



Green Amendment Victories
How Green Amendments Are
Recognizing & Protecting
Environmental Rights in PA & MT



Pennsylvania and Montana are the only two states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate inherent, inalienable and indefeasible rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in these two states, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

Delaware Riverkeeper Network v. Pennsylvania Dep’t of Env’tl. Prot.

No. 525 M.D. 2017, Not Reported in Atl. Rptr., 2018 WL 3554639 (Pa. Commw. Ct. July 25, 2018).

The Delaware Riverkeeper Network (DRN), Maya van Rossum - the Delaware Riverkeeper, and DRN Member Kathleen Stauffer filed a mandamus action seeking to compel the Pennsylvania Department of Environmental Protection (PADEP) to engage in environmental cleanup of the contaminated Bishop Tube Site. The plaintiffs brought claims under the Clean Streams Law, the Hazardous Sites Cleanup Act (“HSCA”), and the Environmental Rights Amendment.

The Bishop Tube site was/is a highly contaminated 13.7-acre parcel of land located in East Whiteland, Chester County, PA. PADEP was aware that the site had been seriously contaminated with Trichloroethylene (TCE), as well as other hazardous contaminants and heavy metals, since at least the early 1980s. TCE is a known carcinogen and has been shown to cause “cancers of the kidneys, liver, and blood, as well as numerous other illnesses ranging from

headaches, dizziness, and sleepiness to facial nerve damage, irregular heartbeat, kidney and liver damage, coma, and death”. In seeking to describe the high levels of contamination at the site, the Commonwealth Court of Pennsylvania explained: “the statewide health standard for acceptable TCE concentration in groundwater is five parts per billion, but the concentration at and near the Bishop Tube Site is ‘in the hundreds of thousands.’”

In 2005, DEP entered into an agreement with Constitution Drive Partners, a commercial developer, that protected the developer from legal action after undertaking minimal clean-up activities at the site and pursuing a non-residential development project. While Constitution Drive Partners installed the agreed upon remediation system, the system was quickly damaged and made inoperable in 2011 by the developer’s contractor. In 2014 DEP notified Constitution Drive Partners that this damage violated and invalidated terms of their agreement and had potentially exacerbated contamination at the site. PADEP took no action to enforce/secure cleanup or remediation of the site by the developer. PADEP took no action to oppose the developer’s change of his development from commercial to residential, including the construction of hundreds of residential homes. No further action was ordered or undertaken for cleanup of the site either by the developer or responsible parties. The failure to secure cleanup of site contamination has resulted in a pollution plume allowed to spread beyond the boundaries of the Bishop Tube site. Amongst other impacts, the expanding pollution plume has impacted groundwater and a state designated Exceptional Value Stream named Little Valley Creek.

Over the years additional information was secured documenting the dangerous site conditions. By 2008 it was determined that PADEP had enough information to support a start of site cleanup. In 2009, rather than order responsible parties to begin cleanup, PADEP ordered more site investigation.

DRN claimed that PADEP had exhibited "manifest neglect and dilatory conduct" for at least 17 years, by failing to undertake or require remediation of contamination at the Site. DRN asserted that there were immediate and interim remedial actions available to address contamination at the site. With regards to the Environmental Rights Amendment DRN claimed the “Amendment imposes an affirmative fiduciary duty on DEP to preserve and maintain natural resources, including pure water .. and contends DEP violated

that duty by failing to undertake remediation and by failing to timely disclose information to the public concerning the Site.”

DEP filed preliminary objections, alleging that the Court lacked jurisdiction, that DRN lacked standing, and that DEP’s “pending federal lawsuit against some potentially responsible third parties” barred DRN’s lawsuit. The Court rejected all of DEP’s claims.

On standing, the Court relied in part on the Robinson Twp, Delaware Riverkeeper Network v. Commonwealth, 83 A.3d 901 (Pa. 2013), case to find standing and confirm that an environmental organization such as DRN is entitled to bring an action based on threatened injury to its organization members. The Court also found standing under HSCA.

In regard to DRN’s ability to bring a mandamus action to secure performance of a mandatory, non-discretionary duty, DEP openly admitted the following:

“Significantly, DEP acknowledges it does have some non-discretionary duties under the HSCA, the Clean Streams Law, and the Environmental Rights Amendment. Specifically, DEP admits that HSCA imposes a mandatory duty to develop programs to investigate and remediate contamination by hazardous substances. It admits the Clean Streams Law imposes a mandatory duty to receive and act on complaints of water pollution and other violations. **It admits the Environmental Rights Amendment imposes a mandatory duty to prevent degradation of the environment and to serve as a trustee for Pennsylvania’s natural resources.**” (emphasis added)

After conceding that a “mandamus claim will lie where a state actor has done nothing or “virtually” nothing toward performing a mandatory duty,” PADEP asserted that it had performed its mandatory duties by “diligently” pursuing remediation efforts since 1981. By contrast, DRN asserted through evidence and facts that PADEP had performed “virtually no substantive cleanup work on the Site.” The court noted that it was a question of fact whether PADEP had

been diligent in its efforts with regards to the site. As a result, this question of fact could not be resolved at this preliminary level of the case.

Notably, the Court rejected PADEP's attempt to distinguish "doing nothing" from "doing almost nothing" as hair-splitting. It further determined/noted that DRN did not seek to compel any particular result, but merely that PADEP act to fulfill its legal obligations. Thus, DRN's mandamus claims were proper. The Court further determined that there were no alternative remedies available that would address DRN's claims - other than a decision that PADEP needed to take action to address contamination at the site. Ultimately, after disposing of all of PADEP's preliminary objections, the court ordered the DEP to file an answer within 30 days of the Court's order in the decision.

This case, based on mandamus and the Environmental Rights Amendment, demonstrates that mandamus against governmental entities is a viable cause of action when chronic inaction infringes on protected environmental rights and public natural resources.

Notably in this case, rather than seeking that a discrete and/or specific type of action be ordered/undertaken, the plaintiffs sued only one agency, and simply sought that the agency act in accordance with its mandatory constitutional duties. Because the Environmental Rights Amendment does not itself specify the specific action(s) a governmental entity must take in order to protect clean air, water, and other aspects of a healthy environment; this case helps confirm that mandamus actions seeking compliance with the duties articulated in the Environmental Rights Amendment will have a greater likelihood of success when the plaintiff does not request any particular form or type of action in order to secure compliance.

However, DEP argued it had taken some action since 1981 to remediate the site. Even if it was taking a long time. Although, DEP did admit "the Environmental Rights Amendment imposes a mandatory duty to prevent degradation of the environment and to serve as a trustee for Pennsylvania's natural resources". *Id* at 6. The Commonwealth Court noted that "DEP did not take any emergency interim action" even though effective measures were available at the time. HSCA even "provides for implementing such measures." *Id* at 9. DEP had the tools, but avoided the repair.

DEP told the court it did not violate the Environmental Rights Amendment because it was also taking action to identify third parties—those who originally contaminated the site—for cleanup. DEP argued this action was enough to show they were working to clean up the site. The court disagreed. The Environmental Rights Amendment “contains no language that would preclude legal action because of DEP’s alleged diligence in pursuing enforcement action against third parties”. *Id.* This made the argument of whether DEP took enough action “an issue of fact”. Riverkeeper pointed out DEP’s failure to remediate the site in two decades could be found a failure to comply with their constitutional obligations under the Environmental Rights Amendment. This argument was sufficient for the court overrule DEP’s objection to the claim.

For the court to rule that DEP took enough action to comply with the Environmental Rights Amendment further litigation would be required. The court overruled all of DEP’s objections and ordered they file an answer to the Petition for Review within 30 days. The case is ongoing.