cause large sea level rise that submerges global coastlines, as it is about how soon the large changes will begin.

Other impacts from unabated emissions will abound. Acidification stemming from ocean uptake of a portion of increased atmospheric CO_2 will increasingly disrupt coral reef ecosystem health, with potentially

---

[12] *Climate Sensitivity*, *supra* note 7, at 25.

devastating impacts to certain nations and communities. Inland, fresh water security will be compromised due to receding mountain glaciers and snowpack and reduced flow in major river systems.

As to human health, increasing concentrations of CO_2 and associated increased global temperatures will deepen impacts, with children being especially vulnerable. Climate threats to health move through various pathways, including through additional stress on clean air, clean water, and food supply. Accordingly, un-arrested climate change will increase malnutrition and consequent disorders, including those related to child growth and development; increased death, disease, and injuries from heat waves, floods, storms, fires, and droughts; and increased cardio-respiratory morbidity and mortality associated with increased ground-level ozone. *Id.* at 6-8. These impacts and risks are in addition to the toll on public health and the environment stemming from non-CO_2 pollution emitted or discharged in the processes of extracting, refining, producing, transporting, and burning of fossil fuels. *Id.* at 8-9.

With regard to other species, *Amici* note that climate zones are already shifting at rates exceeding natural rates of change, a trend that will continue as long as the planet is out of energy balance. As the shift of climate zones becomes comparable to the range of some species, less mobile species will be driven to extinction. The UN Intergovernmental Panel on Climate Change estimates that with global warming of 1.6°C or more relative to pre-industrial

temperatures, 9-31 percent of species will be driven to extinction, while warming of 2.9°C will drive an estimated 21-52 percent of species to extinction. These temperature/extinction thresholds will not be avoided absent concerted action on emissions. *Id.* at 7.

One year ago, *Amici* concluded that continuation on the present path would "consign our children and their progeny to a very different planet, one far less conducive to their survival." Br. of *Amici Curiae* Scientists at 25, No. 13-5192 (D.C. Cir. Nov. 12, 2013). Research in the intervening months amplifies that concern. Glacial ice streams in Greenland appear to be speeding up their discharge to the Island's west coast,[13] and the northern part of the Greenland ice sheet, previously considered stable, is beginning to discharge ice to the ocean.[14] Findings that Greenland's ice-covered valleys extend far below sea level imply that its ice sheet may be a more efficient recipient of ocean heat than previously understood, and thus more vulnerable to rapid melting.[15] Similarly,

---

[13] I. Joughin, et al., *Brief Communication: Further Summer Speedup of Jakobshavn Isbrae*, 8 The Cryosphere 209 (2014), *available at* http://www.the-cryosphere.net/8/209/2014/tc-8-209-2014.pdf.

[14] Shfaqat A. Khan, et al., *Sustained Mass Loss of the Northeast Greenland Ice Sheet Triggered by Regional Warming*, 4 Nature Climate Change 292 (2014).

[15] M. Morlighem, et al., *Deeply Incised Submarine Glacial Valleys Beneath the Greenland Ice Sheet*, 7 Nature Geoscience 418 (2014).

Antarctic ice shelves appear to be melting at an accelerating rate, resulting in significant freshwater discharge in the areas around the Amundsen Sea and the Antarctic Peninsula, with important impacts to regional surface ocean salinity and sea-level rise along the Antarctic coast.[16]

The consequences of large scale melting in Antarctica and Greenland will be irreversible, at least on time scales important to society, not only because the major ice sheets took many millennia to grow to their present size, but also because, once begun, the dynamics and momentum of ice sheet disintegration will not be halted by a subsequent gradual reduction of emissions. *Young People*, *supra*, at 13-15.

These recent findings are consistent with our understanding that, during the Eemian era – when the global average temperature was only a little higher than the Holocene maximum we have now matched – sea level reached heights several meters higher than at present. *Id.* at 4, 6.

---

[16] Craig D. Rye, et al., *Rapid Sea-level Rise Along the Antarctic Margins in Response to Increased Glacial Discharge*, 7 Nature Geoscience 732 (2014).

C. To preserve a habitable climate system, action must be undertaken without delay.

To restore energy balance, stabilize climate, avoid severe heating, and avert uncontrollable climate change, *id.* at 13-16, atmospheric CO_2 must be reduced to about 350 ppm, assuming the net of other human-made climate forcings remains at today's level, *id.* at 5, 10. The level of atmospheric CO_2 functions as the long-wave control knob on the planet's thermostat.[17] Accordingly our decision, *vel non*, to reduce emissions and rely on carbon-free sources of energy will determine the period of atmospheric carbon overshoot.

To minimize that period, *Amici* and colleagues prescribed a glide path of emission reductions that, to be effective, must be commenced without further delay. *Id.* at 10. The issue of delay is critical, as may be considered with the aid of Chart 2. App. The left side of Chart 2 illustrates the long-residence time of atmospheric CO_2, reflecting the length of time it would take to return CO_2 to lower concentrations even if, as indicated on the right side of the chart, fossil fuel emissions were ceased entirely. Of course, an abrupt cessation of all CO_2 emissions, whether in

---

[17] Andrew A. Lacis, James E. Hansen, et al., *The Role of Long-Lived Greenhouse Gases as Principal LW Control Knob That Governs the Global Surface Temperature for Past and Future Climate Change*, 65 Tellus B 1 (2013), *available at* http://www.tellusb.net/index.php/tellusb/article/view/19734.

2015 or 2030, is unrealistic. Industry, other business, and consumers all need time to retool and reinvest in emission-free options to fossil fuels. Accordingly, *Amici*'s proposed glide path to secure an atmosphere with a CO_2 concentration no higher than 350 ppm and a global mean temperature rise of no more than 1°C above the pre-industrial level, is based on annual fossil fuel CO_2 emission reductions of six percent, coupled with programs to limit and reverse land use emissions via reforestation and improved agricultural and forestry practices. *See* App., Chart 3.

Action to achieve these reductions could restore the atmosphere to approximately 350 ppm within this century. However, consistent with the abrupt phase out scenarios discussed in the prior paragraph, if rapid annual emission reductions were delayed until 2030, then the atmospheric CO_2 will remain above 350 ppm for about 700 years, and global temperature will remain more than 1°C higher than the pre-industrial level for about 400 years. If the cessation of emissions were not for another forty years, then the atmosphere would not return to 350 ppm CO_2 for nearly 1000 years. Considered another way, the required rate of emission reductions would have been about 3.5% per year if reductions had started in 2005, while the required rate of reduction, if commenced in 2020, will be approximately 15% per year. Accordingly, the dominant factor is the date at which fossil fuel emission phase out begins.

III. The federal government's failure to preserve a viable climate system violates the public trust.

In their 2013 *amicus* brief to the D.C. Circuit, *Amici* Scientists noted that the present U.S. climate plan fails even to address a path to achieve the emission reductions necessary to stabilize and reduce atmospheric CO_2, and thus to preserve a viable climate system for our children and future generations. Br. of *Amici Curiae* Scientists at 21 n.18, No. 13-5192 (D.C. Cir. Nov. 12, 2013). *Amici* note the enormous national contribution to the problem, with U.S. sources accounting for the largest share of carbon emissions over time[18] and the United States providing the largest absolute financial subsidy of any nation to the fossil fuel industry.[19]

Further delay in the institution of binding commitments and effective policy to sufficiently reduce fossil fuel emissions will consign our children to a vastly diminished future. The practically irreversible nature of ice sheet melting, lost coastal cities, and widespread species extinction, among other effects,

---

[18] James E. Hansen, *Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity* 189, Fig. 27 (2009); *see also id.* at 177, Fig. 24. Updated figures *available at* www.columbia.edu/~mhs119/UpdatedFigures.

[19] International Monetary Fund, *Energy Subsidy Reform: Lessons and Implications* 13 (Jan. 28, 2013), *available at* www.imf.org/external/np/pp/eng/2013/012813.pdf.

will not be avoided absent effective action. The federal government's delay and then dalliance in the face of the impending calamity cannot be reconciled with its fundamental duty to hold the atmosphere in trust for present and future generations.

Amici believe that the federal public trust doctrine is best conceived as grounded in the reserved powers doctrine. As applied to the climate crisis, this requires action by the U.S. government (and other sovereigns) to preserve a viable climate system conducive to civilization and natural systems.[20] Failure to so act, on the other hand, will deprive any future legislature of power to protect the health, safety, and welfare of U.S. citizens from the ravages of an inhospitable climate system.

Petitioners have pointed to cases indicating that, with respect to a number of sovereigns, the source of the public trust may run very deep, indeed to the very nature of self-government and freedom. Pet. at 19-24.[21] But the effect of the doctrine is similar in each

---

[20] *See also* United Nations Framework Convention on Climate Change, pmbl., art. 2, May 9, 1992, 1771 U.N.T.S. 107 (Parties to the Convention "[d]etermined to protect the climate system for present and future generations" by stabilizing atmospheric GHG concentrations "at a level that would prevent dangerous anthropogenic interference with the climate system.").

[21] *See, e.g., Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947-948 (Pa. 2013) (plurality opinion) (Limits on legislative power are "inherent in the form of government chosen by the people of this Commonwealth" and "the rights of the people . . .

(Continued on following page)

instance: sovereigns are required under it not to lay waste, or allow others to lay waste, to an essential public resource such that its beneficial use is rendered unavailable in the future.[22]

In *Illinois Central*, the trust principle was grounded within the broader terms of the reserved powers doctrine. The Court, in invalidating the legislative grant of submerged lands to a private railroad, recounted the prerogatives of a future legislature that "must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it." *Ill. Cent. R.R.*, 146 U.S. at 460; *see also* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 Ariz. St. L.J. 849, 867-868 (2001).

With respect to the climate crisis, the doctrine describes the federal sovereign's inherent authority, and prescribes its fundamental duty, to protect the atmosphere as an essential national resource. Action, or inaction, by the U.S. government in contravention of that public trust works to throw our planet out of energy balance, dangerously disrupting global and regional climate. Continued failure to act with all

---

are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution."); *In re Water Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (The public trust is an "inherent attribute of sovereign authority that the government . . . cannot surrender.").

[22] Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* 208-257 (2014).

deliberate speed, so as to dial back the thermostat within the short remaining time, risks eliminating the option of preserving a habitable climate system. The clearly anticipated, legitimate claims of "our Posterity"[23] can be met, if at all, only by effective action undertaken today. Succeeding legislatures and presidents, in whom our Constitution vests authority no less than in the present federal government, must not, in violation of the public trust, be deprived of power to protect the people.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

DANIEL M. GALPERN
2760 Onyx Street
Eugene, OR 97403
(541) 968-7164
dan.galpern@gmail.com

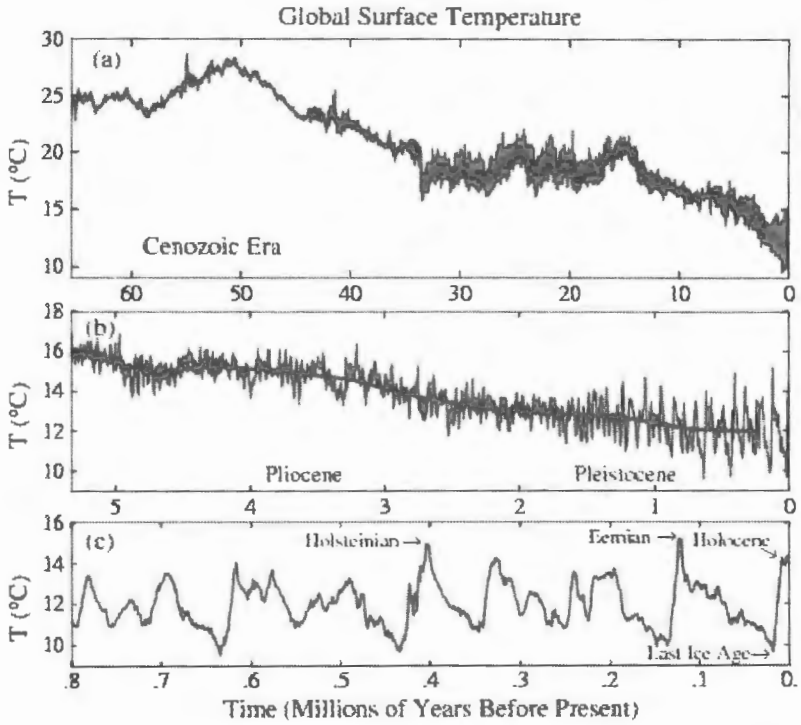
CHARLES M. TEBBUTT
Counsel of Record
941 Lawrence Street
Eugene, OR 97401
(541) 344-3505
charlie.tebbuttlaw@gmail.com

Counsel for Amici Curiae

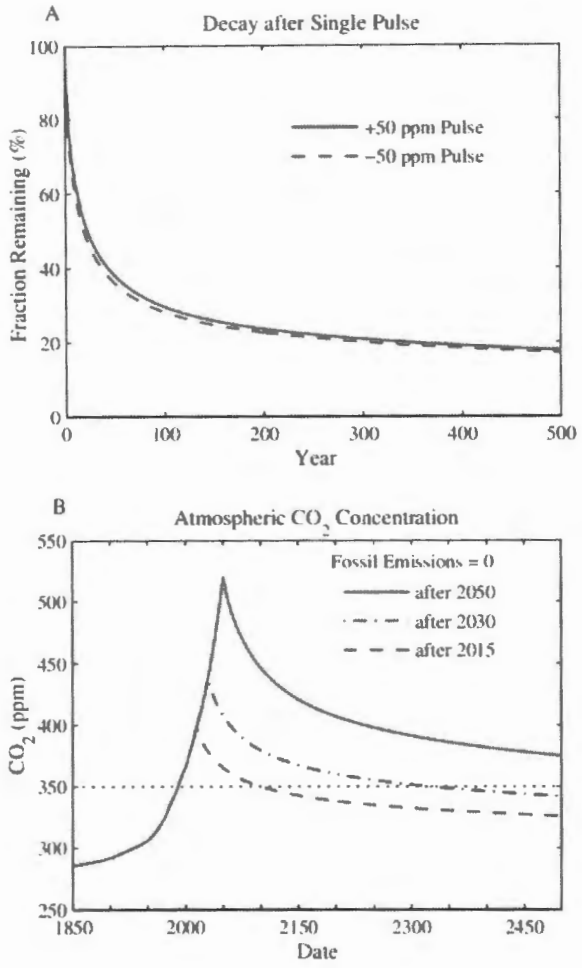
November 6, 2014

[23] U.S. Const. pmbl.

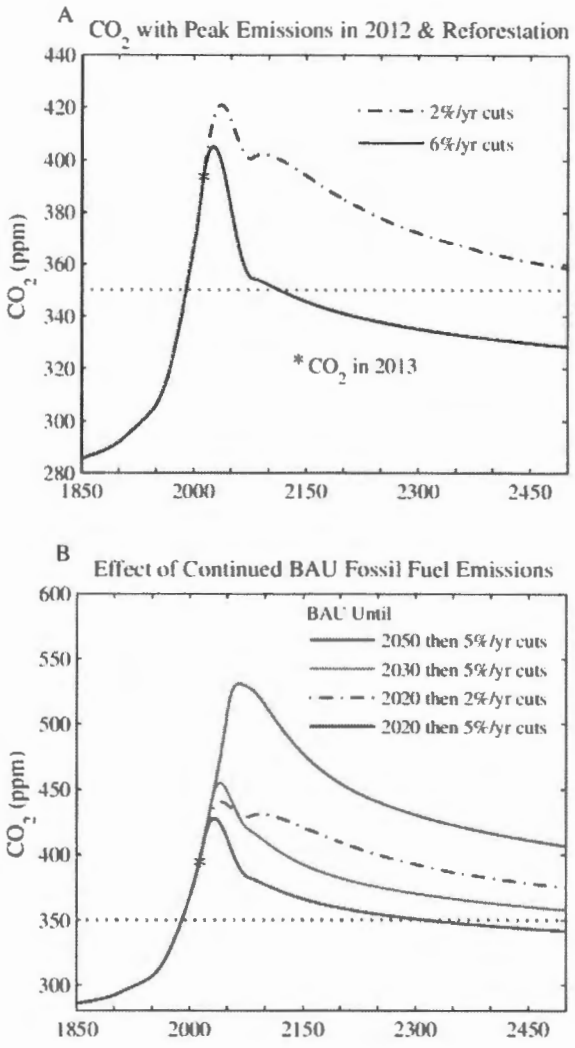
APPENDIX TO CLIMATE SCIENTISTS AMICUS BRIEF



Surface temperature estimate for the past 65.5 million years, including an expanded time scale for the Pliocene and Pleistocene periods (middle), and for the past 800,000 years (bottom). Material from *Climate Sensitivity*, op. cit. nte 7.



Decay of atmospheric CO_2 perturbations. (A) Instantaneous injection or extraction of CO2 with initial conditions at equilibrium. (B) Fossil fuel emissions terminate at the end of 2015, 2030, or 2050 and land use emissions terminate after 2015 in all three cases, i.e., thereafter there is no net deforestation. Material from Fig. 4 in *Young Children*, op. cit. nte 3.



Atmospheric CO_2 if fossil fuel emissions reduced. (A) 6% annual cut and 100 GtC reforestation drawdown occurs in 2031-2080, (B) effect of delaying onset of emission reduction. Material from Fig. 5 in *Young Children*, op. cit. nte 3.