

**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,

/s/ Kacy C. Manahan
Kacy C. Manahan, Esq.
Pa. Atty. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215)-369-1188 x115
kacy@delawariverkeeper.org

*Attorney for Delaware Riverkeeper
Network and Maya K. van Rossum,
the Delaware 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 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

/s/ Kacy C. Manahan
Kacy C. Manahan, Esq.
Pa. Atty. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215)-369-1188 x115
kacy@delawareriverkeeper.org

*Attorney for Delaware Riverkeeper
Network and Maya K. van Rossum,
the Delaware Riverkeeper*

Kacy C. Manahan, Esq.
Pa. Atty. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

*Attorney for Delaware Riverkeeper
Network and Maya K. van Rossum,
the Delaware Riverkeeper*

**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

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS OF INTERVENOR-DEFENDANTS**

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PROCEDURAL HISTORY OF THE CASE.....2

III. STATEMENT OF FACTS.....3

IV. LEGAL ARGUMENT6

A. Standard of Review.....6

 1. *Mootness*.....6

 2. *Standing*.....7

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.....9

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.....11

 1. *Senate Plaintiffs lack standing based on the Commission’s alleged interference with legislative powers and duties.*12

 2. *Senate Plaintiffs lack standing based on an alleged regulatory taking of the Commonwealth’s public natural resources.*.....16

D. Plaintiffs’ Complaint should be dismissed for lack of subject matter jurisdiction because Damascus Township lacks standing.17

 1. *Damascus Township has not suffered injury to its ability to exercise its fiduciary duties imposed by Pennsylvania’s Environmental Rights Amendment.*18

 2. *Damascus Township’s inability to benefit from the Well Fund is not caused by the Commission’s moratorium.*.....21

 3. *Damascus Township’s alleged inability to participate in Marcellus-related economic development is too speculative to form a basis for relief.*.....22

V. CONCLUSION24

TABLE OF AUTHORITIES

Cases

Alaska Legislative Coun. v. Babbitt,
181 F.3d 133 (D.C. Cir. 1999)..... 15, 16

Already, LLC v. Nike, Inc.,
568 U.S. 85 (2013).....7

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n,
576 U.S. 787 (2015).....13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....23

Cal. Pub. Emp. Ret. Sys. v. The Chubb Corp.,
394 F.3d 126 (3d Cir. 2004)23

Chafin v. Chafin,
568 U.S. 165 (2013).....6

Coleman v. Miller,
307 U.S. 433 (1939).....14

Constitution Party of Pa. v. Aichele,
757 F.3d 347 (3d Cir. 2014) 7, 22

Corman v. Torres,
287 F. Supp. 3d 558 (M.D. Pa. 2018).....13

In re Hartje’s Estate,
28 A.2d 908 (Pa. 1972).....20

In re Schering Plough Corp.,
678 F.3d 235 (3d Cir. 2012) 7, 8, 9, 11

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)..... 16, 21

Mayer v. Wallingford-Swarthmore Sch. Dist.,
405 F. Supp. 3d 657 (E.D. Pa. 2019).....6

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)..... 10, 17

Natl’l Audubon Soc’y v. Superior Court,
658 P.2d 709 (Cal. 1983).....19

Pa. Env’tl. Def. Found. v. Commw. of Pa. (PEDF II),
161 A.3d 911 (Pa. 2017)..... 19, 20

Raines v. Byrd,
521 U.S. 811 (1997)..... 8, 11, 13, 14

Robinson Twp. Washington Cty. v. Commw.,
83 A.3d 901 (Pa. 2013)..... 15, 19, 20

Russell v. DeJongh,
491 F.3d 130 (3d Cir. 2007) 11, 14

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)..... 8, 11, 18

State of Miss. v. United States,
146 Fed. Cl. 693 (2020).....17

United States v. S.C.R.A.P.,
412 U.S. 669 (1973).....23

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982).....15

Statutes

16 U.S.C. §§ 3101–3233.....15

28 U.S.C. § 220117

32 P.S. § 815.1013, 4

58 Pa.C.S. § 2314.....22

Other Authorities

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)4

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.....4

Del. River Basin Comm’n, Res. 2021-01 (Feb. 25, 2021)5

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).....5

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 (2020)20

Rules

Federal Rule of Civil Procedure 12(b)(1)6

Federal Rule of Civil Procedure 12(b)(6)7

Constitutional Provisions

Pa. Const. art. I, § 2720

U.S. Const. art. III, § 28

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. 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, 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,¹ is a

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

“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

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,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

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).

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,

/s/ Kacy C. Manahan
Kacy C. Manahan, Esq.
Pa. Atty. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215)-369-1188 x115
kacy@delawareriverkeeper.org

*Attorney for Delaware Riverkeeper
Network and Maya K. van Rossum,
the Delaware Riverkeeper*