March, 2012, the Delaware Riverkeeper Network, seven municipalities, and Dr. Mehernosh Khan filed legal action challenging Act 13, which was signed into law by Governor Corbett on February 14, 2012. Act 13 amended the Pennsylvania Oil and Gas Act, and among other things, preempted municipal zoning of oil and gas development. The plaintiffs challenged the new law on the grounds it violated the Pennsylvania and Constitution and endangered public health, natural resources, communities and the environment. On December 19, 2013, the Pennsylvania Supreme Court issued a final decision declaring portions of the law unconstitutional, giving the Environmental Rights Amendment of the Pennsylvania Constitution strong substantive importance, and remanding portions of the law for additional litigation. Since issuance of the PA Supreme Court decision there have been many questions asked about the substance, meaning and application of this precedent setting decision. The Delaware Riverkeeper Network and our legal counsel are working to answer these important questions for the community in a series of FAQ information sheets.

The Pennsylvania Supreme Court’s decision in Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (2013), reinforced that municipalities can validly zone oil and gas operations like any other industrial use. If a municipality has a zoning ordinance in place that identifies specific districts where this industrial activity is allowed, the municipality cannot allow drilling to occur where it is not permitted, even if a gas drilling company has a lease and even if the company has a permit from the Pennsylvania Department of Environmental Protection (“DEP”).

In addition, when carrying out governmental functions, municipalities must comply with Article I, Section 27 of the Pennsylvania Constitution. This means that municipalities are restrained from unduly infringing on the individual environmental rights of citizens, just as municipalities may not unduly infringe on private property rights. Thus, municipalities cannot allow unchecked shale gas development at the expense of citizens’ rights to clean air, pure water and a healthy environment.

Citizens who have been trying to protect their communities from unreasonable expansion of industrial gas development have confronted opposition from those who place corporate profits above public health and welfare. We hope that this series of FAQ responses helps strengthen community understanding of the PA Supreme Court decision.
What does the Pennsylvania Constitution say about environmental rights?

Article I, Section 27 of the Pennsylvania Constitution states:

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.

In interpreting the plain language of Section 27, the Pennsylvania Supreme Court has explained that Section 27 has two components that may overlap at times. The first component is that of individual environmental rights, while the second is the public trust. We summarize each below.

a) Individual Environmental Rights

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. – Art. 1, Sec. 27, cl.1

The first clause of Section 27 is a statement that the Pennsylvania Constitution protects individual environmental rights from governmental infringement. The term “the people” translates to a right “personal to each citizen,” just as Article I, Section 8 has been interpreted to mean an individual right of privacy. Id. at 951 n.39. Thus, each citizen has an individual right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. The Pennsylvania Constitution protects these rights in the same way as all other inherent rights enshrined in Article I, including the right to free speech and property rights. Id. at 953-54

“The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.” Id. at 952 (emphasis added). In other words, Section 27 protects individual environmental rights from undue governmental infringement, just like other rights such as free speech, due process, and property rights.

b) Public Trust

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. Art. I, Sec. 27, cls. 2 & 3.

Section 27 recognized a public trust over Pennsylvania’s public natural resources, and charged the Commonwealth and its political subdivisions, as trustees. Id. at 951-52, 956-57, 977-78. As trustees, state and local governments are constrained to conserve and maintain public natural resources for the benefit
of all Pennsylvania citizens, including generations yet to come. Id. at 954-59. Public natural resources, which form the body or corpus of the trust, include both publicly-owned resources such as state forest lands and local parks, and “those resources not owned by the Commonwealth, which involve a public interest,” which might include resources like groundwater. 1970 Pa. Legislative Journal-House, at 2271-72; see also Robinson Twp. 83 A.3d at 955.

As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. Id. at 956-57, 977-78. (plurality). “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” Id. at 957. Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 prohibits government:

from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.

Id. (emphasis added). Section 27 also requires government “to act affirmatively to protect the environment, via legislative action.” Id. at 958.

As to present and future Pennsylvanians, who are the beneficiaries of Section 27’s public trust, state and local governments have fiduciary duties “to deal impartially with all beneficiaries and, second, . . . to balance the interests of present and future beneficiaries.” Id. at 959. The duty of impartiality “means that the trustee must treat all equitably in light of the purposes of the trust,” which can touch on “questions of access to and distribution of public natural resources.” Id. Further, to treat present and future beneficiaries equitably means to balance their interests; in other words, “the trustee cannot be shortsighted.” Id. at 959 (plurality).