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

Senator Gene Yaw, et al., *Plaintiffs*	:	Civil Action No. 2:21-cv-00119-PD
v.	:	
Delaware River Basin Commission, *Defendant*	:	

DELAWARE RIVER BASIN COMMISSION'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Delaware River Basin Commission hereby moves to dismiss Plaintiffs' First Amended Complaint, and in support, respectfully rely upon the attached memorandum of law.

WHEREFORE, Defendant Delaware River Basin Commission respectfully requests that the Court dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS
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I. Introduction.

In this declaratory judgment action, two Pennsylvania State Senators, the Pennsylvania Senate Republican Caucus (collectively the "Senate Plaintiffs"), and four Pennsylvania counties and municipalities (collectively the "Municipal Plaintiffs") request this Court to declare the Delaware River Basin Commission's ("DRBC or "Commission") prohibition on high volume hydraulic fracturing ("HVHF") within the Delaware River Basin ("Basin") to be unlawful or to constitute a taking requiring just compensation. The Commission adopted the prohibition on February 25, 2021, on the basis of its determination that if performed in the Basin, HVHF and related activities would impair drinking water resources and other water uses protected by the Commission's Comprehensive Plan.

The Federal Government and the states of Pennsylvania, Delaware, New Jersey, and New York ("Basin states") created the Commission. The four governors of the Basin states and a representative of the United States serve as the five Commissioners of the organization's governing body. The Commission is charged with managing the water resources of the Basin and protecting the water supply of over 13 million people and the health and vitality of the Basin's aquatic ecosystems. Plaintiffs improperly seek to impose the preference of a few officials in one of four Basin states on citizens of all four Basin states whose Governors, including

Pennsylvania Governor Tom Wolf, voted as DRBC Commissioners to protect the water resources of the Basin by prohibiting HVHF.

For the several reasons set forth below, the Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to assert their claims. Alternatively, Plaintiffs' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

II. Background.

The Third Circuit has explained the origins, functions, and authority of the Commission in several opinions. *See, e.g., Wayne Land and Mineral Group, LLC v. DRBC,* 894 F.3d 509 (3d Cir. 2018) (*Wayne I*); *Wayne Lane and Mineral Group, LLC v. DRBC,* 959 F.3d 569 (3d Cir. 2020) (*Wayne II*); *DRBC v. Bucks Cty. Water and Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981) (*Bucks County*). Only a brief overview is provided here as relevant to the present Motion.

Pennsylvania, New York, New Jersey, and Delaware and the United States enacted the Delaware River Basin Compact ("Compact")[1] in 1961 to provide for their joint administration of the water resources of the Basin pursuant to a multipurpose comprehensive plan without regard to state boundaries. The Compact formed the Commission and designated the four governors of the Basin states and a

[1] Public Law 87-328, 75 Stat. at Large 688 (September 27, 1961), is available at https://www.nj.gov/drbc/library/documents/compact.pdf.

representative of the Federal Government as the five Commissioners who serve as the organization's governing body. *See* Compact §§ 1.3(b), 2.2, 14.1(b)(1). An affirmative vote of at least three Commissioners at a public meeting is required to take any Commission action. Compact §§ 2.5, 14.4(a). As set forth in separate Articles of the Compact, DRBC's broad authority extends to water supply, pollution control, flood protection, watershed management, recreation, hydroelectric power, and water withdrawals and diversions. *See Bucks County*, 641 F.2d at 1089 n.3.

To ensure an adequate supply of clean water for drinking, recreation, and commercial and industrial operations upon which over 13 million people depend, the Commission adopts a comprehensive plan, promulgates regulations, and reviews projects proposed by public or private entities that may have a substantial effect on the water resources of the Basin. *See, e.g.*, Compact, § 13.1 (Comprehensive Plan), Article 5 (Pollution Control), & § 3.8 (Referral and Review). DRBC's Section 3.8 authority to review projects provides an adjudicatory mechanism to prevent entities from commencing projects that may impair DRBC's Comprehensive Plan and is distinct from the rulemaking provisions of the Compact.

By 2009, new technologies combining HVHF and horizontal drilling created the potential for natural gas development and resulting water pollution and diminished flows in certain areas that might not have been subject to development or as much development but for fracking. The Amended Complaint references the

Marcellus Shale formation as one such area, *see* Am. Compl. ¶¶ 48–49, which stretches into the upper portion of the Basin. However, DRBC Special Protection Waters[2] and ecologically sensitive headwater areas are located in this same region. To address threats posed by HVHF activities to water resources, the Commission's former Executive Director issued three determinations ("EDDs")[3] in 2009 and 2010 requiring companies planning to develop natural gas in shale formations to submit their plans to the Commission for review and approval under Section 3.8 of the Compact before commencing on-site work.[4]

In addition to asserting its project review authority over this activity new to the Basin, the Commission sought to develop regulations pursuant to its rulemaking authorities, including, among others, Section 5.2 of the Compact, which grants the

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[2] The Commission classifies certain interstate waters as Special Protection Waters due to their high water resource values. The Commission seeks to ensure that there is no measurable change to the quality of these waters except toward natural conditions. *See* DRBC Water Code (incorporated by reference at 18 C.F.R. Part 410), § 3.10.3A.2 available at https://www.nj.gov/drbc/library/documents/WQregs.pdf.

[3] Determination of the Executive Director of May 19, 2009, available at https://www.nj.gov/drbc/library/documents/EDD5-19-09.pdf; Supplemental Determination of the Executive Director of June 14, 2010, available at https://www.nj.gov/drbc/library/documents/SupplementalEDD6-14-10.pdf; Amendment to Supplemental Determination of the Executive Director of July 23, 2010, available at https://www.nj.gov/drbc/library/documents/AmendedSuppEDD072310.pdf.

[4] The EDDs generally referenced in the Amended Complaint as a "notice," *see* Am. Compl. ¶¶ 80, 112, did not impose a moratorium; they only required the sponsors of natural gas projects targeting shale formations in the Commission's Special Protection Waters to submit the projects for Commission review.

Commission power to control future pollution. By Resolution for the Minutes dated May 5, 2010, the Commissioners unanimously instructed the Executive Director to develop proposed regulations and announced they would defer consideration of projects involving natural gas development activities in shale formations (termed "well pad dockets") until the Commission adopted rules to protect the Basin's water resources and the Comprehensive Plan from the potential adverse impacts of these activities.[5] The deferral of project review has been called a "*de facto* moratorium."

The Commission conducted an extensive public rulemaking process which involved, among other things, public comment on two sequential rule proposals. On February 25, 2021, after considering the voluminous public comments on the draft rules, the actions of state and federal agencies, and peer-reviewed scientific literature, and after performing its own technical and scientific analysis, the Commission adopted final regulations prohibiting HVHF in shale formations in the Basin. *See* Final Rule with Respect to HVHF and Final Amendments to the Rules of Practice and Procedure Concerning Project Review Classifications and Fees ("Final Rule"), available at https://www.nj.gov/drbc/about/regulations/final-rule_hvhf.html.[6] As stated in Resolution No. 2021-01 adopting the final regulations,

[5] May 5, 2010 Resolution for the Minutes ("May 2010 Resolution"), available at https://www.nj.gov/drbc/library/documents/5-05-10_minutes.pdf at 4-5.

[6] "Matters of public record" may be considered in a motion to dismiss. *E.g., Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

the regulations replace the Executive Director determinations, and the Commission's deferral of its review of natural gas well pad projects expired by its own terms. https://www.state.nj.us/drbc/library/documents/Res2021-01_HVHF.pdf at ¶ C.

The Senators twice sought to challenge DRBC's alleged "*de facto* moratorium" by seeking to intervene in the Middle District of Pennsylvania as plaintiffs in the *Wayne* case, Civ. A. No. 3:16-cv-00897-RDM (M.D. Pa.).[7] The District Court denied both motions pursuant to Federal Rule of Civil Procedure 24 on the ground that the Senators had no protectable interest at stake. *See Wayne Land and Mineral Grp., LLC v. DRBC*, 2017 WL 63918 (M.D. Pa. 2017) ("*Wayne 2017*"); *Wayne Land and Mineral Grp., LLC v. DRBC*, 331 F.R.D. 583 (M.D. Pa. 2019) ("*Wayne 2019*"), *rev'd on other grounds*, *Wayne II*. The Senators appealed the decision in *Wayne 2019* to the Third Circuit, which vacated the District Court's order on the ground that before reaching Rule 24, the District Court should have first considered whether the Senators even had standing to bring their claims (which may have provided yet another reason for the District Court to deny intervention). *See Wayne II*, 959 F.3d at 577. The Senators then withdrew their motion to intervene and, several months later, commenced the present action in this Court seeking similar relief.

[7] In *Wayne*, the plaintiff landowner seeks a declaration that its planned natural gas activities are not a "project" as defined in the Compact and are therefore not subject to DRBC's project review authority under Section 3.8 of the Compact.

III. Argument

A. Plaintiffs Lack Standing to Bring All Counts.

Article III standing is a "threshold" jurisdictional issue, *Wayne II*, 959 F.3d at 573–74 (citations omitted), which "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). Plaintiffs bear the burden of demonstrating standing for each claim and for each form of relief. *Davis v. Federal Election Comm'n,* 554 U.S. 724, 734 (2008) (citation omitted). To establish standing, a plaintiff must clearly allege that it has suffered an injury in fact, its injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992).

The element of injury in fact requires a plaintiff to show that its alleged injury was "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct. at 1548 (*quoting Lujan*, 504 U.S. at 560). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. And for an injury to be "concrete," it must "actually exist" and "it must be real and not abstract."[8]

[8] Even when traditional Article III standing may exist, "Prudential considerations further limit a plaintiff's ability to establish that she has standing. These considerations require that: (1) a litigant 'assert his [or her] own legal interests rather than those of third parties,'; (2) courts 'refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,'; and (3) a

Here, the challenged DRBC action was directed to natural gas extraction projects using HVHF and their sponsors, not to legislators or municipalities. *See* Final Rule. When, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Institute*, 555 U.S. 488, 493–94 (2009) (*quoting Lujan*, 504 U.S. at 562).

1. The Senators and Their Caucus Have Not Suffered a Concrete Injury that Affected Them "In a Personal and Individual Way."

The Senator Plaintiffs' status as Senators or as a caucus of Senators does not confer standing. While individual members of a legislative body might suffer an injury in fact when they are singled out for "specially unfavorable treatment," individual legislators may not base standing on an alleged injury to the legislature as a whole. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1953–54 (2019); *Raines v. Byrd*, 521 U.S. 811, 820 (1997); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). For example, an individual legislator may suffer a particularized and concrete injury to a legally protected interest where an executive official's action has nullified the legislator's vote or denied the legislator's ability to vote. *Raines*, 521

litigant demonstrate that her interests are arguably within the 'zone of interests' intended to be protected by the statute, rule or constitutional provision on which the claim is based." *Wheeler v. Travelers Ins. Co*., 22 F.3d 534, 538 (3d Cir. 1994) (citations omitted).

U.S. at 822–23, 829; *Russell v. DeJongh*, 491 F.3d 130, 135 (3d Cir. 2007). However, an individual legislator does not experience an injury sufficient to confer standing if an alleged departure from the law has left the legislator with effective remedies through the political process and thus generally diluted the legislator's institutional legislative power or affected all members of the legislature equally.[9] *Raines*, 521 U.S. at 821.

In *Bognet v. Secretary, Commonwealth of Pennsylvania*, 980 F.3d 336 (3d Cir. 2020), the Third Circuit dismissed for lack of standing an election challenge by a Congressional candidate. The Court analyzed the *Raines* line of cases in language equally applicable here:

> Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd,* 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman [v. Torres],* 287 F. Supp. 3d [558,] 568–69 [M.D. Pa. 2018] (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts'"); *accord Va. House of Delegates v. Bethune-Hill, __ U.S. __,* 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

Id. at 365 n.5 (italics in original).

[9] Section 14.20 of the Compact allows amendments and supplements to the Compact by "legislative action of any of the signatory parties concurred in by all of the others."

For similar reasons, the District Court in *Wayne* twice held, "Once legislation is enacted, legislators such as the three Senators seeking to intervene in this litigation, do not have a significantly protectable interest in its implementation to entitle them to intervene as of right." *Wayne 2017*, 2017 WL 63918, at *4; *Wayne 2019*, 331 F.R.D. at 594. The Court explained:

> Legislators do not have a significantly protectable interest in enacted legislation, notwithstanding their support or vote for it. In *Roe v. Casey*, 464 F. Supp. 483 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980), a member of the General Assembly sought to intervene in a civil rights challenge to a Pennsylvania law limiting state reimbursements for the cost of abortions. The court held that the legislator's interest in defending a state statute from application of federal law was not sufficiently substantial, direct or legally protectable. *Id.* at 486. In contrast, a legislator's protectable interest might encompass the issue of whether the applicable state laws were duly and lawfully enacted, an issue not raised in *Roe* (or in the present case). *Id.* . . . In the present case, the Senators do not contend that they have an economic, aesthetic or recreational interest at stake, *see Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency*, 278 F.R.D. 98 (M.D. Pa. 2011), that Act 13 [or the Compact] was not properly enacted or that their legislative vote has not been cast and properly counted.

Wayne 2017, 2017 WL 63918, at *3–4.

Here, as in *Raines*, the Senators' vote and legislative power have not been affected. Count I seeks to vindicate purported rights belonging to the Pennsylvania legislature. But the party to the Compact is the Commonwealth of Pennsylvania, not the Pennsylvania General Assembly, not the Pennsylvania Senate, and clearly not any individual legislator. And the Compact grants the Governor, not the legislature, authority to act for the Commonwealth. Compact, § 2.2.

The Senators' averment that they "are in privity of contract under the Compact," Am. Compl., ¶ 93, does not confer standing. Neither the Senators who voted to ratify or reject the Compact or the present office holders have concrete, particularized, protected interests in the administration of the Compact. To hold otherwise would transform courts into forums for multiple legislators from five sovereigns to advance their individual preferences regarding interpretation of the Compact. *See, e.g., Russell v. DeJongh*, 491 F.3d 130, 135 (3d Cir. 2007) ("The principal reason for this is that once a bill has become a law, a legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government."); *NCAA v. Corbett*, 296 F.R.D. 342, 349 (M.D. Pa. 2013) ("Once again, *Roe* controls, and the Court cannot conclude that Senator Corman's interest in arguing the constitutionality of the Act is sufficiently substantial, direct, or legally protectable to warrant intervention.").[10]

In *Wayne*, the District Court recognized that:

> [O]nce legislation is enacted, legislators do not have a significant protectable interest in its implementation. Here, where the Compact was enacted as state law in addition to federal law, there is even less

[10] Contract principles support this conclusion. Courts have consistently held that a corporate officer has no standing to enforce a contract and no liability for breach of contract, even when such individual is the authorized signatory or sole shareholder of the entity which is party to the contract. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006) ("But it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts."). Legislators are treated similarly.

> reason to conclude that a state legislator has a protectable interest in insulating state legislation from the joint management of the Basin's water resources by the parties to the Compact.

Wayne 2017, 2017 WL 63918, at *4.

The settled principle that legislators do not have a protectable interest in legislation once enacted provides no exception for individual legislators based on leadership position, committee chair position, or legislative district.

Senator Yaw's receipt of "a detailed annual report of the Well Fund's expenditures," *see* Am. Compl., ¶ 53, in his capacity as a committee chair does not confer standing to bring any claim that may indirectly affect the Well Fund's balance. In *NCAA v. Corbett*, the District Court denied Senator Corman's proposed intervention to challenge the constitutionality of a statute that created a trust fund over which Senator Corman had specific statutory authority and oversight responsibility. *See* 296 F.R.D. at 348. The District Court found his asserted interests were not significantly protectable to support federal Constitutional standing, regardless of whether they were sufficient to establish standing under state law. *Id.* at 348 n.1. Senator Yaw has substantially less authority than did Senator Corman. Senator Yaw pleads he is entitled to an annual reporting of the deposits and expenditures of the Well Fund from the Pennsylvania Public Utilities Commission. Am. Compl. ¶ 53. The statute grants him no authority over Well Fund transactions.

Moreover, this litigation does not even concern an alleged DRBC misappropriation of Well Fund assets and is not a dispute over proper administration of the Well Fund.

Similarly, that Senator Baker's legislative district lies partially within the Basin does not create a particularized interest in the litigation. Senator Baker's concerns as an elected official cannot be distinguished from a "general grievance about the correctness of governmental conduct." *Robinson Twp. v. Pennsylvania*, 84 A.3d 1054, 1054 (Pa. 2014) (quoting *Fumo v. City of Philadelphia*, 927 A.2d 487, 501 (Pa. 2009)).

Because the Senators and the Senate Republican Caucus lack standing to assert claims on behalf of the Commonwealth or landowners, all of their claims in that capacity should be dismissed for lack of jurisdiction.

2. The Pennsylvania Environmental Rights Amendment Does Not Create Standing For Plaintiffs to Assert Their Claims.

Plaintiffs allege that the Pennsylvania Environmental Rights Amendment makes each Plaintiff a trustee of the natural gas on Commonwealth lands, and that as alleged trustees, Plaintiffs have fiduciary duties to monetize natural gas by extracting it from these lands and to use natural resources to address budget shortfalls. *See, e.g.,* Am. Compl. ¶¶ 91–93, 95. Plaintiffs' theory is contrary to the plain text of the Environmental Rights Amendment, its purpose, its history, and Pennsylvania Supreme Court precedent.

Pennsylvania's legislature unanimously assented, and the voters ratified, this Amendment to the Commonwealth's Constitution to prevent the type of environmental devastation that historically resulted from Pennsylvania's history of timber, hunting, and coal exploitation. *Pa. Envtl. Def. Found'n v. Commw. (PEDF)*, 161 A.3d 911, 916–19 (Pa. 2017).[11] In response to this legacy of pollution, the Environmental Rights Amendment affirmatively requires the Commonwealth, as trustee, to "conserve and maintain" public natural resources "for the benefit of all the people":

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. The Environmental Rights Amendment is part of Article I of the Pennsylvania Constitution, a declaration of public rights. Held in trust for the public, the public's resources are not the property of government, may not be exploited by government officials, and may not be developed in a manner that

[11] "We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage." *PEDF,* 161 A.3d at 918 (quoting 1970 Pa. Journal-House at 2270). "That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life." *Id*. at 918–19.

infringes on the public's right to pure water. Rather, the Amendment obligates the Commonwealth to protect the rights of the public, who are the beneficiaries of the trust. *PEDF*, 161 A.3d at 931–32.

The Pennsylvania Supreme Court has described the fiduciary duties under the Environmental Rights Amendment as requiring Commonwealth agencies and entities, including the General Assembly, to act toward the people and the Commonwealth's natural resources with "prudence, loyalty, and impartiality," *PEDF*, 161 A.3d at 932 (quoting *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 956–57 (Pa. 2013)), and to "conserve and maintain those resources." *Id.*[12] The Court expressly rejected the proprietary trust model (the model the Plaintiffs seek to invoke here) requiring extraction of natural resources for financial gain and imposed fiduciary requirements consistent with the conservation objectives of the trust. *Robinson Twp.*, 83 A.3d at 956–57; *PEDF*, 161 A.3d at 932 ("Under [the Environmental Rights Amendment], 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

[12] Ten years before the Environmental Rights Amendment was ratified, five sovereigns, including Pennsylvania, created the DRBC for a similar reason: to jointly manage the Basin's water resources in the face of pollution and competing demands for water.

operations.'") (quoting Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970)).

Plaintiffs stand the Environmental Rights Amendment on its head. None of the Senate Plaintiffs are trustees. And even if there are some lands in the Basin over which the Municipal Plaintiffs are obligated to exercise fiduciary duties as trustees, the Amendment does not create any duty in any trustee to exploit such lands' resources to the detriment of the public and their water resources and environment. The trustees are obligated to "preserv[e] . . . conserve and maintain" natural resources, but Plaintiffs seek to disrupt, convert, and monetize them—the very exploitative activities that the Environmental Rights Amendment was designed to prevent. Plaintiffs' attempt to conjure standing through the Environmental Rights Amendment should be rejected and Plaintiffs' claims should be dismissed.[13]

3. The Municipal Plaintiffs' Remaining Alleged Harms Do Not Demonstrate Standing.

In Count III, Plaintiffs demand a declaration that the Commission illegally exercised the power of eminent domain over private property to the detriment of unidentified, individual landowners. But the Commission has not compelled the

[13] Even under Plaintiffs' backwards interpretation of the Environmental Rights Amendment, they still fail to establish standing as they have not shown that any specific lands were or would have been subject to leases to extract natural gas absent Commission action. *See Summers,* 555 U.S. at 494–96 (dismissing claim for lack of standing because plaintiffs did not show they had concrete, imminent plans with respect to specific parcels of land).

Municipal Plaintiffs substantially or directly (or even indirectly) to do anything or engage in any conduct. So, to manufacture standing to assert this claim, the Municipal Plaintiffs appear to argue that but for the prohibition, unidentified landowners within the municipalities would have executed leases to develop unconventional wells, that such leases would generate economic development or fees that would be deposited into the Well Fund, Am. Compl. ¶¶ 52, 60, and that some unidentified amounts of the Well Fund then would be distributed to the Municipal Plaintiffs, *id.* ¶ 95.[14] Such allegations do not confer standing upon the Municipal Plaintiffs.

Under federal law, the Municipal Plaintiffs must assert their own legal interests, *Wheeler*, 22 F.3d at 538,[15] and cannot assert the interests of unidentified private citizens allegedly desiring to develop private projects involving HVHF.

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[14] Although the Municipal Plaintiffs assert they have unspecified lands in the Basin and some unspecified parcels have amounts of natural gas, *see* Am. Compl. ¶¶ 45, 46, 60, 72, they do not allege any interest or plan as landowners in actually extracting such resources.

[15] Even under state law, the Municipal Plaintiffs only have the powers granted to them by the legislature, and such powers do not include a "statutory mandate, express or implied, to sue generally for or on behalf of its citizens." *Skippack Community Ambulance Ass'n, v. Skippack Twp.*, 534 A.2d 563, 564–65 (Pa. Commw. 1987) (township lacked standing to sue to force association to provide access to volunteers who staffed ambulances, notwithstanding township's concern that health and safety of citizenry were in danger); *see also Commw. v. Ashenfelder*, 198 A.2d 514, 515 (Pa. 1964) ("[I]t is well settled that townships, political subdivisions of the Commonwealth, possess only such powers as have been granted to them by the legislature . . . .").

The Municipal Plaintiffs' various grievances regarding the Well Fund fail to establish standing for several additional reasons. *First*, the Commission has no control over the Well Fund—nor is it alleged to have any—and it cannot be the cause of any alleged injuries regarding it. The General Assembly, not the Commission, determines who and who is not eligible to partake in the Well Fund and how its revenues are distributed.

Second, the Municipal Plaintiffs' alleged loss of an opportunity to receive Well Fund distributions is based upon alleged injuries to unnamed landowners who are prevented from developing natural gas extraction projects using HVHF. This alleged indirect economic impact to the Municipal Plaintiffs cannot confer standing. *See Pitchford v. PEPI*, 531 F.2d 92, 96–98 (3d Cir. 1975).

Third, whatever injuries the Municipal Plaintiffs supposedly suffered regarding distribution of legislative revenues, or in general economic development, are entirely speculative. Indeed, the Amended Complaint pleads no facts that any natural gas that may be in any Municipal Plaintiff's jurisdiction is present in economically recoverable amounts, let alone at specific locations owned by unidentified private parties,[16] or that absent the HVHF prohibition, it would be

[16] Notwithstanding the considerable commercial natural gas extraction and production in certain areas in the Susquehanna River Basin, no natural gas production wells using HVHF have been located in the Susquehanna River Basin within several miles of the Delaware River Basin boundary, raising significant

extractable by this method and would thereafter result in material income to the Municipal Plaintiffs from the Well Fund.[17]

B. To the Extent the Counts of the Amended Complaint Seek a Declaration Regarding Section 3.8 of the Compact, They Fail to Present Justiciable Claims or are Barred by the Statute of Limitations.

Counts I and IV expressly are based on Section 3.8, *see* Am. Compl., Count I (heading and ¶ 103) & Count IV (prayer for relief), and such powers as Section 3.8 does or does not confer upon the Commission. But no live controversy remains over the scope of the Commission's project review authority under Section 3.8. The former *de facto* moratorium, which was based in part upon Section 3.8, has expired. The prohibition of HVHF adopted in February 2021 was adopted pursuant to the Compact's rulemaking provisions, *see* 18 C.F.R. § 440.1(b), not pursuant to Section 3.8 of the Compact.

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doubts as to whether economical and commercial natural gas development potential exists in the Delaware River Basin.

[17] Regarding Count IV's demand for a declaration that the Commission violated the Republican Form of Government Clause, Plaintiffs have not stated a cognizable injury in fact. Actions by the Basin Governors and a Federal Representative, exercised through a Commission established through legislation of the Basin states and the United States, do not harm legislative powers. Rather, they provide a means by which the five sovereigns may jointly exercise their authority by addressing water resource problems on a regional basis. Regardless, as set forth in section III.E, *infra*, Count IV also fails to present a justiciable controversy and is based upon the wrong operative documents.

Even if the Court were to entertain such claims, they would be barred by the statute of limitations. The Compact contains no express statute of limitations. In such situations, courts will borrow the closest analogous statute of limitations. *See*, *e.g.*, *Haggerty v. USAir, Inc.*, 952 F. 2d 781, 786 (3d Cir. 1992). Federal courts apply the catch-all six-year federal statute of limitations in 28 U.S.C. § 2401(a) to claims under the Administrative Procedure Act ("APA"). *See U.S. v. Sams*, 521 F.2d 421, 428 (3d Cir. 1975). Although the Commission is not subject to the APA, *see* Compact, § 15.1(m), Section 2401(a) provides the closest analogous statute of limitations for claims alleging violations of the Compact. The takings claim is governed by Pennsylvania's six-year statute of limitations for regulatory takings claims, 42 Pa. Cons. Stat. § 5527(a)(2). *See 287 Corp. Ctr. Assocs. v. Twp. of Bridgewater*, 101 F.3d 320 (3d Cir. 1996).

The original Complaint was filed in 2021, more than six years after the EDDs and the 2010 Resolution were issued. Accordingly, any claims by Plaintiffs regarding the decisions of the Executive Director and/or the Commission in 2009 and 2010 are time-barred.

C. Counts II and III Fail to State a Takings Claim.

Counts II and III should be dismissed for the additional reason that Plaintiffs fail to plead a cognizable takings claims for regulatory takings of Commonwealth

land (as purportedly alleged in Count II) or regulatory takings of private land (as purportedly alleged in Count III).

The Fifth Amendment distinguishes between physical takings—*i.e.*, when the government physically intrudes upon property and takes or uses it—and regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). There is no allegation of a physical taking in this action.

Within regulatory takings, the Supreme Court distinguishes *per se* takings that deprive landowners of all economic value of the parcel as a whole, *Lucas v. Southern Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), from regulations that impact less than the parcel as a whole, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), but nevertheless "go[] too far," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Whether a regulation "goes too far" requires a careful balancing test and due respect for governmental needs because "Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford." *Tahoe-Sierra Pres. Council*, 535 U.S. at 324. Therefore, the Court has developed a series of fact-specific factors to consider in determining whether a regulation effects a taking, including (i) "[t]he economic impact of the regulation on the claimant," (ii) "the extent to which the regulation has interfered with distinct investment-backed

expectations," (iii) "the character of the governmental action," *Penn Central Transp. Co.*, 438 U.S. at 124; and (iv) all other "relevant circumstances," *Tahoe-Sierra Pres. Council*, 535 U.S. at 335; *see also id.* at 331 (noting that where the claim does not concern a "total taking of the entire parcel, . . . then *Penn Central* [is] the proper framework.").

The Amended Complaint does not attempt to allege a *per se* regulatory taking. Nor could it. The prohibition affects far less than any parcel as a whole. By its plain terms, it addresses resource extraction only by HVHF, and did not bar other beneficial uses of any parcel, whether industrial, commercial, residential, or otherwise. Therefore, to state a claim for a regulatory taking in Count II and Count III, Plaintiffs must plead facts that could satisfy the *Penn Central* factors. The Amended Complaint falls far short.

The Amended Complaint's failure to identify an actual parcel of land is fatal to Plaintiffs' takings claims. The Supreme Court is clear that in a *Penn Central* analysis: "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295–96 (1981) (rejecting argument that "the 'mere enactment' of the Surface Mining Act constitutes a taking"). Chief Justice Roberts recently reinforced this rule: "We have said often enough that the answer to

this question [of when a regulation "goes too far"] generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: *The inquiry 'must be conducted with respect to specific property.'"* *Murr v. Wisconsin*, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting on other grounds) (emphasis added).

The Amended Complaint's failure to identify a "specific property" is not a mere technicality; a *Penn Central* analysis is impossible without it. For example, the Court cannot analyze or answer: (i) Does natural gas exist in the parcel at issue?; (ii) If so, is it extractable by HVHF?; (iii) Is it extractable by other means?; (iv) Notwithstanding the prohibition, did the parcel owner have legal authority and all governmental authorizations to conduct HVHF on the parcel?; (v) What rights and uses may be made of the other portions of the parcel, *i.e.*, other minerals and resources, other commercial uses, other recreational uses, etc.?; (vi) What is the economic value of those other rights and uses?; or (vii) What were the investment-backed expectations of the parcel owner when acquiring the parcel? These questions and others are unanswerable given Plaintiffs' vague allegations of "state-owned lands" in Count II, *see* Am. Compl. ¶ 110, and unidentified "private property" in Count III, *id.* ¶ 115.

Count II's vague allegation of "state-owned lands" highlights additional core defects in Plaintiffs' claims. Pennsylvania has long prohibited new leases for gas development on "state-owned lands," and the Amended Complaint contains no facts

from which one could conclude that any Commission conduct had any effect on gas development on Commonwealth lands within the Basin. The closest the Amended Complaint comes to identifying any "state-owned lands" is a general allegation that "the Commonwealth owns . . . twenty-three state parks and several state forests [within the Basin]." Am. Compl., ¶ 47. However, since October 2010 (except for a brief seven-month period from May 23, 2014–January 29, 2015), Pennsylvania has prohibited new leases for gas in all 121 state parks and forests owned and managed by the Pennsylvania Department of Conservation and Natural Resources (DCNR). *See* Exec. Order 2010-05 (Gov. Rendell, Oct. 26, 2010) (ordering that "no lands owned and managed by DCNR shall be leased for oil and gas development"); Exec. Order 2014-03 (Gov. Corbett, May 23, 2014) (lifting prohibition); Exec. Order 2015-03 (Gov. Wolf, Jan. 29, 2015) (reinstating prohibition). If the 23 unidentified state parks and forests referenced in the Amended Complaint are part of the 121 parks and forests owned and managed by the DCNR, application of the Commission's former moratorium to these lands would be a redundancy or a nullity, but never a taking.

D. Count IV Presents a Non-Justiciable Controversy and Misconstrues the Operative Legal Documents.

Count IV's claim for "violation of the Guarantee Clause" of Article IV, Section 4 of the United States Constitution should be dismissed for two additional reasons. *First*, it does not present a justiciable claim. The Supreme Court "has

several times concluded, . . . that the Guarantee Clause does not provide the basis for a justiciable claim." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

Second, in seeking to invalidate the prohibition of HVHF, Count IV is based upon an incorrect fact and incorrect Compact provision. The prohibition was not issued by notice of an unelected official. Am. Compl. ¶ 121. Rather it was adopted by the affirmative vote of four Governors, including Pennsylvania Governor Tom Wolf, in their roles as DRBC Commissioners.

IV. Conclusion.

For the foregoing reasons, the Commission respectfully requests that the Motion to Dismiss be granted.

Respectfully submitted,

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Dated: April 15, 2021

Attorneys for Defendant Delaware River Basin Commission

Certificate of Service

I, John S. Stapleton, certify that on this 15th day of April, 2021, I caused true and correct copies of Delaware River Basin Commission's Motion to Dismiss Plaintiffs' First Amended Complaint and accompanying memorandum of law to be served via ECF upon all counsel of record.

/s/ John S. Stapleton
John S. Stapleton