

**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,
925 Canal Street, Suite 3701
Bristol, PA 19007

Proposed Intervenors-Defendants.

Civil Action No. 2:21-cv-00119

Honorable John R. Padova

MOTION FOR LEAVE TO INTERVENE AS DEFENDANT

Pursuant to Federal Rules of Civil Procedure 24(a) and (b), Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, “DRN”) hereby move the Court for leave to intervene in this proceeding as Defendants. DRN seeks intervention of right under Fed. R. Civ. P. 24(a)(2). In the alternative, DRN seeks permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). In support of this motion, DRN relies on the accompanying brief, which is incorporated herein as if fully set forth.

Dated: February 12, 2021

Respectfully submitted,

/s/ Kacy C. Manahan
Kacy C. Manahan, Esq.
Pa. Atty. No. 329031
General Admission Pending

Delaware Riverkeeper Network
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*Attorney for Delaware Riverkeeper Network
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Riverkeeper*

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 for Leave to Intervene as Defendant of Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, supporting Memorandum of Law, exhibits, proposed form of order, and disclosure statement to be served on all counsel of record through the Court's electronic notification system.

Dated: February 12, 2021

/s/ Kacy C. Manahan
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ORDER

AND NOW, this ____ day of _____, 2021, upon consideration of Delaware Riverkeeper Network's and Maya K. van Rossum, the Delaware Riverkeeper's Motion for Leave to Intervene as Defendants, and any responses thereto, it is HEREBY ORDERED that said motion is GRANTED.

The Clerk of Court shall add Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper to the docket and amend the caption accordingly.

BY THE COURT:

Honorable John R. Padova

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RULE 7.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 7.1, undersigned counsel for the Delaware Riverkeeper Network certifies that the Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. Delaware Riverkeeper Network has more than 25,000 members and represents the recreational and aesthetic interests, environmental interests, health interests, quality of life interests, and water-dependent economic and professional interests of its members. Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Dated: February 12, 2021

/s/ Kacy C. Manahan
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Pa. Atty. No. 329031
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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS**

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Pursuant to Federal Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B), Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, “DRN”) submit this memorandum of law in support of their Motion for Leave to Intervene as Defendants (“Motion”).

I. 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 in this action. *See* Pls.’ Compl., ECF No. 1. The Delaware River Basin Commission (“Defendant” or “the Commission”) waived service of process on January 26, 2021. *See* Stip. Of Waiver of Serv. Of Summons, ECF No. 4. DRN’s proposed Motion to Dismiss is attached hereto as Exhibit B.

II. 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 Delaware River Basin (“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 docket 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. 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).

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.

Delaware Riverkeeper Network seeks to intervene to defend the validity of the Commission’s jurisdiction and authority over activities that may affect the water resources of the Basin and to protect and preserve the interests of Delaware Riverkeeper Network and its members. Delaware Riverkeeper Network is a nonprofit organization established in 1988 to protect, preserve and enhance the Delaware River, its tributaries, and habitats. *See* Exhibit A, Declaration at ¶ 3. Delaware Riverkeeper Network has over 25,000 members, who live, work, and/or recreate within the Basin. *See* Exhibit A, Declaration at ¶ 8. Delaware Riverkeeper Network organizes and implements stream restoration projects, volunteer water quality and ecosystem monitoring, educational programs, community technical assistance projects, environmental advocacy initiatives, community/member action and involvement projects, recreational activities, and environmental enforcement and litigation activities throughout the entire Delaware River Basin, and at a state or national level when necessary to advance the organization’s mission. *See* Exhibit A, Declaration at ¶ 6.

Delaware Riverkeeper Network is the only watershed advocacy organization committed to actively monitoring, participating in, watchdogging, and engaging others in the Commission’s regulatory programs and policy decisions throughout the Basin. Delaware Riverkeeper Network has an unparalleled knowledge of and experience with the Commission’s enabling legislation and regulatory programs, as well as a hands-on understanding of the relationship between those programs and state and federal initiatives. *See* Exhibit A, Declaration at ¶¶ 9–10.

In 1989, Delaware Riverkeeper Network conceived of, crafted, and advanced a petition to secure anti-degradation protection for the Middle and Upper non-tidal Delaware River. When finally granted, this new protection took the form of a Delaware River-specific body of regulation called Special Protection Waters that the Commission passed and implements. *See* Exhibit A, Declaration at ¶ 11. In 2001, Delaware Riverkeeper Network submitted and advanced a petition to secure Special Protection Waters designation and protection for the lower, non-tidal, Delaware River. As a result of these combined efforts, the Delaware River contains the longest stretch of river in the nation that has anti-degradation-level protection. *See* Exhibit A, Declaration at ¶ 12. These regulations and designations are fundamental to the moratorium at issue in this case.

Since fracked gas extraction was first proposed in the Basin, Delaware Riverkeeper Network has used its knowledge of these and other Commission regulations and enabling legislation, along with strong organizing and advocacy, to secure and maintain the limitations on fracked gas extraction within the watershed that is the subject of this litigation. *See* Exhibit A, Declaration at ¶ 14.

In 1994, Maya K. van Rossum was appointed Executive Director of Delaware Riverkeeper Network; in 1996 van Rossum was appointed the Delaware Riverkeeper and leader of Delaware Riverkeeper Network. She is also a member of Delaware Riverkeeper Network. *See* Exhibit A, Declaration, at ¶ 2. The Delaware Riverkeeper is a full-time ombudsman who advocates and works for the protection and restoration of the ecological, recreational, commercial, and aesthetic qualities of the Delaware River, its estuary, bay, tributaries, and habitats. The Delaware Riverkeeper regularly visits the Delaware River for personal and professional reasons. The Delaware Riverkeeper is the chief executive officer of Delaware Riverkeeper Network. *See* Exhibit A, Declaration, at ¶ 4.

As Delaware Riverkeeper and as a member of Delaware Riverkeeper Network, Ms. van Rossum personally enjoys the natural resources of the Basin. She has personally visited the main stem River, streams, wetlands, and adjacent forested areas in the watershed that would be directly and/or indirectly affected by fracked gas extraction activities by herself and with her family, friends, and colleagues for recreational, personal, and professional reasons. She has plans to return to these areas for recreational purposes including, among other things, kayaking, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes as the Delaware Riverkeeper. She enjoys her visits to these areas whether in her professional capacity, personal capacity, or as a parent. She often includes her family in her enjoyment of the Basin and finds these beautiful and unique areas important to share with her children for their personal and educational growth. *See* Exhibit A, Declaration at ¶¶ 15–16.

In her capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the natural resources that would be implicated by the outcome of this litigation, she will be personally and professionally harmed by the damage that would be inflicted by shale gas development within the Basin should the Commission’s effective moratorium on fracked gas extraction be invalidated. *See* Exhibit A, Declaration at ¶ 17.

III. ARGUMENT

A. DRN is entitled to intervene of right pursuant to Fed. R. Civ. P. 24(a)(2).

Rule 24 of the Federal Rules of Civil Procedure governs intervention in an existing lawsuit.

A movant may intervene as of right under Rule 24(a)(2):

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Within the Third Circuit, a non-party may intervene as of right if:

- (1) the application for intervention is timely;
- (2) the applicant has a sufficient interest in the litigation;
- (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and
- (4) the interest is not adequately represented by an existing party in the litigation.

Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)). DRN has satisfied each of these four elements and is thus entitled to intervene as of right in this action.

1. DRN's application for intervention is timely.

Whether a motion to intervene is timely depends on: “(1) the stage of the proceedings; (2) prejudice to the parties due to the delay; and (3) the reason for the delay.” *Haymond v. Lundy*, 205 F. Sup. 2d 390, 401 (E.D. Pa. 2002). Here, DRN has moved to intervene prior to the commencement of discovery and prior to the filing of any dispositive motions. At this early stage, it cannot be said that the current parties to the action will be prejudiced. *See Nat'l Collegiate Athletic Ass'n v. Corbett*, 296 F.R.D. 342, 347 (M.D. Pa. 2013) (“Generally, an applicant’s intervention will not prejudice the current parties where discovery has yet to commence and dispositive motions have yet to be filed.”). Thus, since DRN did not delay in filing this motion, and since the parties will suffer no prejudice, the first factor has been satisfied.

2. DRN has sufficient interest in the litigation.

A proposed intervenor as of right must possess an interest that is “significantly protectable,” meaning a “legal interest as distinguished from interests of a general and indefinite character.” *Mountain Top*, 72 F.3d at 366; *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971). A significantly protectable interest exists where “there is a tangible threat to a legally cognizable interest.” *Mountain Top*, 72 F.3d at 366 (quoting *Harris*, 820 F.2d at 601). An

applicant's legally cognizable interest is "specific to [it], is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Pennsylvania v. President of the U.S.*, 888 F.3d 52, 58 (3d Cir. 2018) (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998)).

Environmental litigants have a legally cognizable interest where "they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In addition, a membership organization such as Delaware Riverkeeper Network "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181.

DRN has a protectable interest and standing to intervene. As set forth above, Delaware Riverkeeper Network is a nonprofit organization whose purpose is to protect, preserve and enhance the Delaware River, its tributaries, and the habitats and communities of the Basin. Likewise, Ms. van Rossum, as the leader of, and as a member of, Delaware Riverkeeper Network, recreationally and aesthetically enjoys and benefits from the waterways and natural resources of the Basin, including those that would be impacted by fracked gas extraction activities, and works to protect them against the risks posed by fracked gas extraction and related activities. *See* Exhibit A, Declaration at ¶¶ 4, 15–17. DRN's members live, work, and recreate in the Basin and a core objective of DRN is the restoration and protection of the Basin. *See* Exhibit A, Declaration at ¶¶ 3, 8.

Should this Court grant the declaratory judgment sought by Plaintiffs, the Basin would be opened to natural gas exploration, with all its attendant pollution and use of the Basin's resources. These impacts could undermine, in whole or in part, the Special Protection Waters regulations that have been a fundamental part of DRN's work and cause a real and substantial threat to DRN and to the recreational, aesthetic, and environmental interests of its members, including van Rossum.

3. *DRN's interest may be affected or impaired, as a practical matter, by the disposition of the action.*

To meet the requirements of Rule 24(a)(2), a party seeking to intervene in a matter must show that the established interest "is in jeopardy in the lawsuit." *Pennsylvania*, 888 F.3d at 59 (quoting *Brody v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992)). "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. The burden is minimal." *Am. Farm Bureau Fed'n v. U.S. Env't'l Prot. Agency*, 278 F.R.D. 98, 108 (M.D. Pa. 2011) (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)). "[C]ourts have granted intervention as of right to public interest groups in actions challenging the legality of a measure which it had supported or in circumstances where the outcome of the litigation might affect the group's members' enjoyment of the resource." *Id.* at 109.

The declaratory judgment sought by Plaintiffs in their Complaint would remove natural gas drilling from the oversight of the Commission, open up the Basin to drilling without any regulatory input from the Commission, negatively affect the water resources of the Basin, and undermine the Special Protection Waters program and protections DRN's petition, advocacy and education efforts were instrumental in securing. The aesthetic and recreational values of the Basin's resources as well as access to unpolluted waters will be diminished if Plaintiffs' claims are successful. This degradation of resources will place DRN members' enjoyment of the resources

of the Basin in jeopardy. *See* Exhibit A, Declaration at ¶ 16. Furthermore, DRN’s efforts as an organization to protect the Basin’s resources would be undermined. *See* Exhibit A, Declaration at ¶¶ 10–14.

4. *DRN’s interest is not adequately represented by an existing party in the litigation.*

A potential intervenor may show inadequate representation by existing parties

based on any of three possible grounds: “(1) that although the applicant’s interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant’s interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit.”

United States v. Territory of Virgin Islands, 748 F.3d 514, 519–20 (3d. Cir. 2014) (quoting *Brody*, 957 F.2d at 1123). This burden is not a heavy one—it “is generally ‘treated as minimal’ and requires the applicant to show ‘that representation of his interest “*may be*” inadequate.’” *Pennsylvania*, 888 F.3d at 60 (quoting *Mountain Top*, 72 F.3d at 368).

Although in some circumstances, a government entity may be found to adequately represent the concerns of public interest groups, “when an agency’s views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is [of establishing inadequacy of representation] is relatively light.” *Kleissler*, 157 F.3d at 972; *accord Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (“[W]hen the proposed intervenors’ concern is not a matter of ‘sovereign interest,’ there is no reason to think that the government will represent it.”). As the court in *American Farm Bureau Federation* recognized that the Environmental Protection Agency, a government entity like the Commission, considers “not only the interest of the public interest groups, but also the possibly conflicting interests from agriculture, municipal stormwater associations, and land developers.” *Am. Farm Burau Fed’n*, 278 F.R.D. at 111.

As is evident in the Delaware River Basin Compact, the Commission has a wide range of powers and duties, including encouraging the “planning, development and financing of water resources projects” and the development of comprehensive plans for all users of the water resources of the Basin. *See* Compact, Article 3. In exercising these duties, the Commission must consider the interests of various individuals and entities within the Basin, certainly not limited to the interests of DRN. The Commission represents broad interests in multiple states of many different users of the Basin’s resources, including commercial, industrial, municipal and recreational. These broad interests may influence the Commission’s position in this litigation. The interests of DRN are narrow, and personal to DRN and its members. The Commission cannot adequately represent the interests of DRN in this litigation.

B. DRN should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(1)(B) because it has a defense that shares with the main action a common question of law and/or fact.

Should this court find that DRN is not entitled to intervene as of right, it should nevertheless permit DRN to intervene. Federal Rule of Civil Procedure 24(b)(1)(B) allows permissive intervention for an applicant who “has a claim or defense that shares with the main action a common question of law or fact.” The decision whether to grant permissive intervention is within the discretion of the court, after considering “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Virgin Islands*, 748 F.3d at 524 (quoting Fed. R. Civ. P. 24(b)(3)).

As explained above, DRN’s motion to intervene in this case is timely. *See* Section III.A.1, *supra*. The Complaint in this matter was filed on January 11, 2021. No discovery has been conducted and no dispositive motions have been filed to date. DRN has a particular legally protectable interest that may be affected or impaired by the disposition of the Complaint. The

Commission cannot adequately represent the interests of DRN in the litigation. Additionally, through its long history of working to protect and preserve the Basin, DRN has particular knowledge and may help to clarify complex issues and contribute to the resolution of this matter.

IV. CONCLUSION

DRN is entitled to intervene as of right in the instant matter. DRN's motion is timely, DRN possesses a legally cognizable interest that may be affected or impaired by the litigation, and the Commission does not adequately represent DRN's interests. In the alternative, permissive intervention is warranted. Accordingly, DRN respectfully requests that this Court grant its Motion to Intervene.

Dated: February 12, 2021

Respectfully submitted,

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Riverkeeper*

Exhibit A

DECLARATION OF MAYA VAN ROSSUM

Pursuant to 28 U.S.C. § 1746, I, Maya van Rossum, hereby declare:

1. I reside at 716 South Roberts Road, Bryn Mawr, Delaware County, Pennsylvania, 19010. My residence is within the Delaware River Basin. In addition I own a part time residence at 263 Lebanon Road, Glen Spey, NY. This part time home is located within the Delaware River Basin.

2. I earned my Juris Doctor from Pace University School of Law, and then earned a Masters of Law in Corporate Finance from Widener University School of Law. While at Pace University, I secured a certificate for pursuing a special program focused on environmental law and participated in the Environmental Law Clinic that pursued legal work addressing River issues. In 1992 I worked as the staff attorney in the Environmental Law Clinic at Widener University School of Law where I engaged in advocacy and litigation on behalf of the Delaware Riverkeeper Network while providing support to Law Clinic students similarly engaged. In 1994, I came to work for the Delaware Riverkeeper Network ("DRN") as the organization's Executive Director. In 1996, I was appointed Delaware Riverkeeper and leader of the Delaware Riverkeeper Network. I am also a member of the Delaware Riverkeeper Network.

3. DRN was established in 1988. It is a nonprofit 501(c)(3) membership organization. DRN advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River Watershed. The mission of DRN is to champion the rights of communities to a Delaware River and tributary streams that are free flowing, clean, healthy and abundant with a diversity of life.

4. The Delaware Riverkeeper is a full-time ombudsman who advocates and works for the protection and restoration of the ecological, recreational, commercial, and aesthetic qualities

of the Delaware River, its estuary, bay, tributaries, and habitats. The Delaware Riverkeeper regularly visits the Delaware River for personal and professional reasons. The Delaware Riverkeeper is the chief executive officer of Delaware Riverkeeper Network.

5. The DRN office is located at 925 Canal Street, Suite 3701, Bristol, PA 19007. Currently there are 20 staff members and numerous volunteers. The volunteer network is fluid, constantly changing, and project-specific. The exact number changes on a year-to-year basis. Thousands of individuals have done work for us in the past, undertaking water quality monitoring, stream clean ups, habitat restoration projects, and/or getting actively engaged in defending the Delaware River, its watershed, habitats and ecosystems through, for example, letter writing, participation in the public process, organizing activities and events, sharing information, and educating others to become involved.

6. DRN's professional staff and volunteers work throughout the entire Delaware River Watershed, including the four watershed states of Pennsylvania, New Jersey, Delaware, and New York. DRN is also involved at the national level and in other states in the United States to the extent involvement advances our mission and goals as an organization. DRN and its volunteers maintain a breadth of knowledge about the environment, as well as expertise specific to rivers and watersheds. DRN provides effective environmental advocacy, volunteer water quality and ecosystem monitoring educational programs, community technical assistance projects, environmental advocacy initiatives, community/member action and involvement projects, and recreational activities. In addition, DRN takes steps necessary to ensure the enforcement of environmental laws, including pursuing legal actions at a state or national level when necessary to advance the organization's mission.

7. Our membership provides irreplaceable participation in, and support for, DRN advocacy, restoration, scientific monitoring and data collection, education and litigation initiatives. Membership is demonstrated in a number of different ways, including but not limited to: making donations, participating in events, signing letters targeted to decision-makers, participating in DRN public information sessions, helping distribute DRN information including alerts and fact sheets, responding to DRN calls for action on projects and issues, volunteering as a water quality monitor, assisting with DRN restoration projects or actively communicating with DRN about our work and issues of concern in the Watershed, signing up and/or donating financial support. DRN basic membership is free of charge.

8. DRN has on the order of 25,000 members, the vast majority of whom live, work, and/or recreate within the Delaware River Basin. We represent the recreational, educational, and aesthetic interest of our members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking. Additionally, we represent the economic interests of many of our members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, or boating. Furthermore, DRN also represents the health interests of those who use the Delaware River watershed's resources for drinking, cooking, farming, swimming, or gardening. And we support the protection and restoration of the Delaware River, its tributaries and watershed, and the creation and honoring of constitutional environmental rights for the benefit of present and future generations.

9. DRN is the only advocacy organization working throughout the entire Delaware River watershed, and its four watershed states, in pursuit of our water and watershed protection mission.

10. DRN is the only watershed advocacy organization committed to actively monitoring, participating in, watchdogging, and engaging other in the Delaware River Basin Commission's ("DRBC's") regulatory programs and policy decisions throughout the Basin. DRN has an unparalleled knowledge of DRBC enabling statutes and regulatory programs, as well as a hands-on understanding of the relationship between these programs and state and federal initiatives.

11. In 1989, DRN conceived of, crafted, and advanced a petition to secure anti-degradation protection for the Middle and Upper non-tidal Delaware River. When finally granted, this new protection took the form of a Delaware River-specific body of regulation called Special Protection Waters that the DRBC passed and implements.

12. In 2001, DRN pursued this same strategy to secure Special Protection Waters designation and protection for the lower, non-tidal, Delaware River. As a result of these combined efforts, the Delaware River has the longest stretch of river in the nation that benefits from anti-degradation-level protection.

13. In 2016, DRN filed a petition with the DRBC to see full implementation of the Special Protection Waters program, including provisions the agency has not yet implemented including watershed prioritization, and watershed protection as well as nonpoint source pollution control plans.

14. Since fracked gas extraction was first proposed for the Delaware River Basin, DRN has used its knowledge of these and other DRBC regulations and enabling legislation, along with strong organizing and advocacy, to secure and maintain the limitations on shale gas extraction, drilling and fracking within the watershed that are the subject of this litigation.

15. I am a member of the Delaware Riverkeeper Network and make personal financial contributions to support the organization on an annual basis. As the Delaware Riverkeeper and as a member of DRN, I personally enjoy the natural resources of the Basin including the portions of the watershed that would be directly and indirectly impacted by shale gas extraction if it were to advance in the watershed.

16. I have personally visited the main stem River, streams, wetlands, and forested areas in the watershed, by myself, with family, friends, and colleagues, for recreational, personal, and professional reasons that would be directly and/or indirectly impacted by natural gas drilling including fracked gas extraction if it were allowed to proceed in the watershed. I have plans to return to these areas for recreational purposes, including among other things, kayaking, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes as the Delaware Riverkeeper. I enjoy these visits to these areas whether in my professional or personal capacity, or as a parent. I often include my family in my enjoyment of the areas of the watershed, and find them beautiful and unique natural areas important to share with my children for their personal and educational growth.

17. In my capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the many natural features of the Delaware River watershed, I will be personally and professionally harmed by the damage that will be inflicted by the construction and natural gas drilling activities that would occur should the DRBC's effective moratorium on shale gas extraction be invalidated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12 day of February, 2021.

A handwritten signature in blue ink that reads "Maya K. van Rossum". The signature is written in a cursive style with a long horizontal line extending to the right.

Maya van Rossum,
the Delaware Riverkeeper

Exhibit B

**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,

925 Canal Street, Suite 3701
Bristol, PA 19007

Proposed Intervenors-Defendants.

Civil Action No. 2:21-cv-00119

Honorable John R. Padova

PROPOSED MOTION TO DISMISS OF
DELAWARE RIVERKEEPER NETWORK AND
MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and Local Rule of Civil Procedure 7.1, 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: _____

Respectfully submitted,

Kacy C. Manahan, Esq.
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*Attorney for Delaware Riverkeeper Network
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Riverkeeper*

CERTIFICATE OF SERVICE

Kacy C. Manahan hereby certifies that on the date set forth below, she caused a true and correct copy of the Proposed Motion to Dismiss of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, supporting Memorandum of Law, and proposed form of order to be served on all counsel of record through the Court's electronic notification system.

Dated: _____

Kacy C. Manahan, Esq.
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*Attorney for Delaware Riverkeeper Network
and Maya K. van Rossum, the Delaware
Riverkeeper*

**IN THE UNITED STATES DISTRICT COURT
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SENATOR GENE YAW, *et al.*,

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COMMISSION,

Defendant,

and

DELAWARE RIVERKEEPER NETWORK and
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RIVERKEEPER,

925 Canal Street, Suite 3701
Bristol, PA 19007

Proposed Intervenors-Defendants.

Civil Action No. 2:21-cv-00119

Honorable John R. Padova

PROPOSED ORDER

AND NOW, this ____ day of _____, 2021, upon consideration of Delaware Riverkeeper Network's and Maya K. van Rossum, the Delaware Riverkeeper's Motion to Dismiss, and any responses thereto, it is HEREBY ORDERED that said motion is GRANTED and Plaintiffs' Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

Honorable John R. Padova

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**IN THE UNITED STATES DISTRICT COURT
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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,

925 Canal Street, Suite 3701
Bristol, PA 19007

Proposed Intervenors-Defendants.

Civil Action No. 2:21-cv-00119

Honorable John R. Padova

**MEMORANDUM OF LAW IN SUPPORT OF
PROPOSED MOTION TO DISMISS OF
DELAWARE RIVERKEEPER NETWORK AND
MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER**

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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. Because plaintiffs lack standing, a requirement under Article III of the United States Constitution, 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 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.

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.

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 docket 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. 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).

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 Plaintiffs lack standing to pursue their claims. "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 Senator Gene Yaw, Senator Lisa Baker, and the Pennsylvania Senate Republican Caucus lack standing to pursue their claims.

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 docket “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,¹ is a “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

¹ 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 that conflicts with the Compact.” *Tarrant Reg’l Water Dist. V. Herrmann*, 569 U.S. 614, 627 n.8 (2013).

“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 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. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). 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.

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

Damascus Township (“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,² "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 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

² 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).

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 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: _____

Respectfully submitted,

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