



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



**GREEN AMENDMENTS
FOR THE GENERATIONS**
Pure Water, Clean Air, Healthy Environment.

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, infeasible and inalienable 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.

Ctr. for Coalfield Justice v. DEP
2017 EHB 799.

(As described on their website, the Pennsylvania Environmental Hearing Board (EHB) “hears appeals from actions of the Pennsylvania Department of Environmental Protection. The Board holds hearings and issues Adjudications, Opinions, and Orders. Hearings before the Board are similar to non-jury civil trials before Common Pleas Courts or Federal District Courts. Appeals from Board decisions are taken to the Commonwealth Court of Pennsylvania.)

Two community organizations challenged to the Environmental Hearing Board (EHB) two longwall coal mining panel permits that the Pennsylvania Department of Environmental Protection (PADEP) issued for mining near Ryerson Station State Park. Longwall coal mining is a highly-mechanized form of underground coal mining in which a machine shears the coal off the mine face. As the machine advances forward, the ground above where the coal used to be falls due to lack of support, causing subsidence. This subsidence has damaged homes, water wells, and streams, including leading to complete flow loss in some streams.

The community organization appellants contended that mining the two approved longwall panels would result in damage to streams and violated Pennsylvania mining laws, water quality laws, and the Environmental Rights Amendment. The EHB ultimately found in favor of the appellants as to one of the longwall panels (i.e. one of the two permit revisions being

contested). This was significant because it meant that the PADEP could no longer approve longwall mining where mining was predicted to cause so much damage to the stream that the only “remediation” method was to destroy the existing streambed and “rebuild” it, effectively eliminating the stream as it previously existed. The EHB noted that heavy construction for multiple months was required to build a new stream, with significant disruption and/or elimination of pre-mining habitat and aquatic life. The EHB’s ruling that such an approval violated the Clean Streams Law and the Environmental Rights Amendment was an important step to protecting streams in counties where longwall mining occurs.

As to one of the longwall panels and its complete destruction of the stream above it, the EHB did not have to delve significantly into the Environmental Rights Amendment’s standards because it found that the PADEP’s approval violated the Clean Streams Law. The EHB noted that while compliance with regulation and statute does not defacto assure compliance with the constitutional obligation; when issuing a permit the opposite is true - a failure to comply with state statutes and regulations intended to protect the natural resources of the state does result in a violation of Article 1 Section 27:

“At a minimum, a Department permitting action that is not lawful under the statutes and regulations in place to protect the waters of the Commonwealth, cannot be said to meet the Department’s trustee responsibility under Article I, Section 27 and is clearly a state action taken contrary to the rights of citizens to pure water.”

As a result the EHB determined Permit Revision 189 was unlawful including for its failure to meet the mandates of Article 1 Section 27.

As to the second longwall panel and stream damage, the EHB undertook a more significant analysis of Article 1 Section 27 and delved into the plain language of Environmental Rights Amendment. The EHB relied on the two Pennsylvania Supreme Court cases to guide its analysis: Robinson Township, Delaware Riverkeeper Network v. Commonwealth, 83 A.3d 901 (Pa. 2013) and PEDF v. Commonwealth, 161 A.3d 911 (Pa. 2017):

“The Supreme Court, ... held that Section 27 grants two separate rights to the people of Pennsylvania. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state’s power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania’s public natural resources. The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries. “

“The Supreme Court ... next turns its attention to defining the Commonwealth’s responsibilities as trustee. After discussing private trust law principles, it finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties and 2) act affirmatively via legislative action to protect the environment. The Supreme Court further states that although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate ‘to mere subjective judgment.’ The trustee may use the assets of the trust ‘only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interest of the beneficiaries.’

Noting that these previous Supreme Court cases dealt with legislative action, the EHB then explored the differences in applying Article 1 Section 27 in the permitting context.

With regards to the second permit revision at issue the EHB quotes the Supreme Court plurality in the Robinson Twp, Delaware Riverkeeper Network case asserting that among the obligations created by Article 1 Section 27 is for “each branch of the government to ***consider in advance of proceeding the environmental effect*** of any proposed action on the constitutionally protected features.” *(emphasis added)*.

The EHB also considers the Supreme Court guidance that Article 1 Section 27 was not intended to create a stagnant landscape that would prevent all environmental impact, but instead quotes the Supreme Court perspective “that to achieve recognition of the environmental rights found in the first clause of Article I, Section 27, ‘necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment’” and again emphasizes the focus on “***preventing*** the government from taking actions that cause unreasonable degradation or deterioration of the air and water and other environmental interests enumerated” *(emphasis added)*.

The EHB focused its decision regarding the validity of the second permit revision on “whether the Department considered the environmental effects of its permitting action and whether that action is likely to cause, or in fact did cause, the unreasonable degradation or deterioration of the waters of the Commonwealth....” Because the EHB determined that PADEP did give extensive, serious and information-driven consideration to the environmental effects of its permit decision prior to taking the permit action the EHB determined that PADEP had fulfilled its obligation for engaging in informed decisionmaking. This assessment reinforces the perspective that Article 1 Section 27 requires a pre-action analysis to support government decisionmaking.

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¹ Delaware Riverkeeper Network has argued that a pre-action analysis must take into account local conditions and must involve science and public health expertise and/or research in order to truly inform a governmental entity about what the short-term, long-term and cumulative impacts of a proposed action will be on the local environment, and present and future generations.

In addition, the EHB confirmed its own determination that given the localized and temporary nature of the resulting environmental impacts that would result from the second permit revision, the permit revision “did not cause the unreasonable degradation or deterioration of the waters of the Commonwealth in the permit area.” As a result, Permit Revision 180 did not result in a constitutional violation.

The EHB also confirmed that streams are “public natural resources” under the Environmental Rights Amendment, and recognized that statutory and regulatory compliance is not coextensive with constitutional compliance. In addition the EHB recognized that pursuant to Article 1 Section 27 “The Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from ***direct state action or the actions of private parties.***” (emphasis added).

The permittee appealed the ruling to the Commonwealth Court, but discontinued its appeal in January 2018.