

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SENATOR GENE YAW, *et al.*,

Plaintiffs,

v.

THE DELAWARE RIVER BASIN  
COMMISSION,

Defendant,

and

DELAWARE RIVERKEEPER  
NETWORK and MAYA K. VAN  
ROSSUM, THE DELAWARE  
RIVERKEEPER,

Intervenor-Defendants.

Civil Action No. 2:21-cv-00119

Honorable Paul S. Diamond

**MOTION TO DISMISS OF INTERVENOR-DEFENDANTS**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and Local Rule of Civil Procedure 7.1, Intervenor-Defendants Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (collectively, “DRN”) hereby move the Court to dismiss the complaint filed by Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus, and Damascus Township (collectively, “Plaintiffs”) in this action. Pls.’ Compl., ECF No. 1.

In support of this motion, DRN relies on the accompanying brief, which is incorporated herein as if fully set forth.

Dated: March 10, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Kacy C. Manahan hereby certifies that on the date set forth below, she caused a true and correct copy of the Motion to Dismiss of Intervenor-Defendants and supporting Memorandum of Law to be served on all counsel of record through the Court's electronic notification system.

Dated: March 10, 2021

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**MEMORANDUM OF LAW IN SUPPORT OF  
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## I. INTRODUCTION

Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus (collectively, “Senate Plaintiffs”) and Damascus Township (“Township”) bring this action for declaratory relief challenging the Delaware River Basin Commission’s (“Defendant’s” or “Commission’s”) decision to suspend its review and approval of natural gas extraction projects and exploratory wells within the Delaware River Basin (“Basin”) pending the promulgation of regulations governing said projects.

After Plaintiffs complaint was filed, on February 25, 2021, the Commission adopted a final rule prohibiting high volume hydraulic fracturing in hydrocarbon bearing rock formations within the Basin. That action ended the *de facto* moratorium at issue in Plaintiffs’ complaint. Accordingly, Plaintiffs’ claims are now moot and must be dismissed.

To the extent Plaintiffs’ claims are not mooted by the Commission’s action, Plaintiffs lack standing, a requirement under Article III of the United States Constitution, and this Court must dismiss Plaintiffs’ complaint.

Senate Plaintiffs’ claims are based on alleged injuries to their lawmaking authority, their ability to act as trustee under the Environmental Rights Amendment, and to the corpus of the natural resources trust itself. Because these injuries are not an invasion to a legally-protected interest held by the legislators themselves or the

Pennsylvania Senate Republican Caucus itself, they amount to generalized grievances insufficient to confer Article III standing.

The Township complains that the Commission's moratorium renders it unable to exercise its fiduciary duties as trustee, or to benefit financially from fracked gas development. The Township's contentions subvert its role as trustee, promoting heedless economic motivations that the citizens of the Commonwealth overwhelmingly voted to thwart by adopting the Environmental Rights Amendment. Such a fundamental misconception of the Amendment renders the Township's injury illusory. In addition, the Township fails to connect the Commission's moratorium on fracking to its inability to receive certain funds from the General Assembly, and otherwise fails to plead any specific economic harm wrought by the moratorium.

Because Plaintiffs' claims have been mooted by the Commission's action, and, alternatively, because none of the Plaintiffs have established standing in this case, their complaint must be dismissed in its entirety, as this court lacks subject matter jurisdiction in either circumstance.

## **II. PROCEDURAL HISTORY OF THE CASE**

On January 11, 2021, Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus, and Damascus Township ("Plaintiffs") filed the Complaint and a Summons was issued. Defendant waived service of process on January 26, 2021. *See* Stip. Of Waiver of Serv. Of Summons, ECF No.

4. DRN moved to intervene as of right, or in the alternative, for permissive intervention, on February 12, 2021. DRN's motion was granted by Order of this Court on February 25, 2021. *See* Order, ECF No. 15.

### **III. STATEMENT OF FACTS**

On July 7, 1961, the Commonwealth of Pennsylvania, by and through its General Assembly, entered a compact with the United States, the State of Delaware, the State of New Jersey, and New York State for the conservation, utilization, development, management, and control of the water and related resources of the Basin. *See* 32 P.S. § 815.101 (hereinafter, "Compact") at § 1.3(a). The Compact sought "to provide for a joint exercise" of the "sovereign right[s] and responsibilit[ies]" of the signatory parties "in the common interests of the people of the region." Compact, § 1.3(b).

The Compact created the Commission "as a body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments of the respective signatory parties." *Id.* § 2.1. The signatory parties, including the Commonwealth of Pennsylvania, granted the Commission jurisdiction within the limits of the Basin. *Id.* § 2.7. Among those powers is the creation of a comprehensive plan "for the immediate and long range development and uses of the water resources of the basin," *id.* § 3.2(a), and the power to review projects having a "substantial effect on the water resources of the basin" to determine whether the

project “would substantially impair or conflict with” the comprehensive plan. *Id.* at § 3.8.

On May 19, 2009, the Commission’s executive director, acting pursuant to Section 2.3.5 B.18 of the Commission’s Rules of Practice and Procedure, determined that natural gas extraction projects within the Basin “may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics.” Del. River Basin Comm’n, Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters, at 2 (May 19, 2009). As a result of this determination, natural gas extraction project sponsors were notified that they must apply for and obtain Commission approval prior to commencing a project. *Id.*

On May 5, 2010, the Commission unanimously resolved to “postpone [its] consideration of [natural gas] well pad dockets until regulations are adopted . . . .” Del. River Basin Comm’n, Meeting of May 5, 2010 Minutes at 4–5, [https://www.nj.gov/drbc/library/documents/5-05-10\\_minutes.pdf](https://www.nj.gov/drbc/library/documents/5-05-10_minutes.pdf). Because the Compact forbids the undertaking of any project having a substantial effect on water resources of the basin prior to the Commission’s review, there is currently a moratorium on natural gas drilling in the Delaware River Basin pending further action from the Commission. On June 14, 2010, the Commission’s executive

director supplemented her May 19, 2009 determination to include wells intended solely for exploratory purposes. *See* Del. River Basin Comm’n, Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities Within the Drainage Area of Special Protection Waters (June 14, 2010).

On February 25, 2021, the Commission adopted a final rule prohibiting high volume hydraulic fracturing in hydrocarbon-bearing rock formations within the Basin. *See* Del. River Basin Comm’n, Res. 2021-01 (Feb. 25, 2021), [https://www.state.nj.us/drbc/library/documents/ResForMinutes022521\\_regs-transfers.pdf](https://www.state.nj.us/drbc/library/documents/ResForMinutes022521_regs-transfers.pdf), attached hereto as Exhibit “A”. That action replaces the Executive Director Determinations of May 19, 2009, June 14, 2010, and July 23, 2010, and caused the Resolution for the Minutes of May 5, 2010, to expire by its own terms. *Id.* at 5.

Plaintiffs’ Complaint seeks a declaration from this Court that “the Commission’s moratorium on the construction and operation of wells [for] natural gas extraction violates the terms” of the Compact. Pls.’ Compl. at ¶ 2, ECF No. 1. Alternatively, if the moratorium is a valid exercise of the Commission’s authority, then Plaintiffs seek a “declaration that the moratorium constitutes a regulatory taking without just compensation under the Fifth Amendment to the United States Constitution.” *Id.* at ¶ 3.

#### IV. LEGAL ARGUMENT

##### A. Standard of Review

DRN moves to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis that the court lacks subject matter jurisdiction over Plaintiffs' claims.

###### *1. Mootness*

Article III of the Constitution prohibits federal courts from “decid[ing] questions that cannot affect the rights of litigants in the case before them” by limiting jurisdiction to “cases” and “controversies.” *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). “There is thus no case or controversy, and a suit becomes moot, ‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

“Mootness is a proper basis for a 12(b)(1) motion to dismiss because the mootness doctrine implicates jurisdictional matters.” *Mayer v. Wallingford-Swarthmore Sch. Dist.*, 405 F. Supp. 3d 657, 640 (E.D. Pa. 2019). “The central question . . . ‘is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.’” *Id.* (quoting *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int’l Union AFL-CIO-CLC v. Gov’t of Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016)). This is based in the requirement that “an ‘actual controversy’ must exist not only ‘at

the time the complaint is filed,’ but through ‘all stages’ of the litigation.” *Already, LLC*, 568 U.S. at 90–91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

## 2. Standing

“A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.” *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (alteration in original) (quoting *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)). In reviewing a facial challenge to subject matter jurisdiction under Rule 12(b)(1), a court uses the same standard it would in deciding a Rule 12(b)(6) motion, and “consider[s] the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.” *Id.* at 358 (quoting *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012)). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *In re Schering Plough Corp.*, 678 F.3d at 243 (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “With respect to 12(b)(1) motions in particular, ‘[t]he plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.’”

*Id.* at 244 (alteration in original) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)).

Standing is a constitutional prerequisite to invoking this court’s subject matter jurisdiction and derives from the requirement that federal courts resolve only “cases” and “controversies.” U.S. Const. art. III, § 2. “The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry ‘often turns on the nature and source of the claim asserted.’” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citations omitted) (first citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); and then quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). “[T]he standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court’s remedial powers on his behalf.” *In re Schering-Plough Corp.*, 678 F.3d at 244 (quoting *Warth*, 422 U.S. at 498–99).

The standing doctrine consists of three elements: “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). When “a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element” of standing. *Id.* (alteration in original) (quoting *Warth*, 422 U.S. at 518). In evaluating a plaintiff’s

standing, the court must “careful[ly] . . . examin[e] . . . a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” *In re Schering-Plough Corp.*, 678 F.3d at 245 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

**B. Plaintiffs’ Complaint should be dismissed for lack of subject matter jurisdiction because the Commission’s moratorium is no longer in effect and Plaintiffs’ claims are therefore moot.**

The Commission’s adoption of a final rule prohibiting high volume hydraulic fracturing in hydrocarbon bearing rock formations in the Basin caused the moratorium challenged by plaintiffs in this action to expire. Thus, this Court can no longer grant the relief requested in Plaintiffs’ Complaint.

Count I of Plaintiffs’ complaint requests a “declaration from this Court that the Commission’s *de facto* moratorium within the Basin exceeds the power granted to it by the Compact.” Pls’ Compl. at p. 16. Count II seeks an order “declaring that the Compact does not authorize the imposition of the *de facto* moratorium” or an order “declaring the Commission’s moratorium a taking requiring provision of just compensation for the diminution of the economic value of the property seized . . . .” Pls’ Compl. at p. 17. Count III seeks a declaration that the moratorium “is an unauthorized attempt to exercise the General Assembly’s power of eminent domain an exceeds the limited power of condemnation granted to it under the Compact,” or a declaration that the moratorium is a “regulatory taking authorized by Section 14.14

[of the Compact] and, thus, must be effectuated in accordance with the process set forth therein.” Pls.’ Compl. at p. 18. Finally, Count IV seeks either an order declaring that “the Compact does not authorize the imposition of the *de facto* moratorium, as such an interpretation would violate Article IV, Section 4 of the United States Constitution and render the Compact illegal” or an order that “Section 3.8 of the Compact violates Article IV, Section 4 of the United States Constitution and, therefore, is invalid.” Pls.’ Compl. at p. 20.

Because circumstances have changed such that the moratorium no longer exists, an order from this Court granting the relief requested by Plaintiffs would be “an opinion advising what the law would be upon a hypothetical state of facts,” thus lacking the “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (first quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937); and then quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). As Plaintiffs’ requested relief under the Declaratory Judgment Act no longer presents an Article III case or controversy, Plaintiffs’ complaint must be dismissed.

**C. Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction because Senator Gene Yaw, Senator Lisa Baker, and the Pennsylvania Senate Republican Caucus lack standing to pursue their claims.**

Should this Court find that Plaintiffs' complaint has not been mooted by the Commission's adoption of a final rule on February 25, 2021, then it should nevertheless find that Senator Gene Yaw, Senator Lisa Baker, and the Pennsylvania Senate Republican Caucus (collectively, "Senate Plaintiffs") lack standing to bring this suit. "Legislators, like other litigants in federal court, must satisfy the jurisdictional prerequisites of Article III standing," including injury-in-fact. *Russell v. DeJongh*, 491 F.3d 130, 133 (3d Cir. 2007). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560).

The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that [they have] a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to [them]." *Raines*, 521 U.S. at 819. "[O]f the three required elements of constitutional standing, 'the injury-in-fact element is often determinative.'" *In re Schering-Plough Corp.*, 678 F.3d at 245 (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009)). This element "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* (quoting *Lujan*, 504 U.S. at 563).

Prior to examining standing, it is appropriate to examine the context of Senate Plaintiff's claimed injury. Pennsylvania's legislative body voluntarily voted in 1961 to join the Compact, and Pennsylvania continues to exercise its authority through representation on the Commission in all matters properly brought before the Commission, and the Pennsylvania legislature has made no attempt to resign from the compact and the many benefits participation provides.

Senate Plaintiffs allege two primary injuries. First, they allege that the Commission's actions interfere with their legislative powers and ability to carry out their trust duties. Pls.' Compl. at ¶¶ 75–76, 82. The second injury alleged by Senate Plaintiffs is a direct injury to the corpus of the trust established by the Environmental Rights Amendment via a regulatory taking. Because Senate Plaintiffs allege injuries to institutional interests not held by plaintiffs themselves, and because they fail to allege an injury under the recognized theory of “vote nullification,” neither of the two injuries alleged is sufficient to support Article III standing.

*1. Senate Plaintiffs lack standing based on the Commission's alleged interference with legislative powers and duties.*

Senate Plaintiffs first allege that the Commission's decision to postpone consideration of natural gas well pad dockets “suspends law within the Commonwealth—a power reposed exclusively in the General Assembly” and that the Commission has “attempted to exercise legislative authority exclusively vested in the General Assembly.” Pls.' Compl. at ¶¶ 75–76. Then, turning to the trust

established by Article I, Section 27 of the Pennsylvania Constitution, also known as the “Environmental Rights Amendment” Senate Plaintiffs assert that the moratorium “interferes with the ability of the Senate Plaintiffs . . . to manage and act in the Trust’s best interests and precludes them from exercising their constitutionally imposed fiduciary duties relative thereto.” Pls.’ Compl. at ¶ 82.

First, Senate Plaintiffs do not represent the majority of, nor do they represent the entirety of, the General Assembly. *See Corman v. Torres*, 287 F. Supp. 3d 558, 568–69 (M.D. Pa. 2018) (finding that a plaintiff group consisting of only a subset of one chamber of the Pennsylvania General Assembly failed to establish legislative standing); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 802–03 (2015) (explaining that where legislators are authorized to represent the institutional interests of the entire legislative body, standing may be found in some circumstances). As a subset of the General Assembly, Senate Plaintiffs cannot vindicate that body’s institutional interests in this action. The power to legislate is not personally held by Senate Plaintiffs and is thus not concrete or particularized. Although Senate Plaintiffs characterize the moratorium as an attack on their lawmaking authority, that authority is shared by all members of the General Assembly. *See Raines*, 521 U.S. at 821 (a claim based on an institutional injury is based on a loss of political power held by all members of the legislature equally, and

is thus insufficiently concrete and particularized to support standing for individual members).

Second, Senate Plaintiffs fail to identify any specific legislative act nullified by the Commission's actions. Instead, they generally describe the regulatory scheme governing natural gas extraction in the Commonwealth of Pennsylvania. *See* Pls.' Compl. at ¶¶ 43–65. While the Supreme Court *has* recognized state legislator standing under a theory of “vote nullification” with respect to specific legislative actions, the conditions for such an injury are not present here. *See Coleman v. Miller*, 307 U.S. 433, 438, 441 (1939). A legislator has standing to bring suit to “vindicate a purported institutional injury” where “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Raines*, 521 U.S. at 823 (citing *Coleman*, 307 U.S. at 441, 446). On the other hand, “once a bill has become law, a legislator’s interest in seeing the law followed is no different from a private citizen’s general interest in proper government.” *Russell*, 491 F.3d at 135.

Thus, Senate Plaintiffs’ interest in seeing Pennsylvania’s regulatory scheme applied within the Delaware River Basin, unfettered by federal law,<sup>1</sup> is a

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<sup>1</sup> The Supremacy Clause of the United States Constitution, art. VI, cl. 2, “ensures that a congressionally approved compact, as a federal law, pre-empts any state law

“generalized grievance[] about the conduct of government or the allocation of power in the Federal System.” *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 479 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Such a generalized grievance does not support Article III standing.

For these same reasons, Senate Plaintiffs also fail to allege an injury to their power to carry out their duties as trustees, as these duties are not personally held, but rather belong to the Commonwealth itself and its political subdivisions. *See Robinson Twp. Washington Cty. v. Commw.*, 83 A.3d 901, 956–57 (Pa. 2013) (plurality) (“The Commonwealth is named trustee, and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania’s government.”). In *Alaska Legislative Council v. Babbitt*, 181 F.3d 133 (D.C. Cir. 1999), Alaska state legislators similarly argued in support of their standing to challenge certain provisions of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233, that “because the federal statute and its implementation are illegal, the federal government has interfered with [plaintiffs’] state duties, and has nullified their legislative prerogatives” including the duty and authority “to protect and preserve the public trust for all citizens of the State of

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that conflicts with the Compact.” *Tarrant Reg’l Water Dist. V. Herrmann*, 569 U.S. 614, 627 n.8 (2013).

Alaska.” *Alaska Legislative Coun.*, 181 F.3d at 1337. The D.C. Circuit held that the Alaska legislators were not “deprive[d] of something to which they are personally entitled,” and that “their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature.” *Id.* at 1337–38. Here, the Senate Plaintiffs similarly complain of a loss of political power by claiming that the Commission’s moratorium interferes with their exercise of constitutionally-imposed fiduciary duties. Such “abstract dilution of institutional legislative power” is insufficient to support standing. *Id.* at 1338 (quoting *Raines*, 521 U.S. at 826).

In sum, because Senate Plaintiffs “rais[e] only a generally available grievance about government—claiming only harm to [their] and every citizen’s interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large,” they fail to state an Article III case or controversy. *Lujan*, 504 U.S. at 573–74.

*2. Senate Plaintiffs lack standing based on an alleged regulatory taking of the Commonwealth’s public natural resources.*

Senate Plaintiffs allege that “the Commission has engaged in a regulatory taking of the Commonwealth’s public natural resources and appropriated the Trust’s corpus.” Pls.’ Compl. at ¶ 85. Senate Plaintiffs do not have a legally protected interest in property owned by the Commonwealth, and thus lack standing to seek a declaration that the Commission’s actions violate the Fifth Amendment of the

United States Constitution and Article I, Section 10 of the Pennsylvania State Constitution.

Although Senate Plaintiffs seek relief via the Declaratory Judgment Act, 28 U.S.C. § 2201, and not through an inverse condemnation proceeding, the Declaratory Judgment Act requires an actual controversy, meaning “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc.*, 549 U.S. at 127. Like the legislative power and fiduciary duties discussed previously, *see* Section IV.B.1, *infra*, legal title to the corpus of the trust created by the Environmental Rights Amendment is held by the Commonwealth, not by individual legislators. *See State of Miss. v. United States*, 146 Fed. Cl. 693, 699 (2020) (“To pursue a takings claim, a plaintiff must possess ‘a property interest for purposes of the Fifth Amendment.’” (quoting *Members of the Peanut Quota Holders Ass’n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005))). Thus, Senate Plaintiffs lack standing to seek redress for an injury to the trust corpus.

**D. Plaintiffs’ Complaint should be dismissed for lack of subject matter jurisdiction because Damascus Township lacks standing.**

Should this Court find that Plaintiffs’ complaint has not been mooted by the Commission’s adoption of a final rule on February 25, 2021, then it should nevertheless find that Damascus Township (“Township”) lacks standing to bring this suit. The Township alleges three injuries resulting from the Commission’s

moratorium: (1) interference with the Township’s “ability to manage and act in the Trust’s best interests” and the inability to “exercise its constitutionally imposed fiduciary duties relative thereto,” Pls.’ Compl. at ¶ 82, ECF No. 1; (2) deprivation of the Township’s “right to benefit from the Well Fund,” *id.* at ¶ 86; and (3) the inability to “participat[e] in the Marcellus-related economic development made available to neighboring areas.” *Id.* at ¶ 55. The Township’s alleged injuries are insufficient to confer standing, as they are, respectively: (1) based on a misconception of Pennsylvania’s Environmental Rights Amendment and the fiduciary duties imposed thereunder; (2) not fairly traceable to the actions of the Commission; and (3) too speculative to constitute an injury that is not “conjectural or hypothetical.” *See Spokeo*, 136 S. Ct. at 1548.

*1. Damascus Township has not suffered injury to its ability to exercise its fiduciary duties imposed by Pennsylvania’s Environmental Rights Amendment.*

The Township claims that it has a fiduciary duty to prevent the diminution of the Lease Fund and the Marcellus Legacy Fund. Pls.’ Compl. at ¶ 70, ECF No. 1. It also alleges that the moratorium “interferes with the ability of . . . Damascus Township to manage and act in the Trust’s best interests and precludes them from exercising their constitutionally imposed fiduciary duties relative thereto.” Pls.’ Compl. at ¶ 82, ECF No. 1. The Township’s alleged injury to its ability to exercise its fiduciary duties is based on a misconception of what those duties are, as evidenced

by its assertion that “[i]n order to prevent diminution of the Trust’s corpus, [the Township may] take reasonable steps *to increase the value of the Trust’s assets.*” Pls.’ Compl. at ¶ 26 (emphasis added).

While local governments within the Commonwealth such as the Township do have the responsibility to act as trustee to protect public natural resources, *see Robinson Twp.*, 83 A.3d at 956–57 (duties and powers attendant to the trust are vested in local government), that role cannot be reduced to a dollars-and-cents calculation that gives government entities a mandate to maximize the economic value of the public natural resources: “Under Section 27, the Commonwealth may not act as a mere proprietor, pursuant to which it ‘deals at arms[’] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations.’” *Pa. Env’tl. Def. Found. v. Commw. of Pa. (PEDF II)*, 161 A.3d 911, 932 (Pa. 2017) (alteration in original) (quoting Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess. 2269, 2273 (1970)). *See also Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983) (“[P]ublic trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in *rare cases* when the abandonment of that right is *consistent with the purposes of the trust.*” (emphases added)). If an old-growth forest would bring more cash to the

state as lumber on the back of a truck, according to the Township’s view, it is duty-bound to mow it down. This view subverts the Environmental Rights Amendment’s goals and purposes, and thus cannot be the basis for the Township’s alleged injury.

The Township’s fiduciary duty is, in relevant part,<sup>2</sup> “to prevent and remedy the degradation, diminution, or depletion of *our public natural resources*,” *Robinson Twp.*, 83 A.3d at 957 (emphasis added), *not* to prevent the diminution of the Lease Fund and the Marcellus Legacy Fund, as the Township claims. As a fiduciary, the Township’s power to exercise its trustee duties is limited by the trust purposes: “clean air, pure water, and . . . the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I, § 27. *See also In re Hartje’s Estate*, 28 A.2d 908, 910 (Pa. 1972) (citing Restatement (Second) of Trusts § 106 for the proposition that “the trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust”); and John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 Univ. of Mich. J. of L. Reform 77, 100–02 (2020) (contrasting the duty to maximize the economic

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<sup>2</sup> The other basic duty imposed on the Township—which, from the face of Plaintiffs’ Complaint is not at issue here—is to “act affirmatively via legislative action to protect the environment.” *PEDF II*, 161 A.3d at 933 (quoting *Robinson Twp.*, 83 A.3d at 958).

value of school land trusts with the duty to preserve ecological values in natural resource-based trusts).

Even reading the Township’s allegations in the most favorable light, the complaint fails to allege an injury to its ability to exercise its fiduciary duties to protect the public natural resources. Instead, the Township complains of the inability to create profit from the public natural resources within its borders, exactly the type of arms’-length dealing that the Environmental Rights Amendment was designed to constrain. Accordingly, the Township lacks standing based on the claimed injury to its ability to exercise its duties as trustee.

2. *Damascus Township’s inability to benefit from the Well Fund is not caused by the Commission’s moratorium.*

Damascus Township also alleges that it has suffered an injury by being deprived of the benefits of disbursements from the Well Fund. Pls.’ Compl. at ¶¶ 47–57, 86. These alleged injuries are not “fairly traceable” to the Commission’s moratorium. Article III standing requires a “causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’” *Lujan*, 504 U.S. at 560 (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Here, the complained-of injury is the result of the actions of the Pennsylvania General Assembly, the entity that created and manages the Well Fund.

Plaintiffs describe the Well Fund as a fund created by statute, with a funding formula that limits the distribution of funds to municipalities where unconventional natural gas wells are located. Pls.’ Compl. at ¶¶ 47–50, ECF No. 1. *See also* 58 Pa.C.S. § 2314. Plaintiffs emphasize that “the General Assembly has substantial discretion in determining the specific allocation of the money” in the Well Fund, subject only to “certain restrictions stemming from its trustee duties.” Pls.’ Compl. at ¶ 71, ECF No. 1. Plaintiffs do not allege that the Commission’s actions constrain this discretion.

Indeed, the Commission’s moratorium in no way restricts the General Assembly from modifying through legislation the allocation of money in the Well Fund to benefit political subdivisions such as the Township. Thus, although the complained-of action by the Commission is not required to be “the last step in the chain of causation” to satisfy the second prong of the standing inquiry, *Aichele*, 757 F.3d at 366 (quoting *Bennett v. Spear*, 520 U.S. 154, 169–69 (1997)), the General Assembly’s discretion, wholly unfettered from the Commission’s moratorium, breaks the causal chain to the point that the Township’s injury is no longer fairly traceable to the Commission’s actions.

3. *Damascus Township’s alleged inability to participate in Marcellus-related economic development is too speculative to form a basis for relief.*

Finally, the Township alleges that the Commission’s moratorium has “precluded [it] from participating in the Marcellus-related economic development

made available to neighboring areas.” Pls.’ Compl. at ¶ 55, ECF No. 1. It is unclear whether “Marcellus-related economic development” refers to the receipt of proceeds from the Well Fund, or from some other unidentified benefit. To the extent that the Township seeks to allege some harm beyond deprivation of money from the Well Fund, the Township asks this Court to draw an inference unsupported by the facts set forth in its complaint. *See Cal. Pub. Emp. Ret. Sys. v. The Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)).

In order to decide whether the Township suffered an injury, this Court would be required to speculate as to what kind of economic development the Township would have benefitted from but for the Commission’s moratorium. However, the Township’s factual allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also United States v. S.C.R.A.P.*, 412 U.S. 669, 688 (1973) (“[P]leadings must be something more than an ingenious academic exercise in the conceivable.”). Thus, the Township has failed to allege a redressable injury.

V. **CONCLUSION**

Because Plaintiffs' complaint no longer presents a live case or controversy, and because, even if not moot, none of the Plaintiffs in this action have established standing to pursue their claims, DRN respectfully requests that this Court grant its Motion, and dismiss Plaintiffs' Complaint in its entirety.

Dated: March 10, 2021

Respectfully submitted,

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*Attorney for Delaware Riverkeeper  
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# Exhibit A

**NO. 2021-01**

A RESOLUTION to amend the Comprehensive Plan and adopt implementing regulations with respect to high volume hydraulic fracturing and to finalize amendments to the *Administrative Manual – Rules of Practice and Procedure* concerning project review classifications and fees.

WHEREAS, at the business meeting of the Delaware River Basin Commission (“DRBC” or “Commission”) on [May 5, 2010, the DRBC Commissioners unanimously directed DRBC staff “to develop draft regulations on well pads in the shales for notice and comment rulemaking;”](#) and

WHEREAS, the Commission on December 9, 2010 [published draft regulations](#) concerning natural gas development on which it subsequently received nearly 69,000 comments, and on November 8, 2011 the Commission published revised draft natural gas development regulations; and

WHEREAS, the Minutes for DRBC’s business meetings of March, May and July of 2012 record that the Commissioners and members of their technical staffs continued to consult with one another and work in good faith toward consensus on technical aspects of the Commission’s natural gas development regulations; and

WHEREAS, in December 2013, DRBC Alternate Commissioner Angus Eaton of the New York Department of Environmental Conservation (“Department” or “NYSDEC”) on behalf of Commission Chair *pro tem* Governor Andrew Cuomo of the State of New York reported that the Commission would rely on the results, when published, of studies that had been initiated by state and federal agencies for guidance in setting minimum standards for natural gas development in the Basin; and

WHEREAS, in [June 2015, the NYSDEC issued its Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program \(“FSGEIS”\)](#), which concluded that, “[e]ven with the implementation of an extensive suite of mitigation measures considered by the Department . . . , the significant adverse public health and environmental impacts from allowing high-volume hydraulic fracturing to proceed under any scenario cannot be adequately avoided or minimized to the maximum extent practicable in accordance with [the State Environmental Quality Review Act];” and

WHEREAS, in [December 2016, the U.S. Environmental Protection Agency \(“U.S. EPA”\) published its report entitled, Hydraulic Fracturing for Oil and Gas: Impacts From the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States](#), which concluded that “the uses of water in hydraulic fracturing, from water withdrawals . . . through mixing and injection . . . to the collection and disposal or reuse of produced water . . . can impact drinking water resources under some circumstances;” and that such impacts “can range in frequency and severity, depending on the combination of hydraulic fracturing water cycle activities and local- or regional-scale factors;” and

WHEREAS, in March of 2017, DRBC Alternate Commissioner LTC Michael A. Bliss of the United States Army Corps of Engineers, Philadelphia District, acting on behalf of Commission Chair *pro tem* Maj. Gen. William H. Graham for the United States, announced that the Commissioners continued to confer in good faith on a path forward for adoption of rules regarding natural gas development and hydraulic fracturing in the Basin; the Commission at that time had no plans to vote on the draft rules

published in 2011; and any new or continued rulemaking by the Commission would be subject to further public notice and comment; and

WHEREAS, by [Resolution for the Minutes on September 13, 2017](#), noting that the combination of hydraulic fracturing with horizontal drilling and related activities for natural gas extraction presents risks, vulnerabilities and impacts to surface and ground water resources in the Delaware River Basin (“Basin”), the Commission directed the Executive Director to publish no later than November 30 of that year a set of revised draft regulations regarding certain natural gas development activities in the Basin; and

WHEREAS, on November 30, 2017 the Commission issued a [Notice of Proposed Rulemaking](#), FAQs, proposed rule text, and technical guidance to:

- amend its Special Regulations by the addition of a part on hydraulic fracturing, including: the prohibition of high volume hydraulic fracturing (“HVHF”) in shale and other tight formations within the Basin, and conditions relating to water use for hydraulic fracturing and the management of hydraulic fracturing wastewater;
- amend its *Administrative Manual – Rules of Practice and Procedure* (“RPP”) by the addition of project review classifications and fees related to the management of water for and produced water from hydraulic fracturing of hydrocarbon bearing rock formations; and
- amend the RPP by revising certain project review classifications unrelated to hydraulic fracturing; and

WHEREAS, prior to [the close of the comment period on March 30, 2018](#), six public hearings on the draft rules were held – two in Waymart, Pennsylvania in January 2018; two in Philadelphia, Pennsylvania the same month; one in February 2018 in Schnecksville, Pennsylvania, and another, telephonically, on March 6, 2018; and

WHEREAS, during the comment period, the Commission heard oral comment on the draft rules from approximately 223 individuals and received 8,679 written submissions, many of which included multiple comments. [Transcripts from each of the public hearings](#) and [copies of all the written comments](#) were posted on the DRBC website on April 10, 2018; and

WHEREAS, in the course of carefully reviewing the comments submitted on the draft rules, the Commission also has considered the large body of scientific research published since NYSDEC issued its FSGEIS in June 2015 and the U.S. EPA released its final report on the impacts of the hydraulic fracturing water cycle on drinking water in December 2016, largely confirming and expanding upon the findings of those reports and supporting the conclusion that HVHF poses immediate and long-term risks to water resources, human health and aquatic life in the Delaware River Basin; and

WHEREAS, in developing the revised rules, the Commission has considered its Comprehensive Plan, which among other things contains:

- a. provisions codified in the [Commission's Water Code](#), 18 C.F.R. Part 410, protecting the uses of groundwater for domestic, agricultural, industrial and public water supplies and as a source of surface water suitable for recreation, wildlife, fish and other aquatic life (Water Code § 3.40.3 A.), and authorizing the Commission to establish requirements, conditions, or prohibitions which in its judgment are necessary to protect ground water quality (Water Code § 3.40.5 B.3.). *See also*, Water Code provisions:
- § 2.20.5, protecting recharge areas and prohibiting pollution of underground waters and surface waters replenishing underground waters;
  - § 3.40.4 A., protecting groundwater from the introduction of substances in concentrations that are toxic or harmful to human, animal, plant or aquatic life or that exceed federal drinking water standards;
  - § 3.40.4 B., prohibiting degradation of groundwater quality including any degradation that may be injurious to any designated present or future ground or surface water use;
  - § 3.40.5 B.1., prohibiting any person from permitting substances in harmful or toxic concentrations to become groundwater; and
  - § 3.40.5 A., requiring persons to conduct their activities in compliance with Commission regulations so as to prevent requirements of Water Code § 3.40 (relating to groundwater) from being violated; and
- b. provisions codified in the Water Code protecting the quality of the Basin's surface waters, including for example:
- § 3.10.2 B., providing that uses to be protected in all surface waters of the Basin include, among others, public water supplies (except where natural salinity precludes such use) and aquatic life;
  - §§ 3.20.2 through 3.20.6, protecting interstate, non-tidal surface waters for, among other uses, public water supply and maintenance and propagation of aquatic life; and
  - § 3.10.3 A.2., protecting waters classified by the Commission as Special Protection Waters by establishing for such waters a management objective of "no measurable change . . . except toward natural conditions."; and

WHEREAS, the Commission staff, in consultation with the Commissioners and their technical and policy advisors, has developed a detailed response to comments and set of revised rules responsive to the comments received; now therefore,

BE IT RESOLVED by the Delaware River Basin Commission:

A. The Commission hereby finds and determines that:

1. As the scientific and technical literature and the reports, studies, findings and conclusions of other government agencies reviewed by the Commission have documented, and as the

more than a decade of experience with high volume hydraulic fracturing in regions outside the Delaware River Basin have evidenced, despite the dissemination of industry best practices and government regulation, high volume hydraulic fracturing and related activities have adversely impacted surface water and groundwater resources, including sources of drinking water, and have harmed aquatic life in some regions where these activities have been performed.

2. The region of the Delaware River Basin underlain by shale formations is comprised largely of rural areas dependent upon groundwater resources; sensitive headwater areas considered to have high water resource values; and areas draining to DRBC Special Protection Waters.
3. The geology of the region in which shale formations potentially containing natural gas are located in the Basin is characterized by extensive geologic faults and fractures providing preferential pathways for migration of fluids (including gases).
4. If commercially recoverable natural gas is present in the Delaware River Basin and if high volume hydraulic fracturing (“HVHF”) were to proceed in the Basin, then:
  - a. Spills and releases of hydraulic fracturing chemicals, fluids and wastewater would adversely impact surface water and groundwater, and losses of well integrity would result in subsurface fluid (including gas) migration, impairing drinking water resources and other uses established in the Comprehensive Plan.
  - b. The fluids released or migrating would contain pollutants, including salts, metals, radioactive materials, organic compounds, endocrine-disrupting and toxic chemicals, and chemicals for which toxicity has not been determined, impairing the water uses protected by the Comprehensive Plan.
  - c. HVHF activities and their impacts would be dispersed over and adversely affect thousands of acres of sensitive water resource features, including, among others, forested groundwater infiltration areas, other groundwater recharge locations, and drainage areas to Special Protection Waters, where few existing roads are designed to safely carry the heavy industrial traffic required to support HVHF, prevent dangerous spills or provide access to remediate spills that occur.
5. For the foregoing reasons and other grounds described in the administrative record for this rulemaking:
  - a. High-volume hydraulic fracturing and related activities pose significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values.
  - b. Controlling future pollution by prohibiting high volume hydraulic fracturing in the Basin is required to effectuate the Commission’s Comprehensive Plan, avoid injury to

the waters of the Basin as contemplated by the Comprehensive Plan and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.

- B. The Commission hereby withdraws from further consideration the draft natural gas development regulations it published on November 8, 2011; and
1. Adopts the [February 25, 2021 Comment and Response Document](#) in its entirety.
  2. Adopts the revised rules attached hereto as its final rules and incorporates 18 CFR Part 440 into the Comprehensive Plan. The final rules at 18 CFR Part 440.3 provide that high volume hydraulic fracturing in hydrocarbon-bearing rock formations is prohibited within the Delaware River Basin.
  3. Underscores that the final rules include the following noteworthy changes from those [proposed on November 30, 2017](#):
    - a. Within final Part 440 - High Volume Hydraulic Fracturing, of Title 18 of the Code of Federal Regulations ("CFR"), proposed sections 440.4 – Exportation of water for hydraulic fracturing and 440.5 – Produced water have been removed in their entirety, and section 440.2 – Definitions has been revised to eliminate terms associated solely with the two deleted sections.
    - b. Within Part 401 of Title 18 of the CFR, comprising the Commission's Rules of Practice and Procedure, proposed amendments to section 401.35 – Classification of Projects for Review concerning the importation and exportation of water and wastewater into and from the Basin have been withdrawn.
    - c. Also, within Part 401, proposed amendments to section 401.43 – Regulatory Program Fees related to wastewater treatability studies have been withdrawn.
- C. The Comprehensive Plan amendments and final rules adopted today replace the [Executive Director Determinations of May 19, 2009, June 14, 2010 and July 23, 2010](#). The [Resolution for the Minutes of May 5, 2010](#), which postponed the Commission's consideration of well pad projects until the adoption of final rules, expires by its own terms.
- D. The Commission's regulations concerning the exportation from and importation into the Basin of water and wastewater to support hydraulic fracturing will be addressed through one or more separate Commission actions, including if appropriate a separate rulemaking.

BY THE COMMISSION

ADOPTED: February 25, 2021

**The final amendments to existing 18 C.F.R. § 401.35 are as follows:**

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**§ 401.35 Classification of projects for review under Section 3.8 of the Compact.**

(a) Except as the ~~Executive Director-Commission~~ may specially direct by notice to the project owner or sponsor, ~~or as a state or federal agency may refer under paragraph (c) of this section,~~ a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

\* \* \* \* \*

(2) A withdrawal from ground water ~~for any purpose~~ when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

\* \* \* \* \*

(15) Draining, filling or otherwise altering marshes or wetlands when the area affected is less than 25 acres; provided; ~~z~~ however, that areas less than 25 acres shall be subject to Commission review and action ~~(+)~~ where neither a state nor a federal level review and permit system is in effect; ~~requiring action by the Commission, or (ii) when a Commissioner or the Executive Director determines that the final action of a state or federal permitting agency may not adequately reflect the Commission's policy as to wetlands of the Basin. In the case of a project affecting less than 25 acres for which there has been issued a state or federal permit, a determination to undertake review and action by the Commission shall be made no later than 30 days following notification of the Commission of such permit action. The Executive Director, with the approval of the Chairman, may at any time within the 30-day period inform any permit holder, signatory party or other interested party that the Commission will decline to undertake review and action concerning any such project;~~

\* \* \* \* \*

(b) All other projects which have or may have a substantial effect on the water resources of the Basin shall be submitted to the Commission in accordance with these regulations for determination as to whether the project impairs or conflicts with the Comprehensive Plan. Among these are projects involving the following (except as provided in paragraph ~~A-(a)~~ of this section):

\* \* \* \* \*

~~(14) Regional wastewater treatment plans developed pursuant to the Federal Water Pollution Control Act;~~

~~(145)~~ Landfills and solid waste disposal facilities affecting the water resources of the basin;

~~(156)~~ State and local standards of flood plain regulation;

(167) Electric generating or cogenerating facilities designed to consumptively use in excess of 100,000 gallons per day of water during any 30-day period; and

(178) Any other project that the ~~Executive Director~~ Commission may especially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

- (c) Regardless of whether expressly excluded from review by paragraph (a) of this section, any project or class of projects that in the view of the Commission could have a substantial effect on the water resources of the basin may, upon special notice to the project sponsor or landowner, be subject to the requirement for review under section 3.8 of the Compact. Whenever a state or federal agency determines that a project falling within an excluded classification (as defined in paragraph (a) of this section) may have a substantial effect on the water resources of the Basin, such project may be referred by the state or federal agency to the Commission for action under these Rules.
- ~~(d) Except as otherwise provided by § 401.39 the sponsor shall submit an application for review and approval of a project included under paragraph B. above through the appropriate agency of a signatory party. Such agency will transmit the application or a summary thereof to the Executive Director, pursuant to Administrative Agreement, together with available supporting materials filed in accordance with the practice of the agency of the signatory party.~~

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**The final amendments to existing 18 C.F.R. § 401.43 are as follows:**

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**§ 401.43 Regulatory program fees.**

\* \* \* \* \*

(b) \* \* \*

(1) ~~Docket a~~ *Application fee*. Except as set forth in paragraph (b)(1)(iii) of this section, the ~~docket~~ application fee shall apply to:

\* \* \* \* \*

(iii) *Exemptions*. The ~~docket~~ application fee shall not apply to:

\* \* \* \* \*

(2) *Annual monitoring and coordination fee*.

(i) Except as provided in paragraph (b)(2)(ii) of this section, an annual monitoring and coordination fee shall apply to each active water allocation or wastewater discharge approval issued pursuant to the *Compact* and implementing regulations, regardless of whether the approval was issued by the Commission in the form of a docket, permit or other instrument, or by a Signatory Party Agency under the One Permit Program rule (§ 401.42). ~~The fee shall be based on the amount of a project's approved monthly water allocation and/or approved daily discharge capacity.~~

\* \* \* \* \*

(4) \* \* \*

(iii) *Modification of a DRBC approval*. Following Commission action on a project, each project revision or modification that the Executive Director deems substantial shall require an additional ~~docket~~ application fee calculated in accordance with paragraph (e) of this section and subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

\* \* \* \* \*

(c) *Indexed adjustment*. On July 1 of every year, beginning July 1, 2017, all fees established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.<sup>1</sup> In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the ~~docket~~ application fee and annual monitoring and coordination fee will remain unchanged. Following any indexed adjustment made under this paragraph (c), a revised fee schedule will be published in the *Federal Register* by July 1 and posted on the Commission's website. Interested parties may also obtain the fee schedule by contacting the Commission directly during business hours.

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<sup>1</sup> Consumer Price Index – U / Series ID: CWURA102SA0 / Not Seasonally Adjusted / Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD / Item: All items / Base Period: 1982-84=100.

\* \* \* \* \*

(e) \* \* \*

TABLE 1 TO § 401.43 – ~~DOCKET~~ APPLICATION ~~FILING~~ FEES

Project Type	<del>Docket</del> Application Fee	Fee Maximum
	* * * * *	
	* * * * *	
	* * * * *	

\* \* \* \* \*

**The final text of new Part 440 is as follows:**

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**SUBCHAPTER B – SPECIAL REGULATIONS**

\* \* \* \*

**PART 440 – HIGH VOLUME HYDRAULIC FRACTURING**

Sec.

440.1 Purpose, authority and relationship to other requirements

440.2 Definitions

440.3 High volume hydraulic fracturing

**440.1 Purpose, authority and relationship to other requirements.**

- (a) *Purpose.* The purpose of this part is to protect and conserve the water resources of the Delaware River Basin. To effectuate this purpose, this section establishes standards, requirements, conditions and restrictions to prevent or reduce depletion and degradation of surface and groundwater resources and to promote sound practices of water resource management.
- (b) *Authority.* This part implements Sections 3.1, 3.2(a), 3.2 (b), 3.6(b), 3.6(h), 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact.
- (c) *Comprehensive Plan.* The Commission has determined that the provisions of this part are required for the immediate and long range development and use of the water resources of the Basin and are therefore incorporated into the Commission's Comprehensive Plan.
- (d) *Relationship to other Commission requirements.* The provisions of this part are in addition to all applicable requirements in other Commission regulations, dockets and permits.
- (e) *Severability.* The provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity will not affect other provisions or applications of this part, which can be given effect without the invalid provision or application.
- (f) *Coordination and avoidance of duplication.* In accordance with and pursuant to section 1.5 of the Delaware River Basin Compact, to the fullest extent it finds feasible and advantageous the Commission may enter into an Administrative Agreement (Agreement) with any Basin state or the federal government to coordinate functions and eliminate unnecessary duplication of effort. Such Agreements will be designed to: effectuate intergovernmental cooperation, minimize the efforts and duplication of state and Commission staff resources wherever possible, ensure compliance with Commission-approved requirements, enhance early notification of the general public and other interested parties regarding proposed activities in the Basin, indicate where a host state's requirements satisfy the Commission's regulatory objectives and clarify the relationship and project review decision making processes of the states and the Commission for projects subject to review by the states under their state authorities and by the Commission under Section 3.8 and Articles 6, 7, 10 and 11 of the Compact.

**440.2 Definitions.**

For purposes of this part, the following terms and phrases have the meanings provided. Some definitions differ from those provided in regulations of one or more agencies of the Commission's member states and the federal government.

*Basin* - the area of drainage into the Delaware River and its tributaries, including Delaware Bay.

*Commission* - the Delaware River Basin Commission (DRBC) created and constituted by the Delaware River Basin Compact.

*Fracturing fluid(s)* - a mixture of water (whether fresh or recycled) and/or other fluids and chemicals or other additives, which are injected into the subsurface and which may include chemicals used to reduce friction, minimize biofouling of fractures, prevent corrosion of metal pipes or remove drilling mud damage within a wellbore area, and propping agents such as silica sand, which are deposited in the induced fractures.

*High volume hydraulic fracturing (HVHF)* - hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion, whether the well is vertical or directional, including horizontal, and whether the water is fresh or recycled and regardless of the chemicals or other additives mixed with the water.

*Hydraulic Fracturing* - a technique used to stimulate the production of oil and natural gas from a well by injecting fracturing fluids down the wellbore under pressure to create and maintain induced fractures in the hydrocarbon-bearing rock of the target geologic formation.

*Person* - any natural person, corporation, partnership, association, company, trust, federal, state or local governmental unit, agency, or authority, or other entity, public or private.

*Water resource(s)* - water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control within the hydrologic boundary of the Delaware River Basin.

**440.3 High volume hydraulic fracturing (HVHF)**

- (a) **Determination.** The Commission has determined that high volume hydraulic fracturing poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Controlling future pollution by prohibiting such activity in the Basin is required to effectuate the Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.
- (b) **Prohibition.** High volume hydraulic fracturing in hydrocarbon bearing rock formations is prohibited within the Delaware River Basin.