

**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, *et al.*

Intervenor-Defendants,

and

SENATOR STEVE SANTARSIERO, *et
al.*

Intervenor-Defendants.

Civil Action No. 2:21-cv-00119

Honorable Paul S. Diamond

**INTERVENOR-DEFENDANTS DELAWARE RIVERKEEPER
NETWORK'S AND MAYA K. VAN ROSSUM, THE DELAWARE
RIVERKEEPER'S MOTION TO DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

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 K. van Rossum, the Delaware Riverkeeper (collectively, "DRN") hereby

move the Court to dismiss the First Amended Complaint filed by Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus, Damascus Township, Dyberry Township, Carbon County, and Wayne County (collectively, “Plaintiffs”) in this action. Pls.’ First Am. Compl., ECF No. 29.

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

Dated: April 15, 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*

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, *et al.*

Intervenor-Defendants,

and

SENATOR STEVE SANTARSIERO, *et al.*

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 FACTS3

IV. LEGAL ARGUMENT7

A. Standard of Review.....7

B. Plaintiffs’ Amended Complaint should be dismissed for lack of subject matter jurisdiction because the Senate Plaintiffs lack standing to pursue their claims.9

 1. Senate Plaintiffs lack standing based on the Commission’s alleged interference with legislative powers and duties (Counts I, III, and IV).11

 2. Senate Plaintiffs lack standing based on an alleged regulatory taking of the Commonwealth’s public natural resources (Count II).15

C. Plaintiffs’ Amended Complaint should be dismissed for lack of subject matter jurisdiction because Municipal Plaintiffs lack standing to pursue their claims.16

 1. Municipal Plaintiffs have not suffered injury to their ability to exercise their fiduciary duties imposed by Pennsylvania’s Environmental Rights Amendment (Counts I & IV).17

 2. The Municipal Plaintiffs’ inability to benefit from the Well Fund is not caused by the Commission’s prohibition (All Counts).20

 3. Wayne County’s and Damascus Township’s alleged inability to participate in Marcellus-related economic development is too speculative to form a basis for relief (All Counts).22

V. CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

Alaska Legislative Coun. v. Babbitt,
181 F.3d 133 (D.C. Cir. 1999)..... 14, 15

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n,
576 U.S. 787 (2015).....11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....22

Cal. Pub. Emp. Ret. Sys. v. The Chubb Corp.,
394 F.3d 126 (3d Cir. 2004)22

Coleman v. Miller,
307 U.S. 433 (1939).....13

Constitution Party of Pa. v. Aichele,
757 F.3d 347 (3d Cir. 2014)7, 21

Corman v. Torres,
287 F. Supp. 3d 558 (M.D. Pa. 2018).....11

In re Hartje’s Estate,
28 A.2d 908 (Pa. 1972).....19

In re Schering Plough Corp.,
678 F.3d 235 (3d Cir. 2012) 8, 9, 10

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)..... 15, 20

Natl’l Audubon Soc’y v. Superior Court,
658 P.2d 709 (Cal. 1983).....18

Pa. Env’tl. Def. Found. v. Commw. of Pa. (PEDF II),
161 A.3d 911 (Pa. 2017)..... 18, 19

Raines v. Byrd,
521 U.S. 811 (1997)..... 8, 10, 12, 13

Robinson Twp. Washington Cty. v. Commw.,
83 A.3d 901 (Pa. 2013)..... 14, 17, 19

Russell v. DeJongh,
491 F.3d 130 (3d Cir. 2007)9, 13

Spokeo, Inc. v. Robins,
36 S. Ct. 1540 (2016).....9, 17

State of Miss. v. United States,
46 Fed. Cl. 693 (2020).....16

Tarrant Reg’l Water Dist. v. Herrmann,
569 U.S. 614 (2013).....13

United States v. S.C.R.A.P.,
412 U.S. 669 (1973).....22

Valley Forge Christian College v. Ams. United for Separation of Church & State,
454 U.S. 464 (1982).....13

Statutes

16 U.S.C. §§ 3101–323314

28 U.S.C. § 220115

32 P.S. § 815.1013, 4

58 Pa.C.S. § 2314.....21

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.....5

Del. River Basin Comm’n, Res. 2021-01 (Feb. 25, 2021)6, 12

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)7

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

Constitutional Provisions

Pa. Const. art. I, § 10.....15

Pa. Const. art. I, § 27.....19

U.S. Const. amend. V.....15

U.S. Const. art. III, § 2.....8

U.S. Const., art. VI, cl. 2.....13

I. INTRODUCTION

Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus (collectively, “Senate Plaintiffs”) and Damascus Township, Dyberry Township, Carbon County, and Wayne County (“Municipal Plaintiffs”) bring this action for declaratory relief challenging the Delaware River Basin Commission’s (“Defendant’s” or “Commission’s”) decision to prohibit high volume hydraulic fracturing (“fracking”) within the Delaware River Basin (“Basin”).

Senate Plaintiffs’ claims are based on alleged injuries to their lawmaking authority, their ability to act as trustee under the Pennsylvania Constitution’s Environmental Rights Amendment, and to the corpus of the natural resources trust created by that provision. Because these injuries are not an invasion to a legally-protected interest held by the Senate Plaintiffs themselves, Senate Plaintiff’s claims amount to generalized grievances insufficient to confer Article III standing.

The Municipal Plaintiffs complain that the Commission’s prohibition renders them unable to exercise their fiduciary duties as trustees under the Environmental Rights Amendment, or to benefit financially from fracked gas development. The Municipal Plaintiffs’ contentions subvert their role as trustees, 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 Municipal Plaintiffs’ injuries illusory.

In addition, the Municipal Plaintiffs fail to causally connect the Commission's prohibition on fracking to their inability to receive certain funds from the General Assembly, and otherwise fail to plead any specific economic harm wrought by the prohibition.

Because none of the Plaintiffs have established standing in this case, their First Amended 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 filed a complaint challenging the Commission's moratorium on natural gas extraction projects within the Basin. *See* Compl., ECF No. 1. DRN moved to intervene on February 12, 2021. DRN's motion was granted by Order of this Court on February 25, 2021. *See* Order, ECF No. 15.

On that same date, the Commission adopted a final rule prohibiting fracking in hydrocarbon-bearing rock formations within the Delaware River Basin. On March 10, 2021, DRN moved to dismiss the Complaint as moot and for lack of standing. *See* ECF No. 16.

On March 19, 2021, the Court permitted Senators Steve Santarsiero, Carolyn Comitta, Amanda Cappelletti, Maria Collett, Wayne Fontana, Art Haywood, Vince

Hughes, John Kane, Tim Kearney, Katie Muth, John Sabatina, Nikil Saval, Judy Schwank, Sharif Street, Tina Tartaglione, and Anthony Williams (“Senator Intervenors”) to intervene as defendants. *See* ECF No. 24.

On March 31, 2021, Plaintiffs filed their First Amended Complaint. *See* ECF No. 29. By the Court’s Order dated March 31, 2021, DRN’s Motion to Dismiss was denied as moot and all parties were directed to answer, move, or otherwise reply to Plaintiffs’ First Amended Complaint by April 15, 2021. *See* ECF No. 33.

III. STATEMENT OF FACTS

On July 7, 1961, the Commonwealth of Pennsylvania, by and through its legislative body, the 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* Delaware River Basin Compact, 32 P.S. § 815.101 (hereinafter, “Compact”) at § 1.3(a). This interstate and Federal 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 directed Commission staff to develop draft regulations to govern fracking operations for notice and comment rulemaking, and 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, this postponement amounted a moratorium on natural gas drilling in the 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 December 9, 2010, the Commission published draft regulations concerning fracked gas development, which were revised November 8, 2011. *See* Del. River Basin Comm’n, Proposed Amendments to the Water Quality Regulations, Water Code, and Comprehensive Plan to Provide for Regulation of Natural Gas Development Projects, 76 Fed. Reg. 295 (Jan. 4, 2011). On November 30, 2017, the Commission published a proposed amendment to its Special Regulations to prohibit high volume hydraulic fracturing (“fracking”) in shale and other rock formations in the Basin. *See* Del. River Basin Comm’n, Administrative Manual and Special

Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments, 83 Fed. Reg. 1586 (Jan. 12, 2018).

On February 25, 2021, the Commission adopted a final rule prohibiting fracking 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. That action withdrew the draft regulations published November 8, 2011, replaced 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.

The Commission’s prohibition was based on a determination

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

Id. at 10.

Plaintiffs’ First Amended Complaint seeks a declaration from this Court that “the Commission’s prohibition of the construction and operation of wells [for]

natural gas extraction violates the terms” of the Compact. Pls.’ 1st Am. Compl. at ¶ 2. Alternatively, if the prohibition is a valid exercise of the Commission’s authority, then Plaintiffs seek a “declaration that the prohibition 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’ amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis that the court lacks subject matter jurisdiction over Plaintiffs’ 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’ Amended Complaint should be dismissed for lack of subject matter jurisdiction because the Senate Plaintiffs lack standing to pursue their claims.

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).

It is appropriate to acknowledge the context of Senate Plaintiff’s claimed injury—Pennsylvania’s legislative body voluntarily voted in 1961 to join the Compact. Pennsylvania continues to exercise its authority through representation on the Commission in all matters properly brought before the Commission, including the prohibition on fracking, 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.’ 1st Am. Compl. at ¶¶ 84–85, 91, 103, 117, 122. 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. *Id.* at ¶ 94, 110–11. 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 (Counts I, III, and IV).

Senate Plaintiffs first allege that the Commission’s decision to prohibit fracking in the Basin “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.’ 1st Am. Compl. at ¶¶ 84–85; *see also id.* at ¶¶ 103, 117, 122. 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 prohibition on fracking “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.” *Id.* at ¶ 94.

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 prohibition 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).

Neither do Senate Plaintiffs “stand in privity of contract” to this action. *See* Pls. 1st Am. Compl. at ¶ 102. The Commonwealth of Pennsylvania is a party to the Compact, and on February 25, 2021, the Commonwealth of Pennsylvania voted, through its Commission representative, in favor of prohibiting fracking within the Basin. *See* Del. River Basin Comm’n, Res. 2021-01 (Feb. 25, 2021).

Second, Senate Plaintiffs fail to identify any specific legislative act nullified by the Commission's actions to support standing under the “vote nullification” theory. Instead, they generally describe the regulatory scheme governing natural gas extraction in the Commonwealth of Pennsylvania. *See* Pls.’ 1st Am. Compl. at ¶¶ 48–77. 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. Ams. 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.

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).

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 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 prohibition on fracking 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 (Count II).*

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.’ 1st Am. Compl. at ¶ 94, *see also id.* at ¶¶ 110–111. 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.

C. Plaintiffs’ Amended Complaint should be dismissed for lack of subject matter jurisdiction because Municipal Plaintiffs lack standing to pursue their claims.

Municipal Plaintiffs allege three injuries resulting from the Commission’s prohibition on fracking: (1) interference with the Municipal Plaintiffs’ “ability . . . to manage and act in the Trust’s best interests” and the inability to “exercis[e] their constitutionally imposed fiduciary duties relative thereto,” Pls.’ 1st Am. Compl. at ¶ 91; *see also* ¶ 122; (2) deprivation of the Municipal Plaintiffs’ “right to benefit from the Well Fund,” *id.* at ¶ 95; and (3) the inability of plaintiffs Wayne County and Damascus Township to “participat[e] in the Marcellus-related economic development made available to neighboring areas.” *Id.* at ¶ 55.

Municipal Plaintiffs’ 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. *Municipal Plaintiffs have not suffered injury to their ability to exercise their fiduciary duties imposed by Pennsylvania’s Environmental Rights Amendment (Counts I & IV).*

Municipal Plaintiffs claim that they have a fiduciary duty to prevent the diminution of the Lease Fund and the Marcellus Legacy Fund. Pls.’ 1st Am. Compl. at ¶ 76. They also allege that the prohibition “interferes with the ability of . . . Municipal Plaintiffs to manage and act in the Trust’s best interests and precludes them from exercising their constitutionally imposed fiduciary duties relative thereto.” *Id.* at ¶ 91. Accordingly, Municipal Plaintiffs allege that the Commission’s prohibition has “substantially diminished . . . the legislative and executive powers of Municipal Plaintiffs.” *Id.* at ¶ 122. Municipal Plaintiffs’ alleged injury to their ability to exercise their fiduciary duties is based on a misconception of what those duties are, as evidenced by their assertion that “[i]n order to prevent diminution of the Trust’s corpus, . . . Municipal Plaintiffs take reasonable steps *to increase the value of the Trust’s assets.*” *Id.* at ¶ 30 (emphasis added).

While local governments within the Commonwealth such as Municipal Plaintiffs do have the responsibility to act as trustees 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 Municipal Plaintiffs’ 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 Municipal Plaintiffs’ alleged injury.

The Municipal Plaintiffs’ 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 by extracting and selling off public natural resources, 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. “[T]he Environmental Rights Amendment mandates that the Commonwealth, as a trustee, ‘conserve and maintain’ our public natural resources *in furtherance of the people’s specifically enumerated rights*.” *PEDF II*, 161 A.3d at 934 (emphasis added). *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.

² The other basic duty imposed on the Township—which, from the face of Plaintiffs’ amended 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).

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 Municipal Plaintiffs’ allegations in the most favorable light, the complaint fails to allege an injury to their ability to exercise their fiduciary duties to conserve and maintain the public natural resources. Instead, the Municipal Plaintiffs complain of the inability to create profit from the public natural resources within their borders, exactly the type of arms’-length dealing that the Environmental Rights Amendment was designed to constrain. Accordingly, the Municipal Plaintiffs lack standing based on the claimed injury to its ability to exercise its duties as trustee.

2. The Municipal Plaintiffs’ inability to benefit from the Well Fund is not caused by the Commission’s prohibition (All Counts).

Municipal Plaintiffs also allege that they have suffered an injury by being deprived of the benefits of disbursements from the Well Fund. Pls.’ 1st Am. Compl. at ¶¶ 52–62, 95. These alleged injuries are not “fairly traceable” to the Commission’s prohibition. 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.’ 1st Am. Compl. at ¶¶ 52–55. *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.’ 1st Am. Compl. at ¶ 77. Plaintiffs do not allege that the Commission’s actions constrain this discretion.

Indeed, the Commission’s prohibition 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 Municipal Plaintiffs. 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 prohibition on fracking, breaks the causal chain to the point that Municipal Plaintiffs’ injuries are no longer fairly traceable to the Commission’s actions.

3. *Wayne County's and Damascus Township's alleged inability to participate in Marcellus-related economic development is too speculative to form a basis for relief (All Counts).*

Finally, Wayne County and Damascus Township allege that the Commission's moratorium and prohibition have "precluded [them] from participating in the Marcellus-related economic development made available to neighboring areas." Pls.' 1st Am. Compl. at ¶ 60. 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 Wayne County and Damascus Township seek to allege some harm beyond deprivation of money from the Well Fund, they ask this Court to draw an inference unsupported by the facts set forth in their amended 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 Wayne County and Damascus Township suffered an injury, this Court would be required to speculate as to what kind of economic development Wayne County and Damascus Township would have benefitted from but for the Commission's prohibition. However, factual allegations in a complaint "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, Wayne County and Damascus Township have 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’ Amended Complaint in its entirety.

Dated: April 15, 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*

CERTIFICATE OF SERVICE

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

Dated: April 15, 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*