Received 4/2/2021 4:12:19 PM Supreme Court Middle District

Filed 4/2/2021 4:12:00 PM Supreme Court Middle District
38 MM 2021

IN THE SUPREME COURT OF PENNSYLVANIA

No.: _____ Allocatur Docket 2021

DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM,
Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA AND ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents.

PETITION FOR PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER

Petition for Permission to Appeal from the interlocutory Order of the Commonwealth Court of Pennsylvania entered January 12, 2021, under No. 285 M.D. 2019, sustaining Respondents' Preliminary Objections in part and Dismissing Counts I and II of Petitioners' Petition.

Kacy C. Manahan, Esquire
Pa. Atty. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188 x115
kacy@delawareriverkeeper.org

Attorney for Petitioners

Dated: April 2, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this Petition pursuant to Section 702(b) of the Judicial Code, 42 Pa. C.S. § 702(b). On February 11, 2021, Petitioners filed an application for an amendment of the Commonwealth Court's January 12, 2021 Order to set forth expressly the statement specified in 42 Pa. C.S. § 702(b).

That application was denied by order of the Commonwealth Court on March 3, 2021. Accordingly, this Petition for Permission to Appeal from an Interlocutory Order is filed pursuant to the provisions of Pennsylvania Rule of Appellate Procedure 1311(a)(1).

TEXT OF THE ORDER IN QUESTION

The Order of the Commonwealth Court of Pennsylvania entered January 12, 2021 at No. 285 M.D. 2019 provides in relevant part as follows:

> AND NOW, this 12th day of January, 2021, upon consideration of Respondents' preliminary objections, the preliminary objections are SUSTAINED, IN PART, and OVERRULED, IN PART, as follows:
>
> 1. Respondents' preliminary objections in the nature of a demurrer to Counts I and II of the Petition are SUSTAINED, and Counts I and II of the Petition are DISMISSED.

A copy of the Commonwealth Court's January 12, 2021 memorandum opinion and order, is appended to this Petition at Appendix A.

STATEMENT OF THE CASE

1. Perfluorooctanoic Acid ("PFOA") and other per- and poly-fluoroalkyl substances ("PFAS") are toxic, synthetic compounds that persist for many years in the human body once ingested and, even at very low levels, have been linked with significant health consequences including, among others, kidney cancer, testicular cancer, thyroid disease, high cholesterol, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis.

2. The Delaware Riverkeeper, Maya van Rossum, and Delaware Riverkeeper Network (collectively, "Petitioners") have actively worked to bring the human health and environmental harms caused by PFAS to the public's attention, submitting technical information and both scientific and policy analysis through comments, testimony, and correspondence to government agencies since 2005.

3. PFOA is significantly elevated in many Bucks and Montgomery County water supplies, affecting approximately 84,000 residents of the Commonwealth. In Warminster, for example, a municipal well tested at 1,440 parts per trillion, whereas a "safe" maximum contaminant level, per scientific evidence, is between 1 parts per trillion an 6 parts per trillion—over 200 times lower than the tested well.

4. In 2014, numerous public and private wells in Horsham, Warrington, and Warminster Township were closed down due to PFOA levels recorded in the

Water. Pennsylvania Department of Environmental Protection ("DEP") and the Environmental Quality Board of the Commonwealth of Pennsylvania ("EQB") (collectively, "Respondents"), therefore, have been aware of the issue for years.

5. On May 8, 2017, the Delaware Riverkeeper Network ("DRN") petitioned Respondents to exercise their authority under the Pennsylvania Safe Drinking Water Act and establish a maximum contaminant level for PFOA in drinking water in Pennsylvania between 1 parts per trillion and 6 parts per trillion.

6. At an Environmental Quality Board meeting on August 15, 2017, DEP officials represented that DEP would produce and present a report on the Rulemaking Petition no later than June 2018. No such report was ever produced or presented.

7. Respondents failed to take steps necessary to protect health and to prevent degradation of the environment by refusing to regulate PFAS in drinking water. In particular, the DEP failed and refused to propose and seek to establish a maximum contaminant level ("MCL") for PFOA to ameliorate the known risks from contaminants entering the water system.

8. On May 5, 2019, Petitioners sought review in the Commonwealth Court in the nature of an action for injunctive and declaratory relief pursuant to the Citizen Suit Provision of the Safe Drinking Water Act, 35 P.S. § 721.13(b), and the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania

Constitution. The first Amended Petition for Review was subsequently filed on July 11, 2019.

9. Respondents filed preliminary objections and following oral argument, on January 12, 2021, the Commonwealth Court issued an order sustaining in part, and overruling in part, Respondents' preliminary objections. The Commonwealth Court dismissed Counts I and II of Petitioners' petition and granted leave to Petitioners to amend the portion of Count III of the petition concerning its claims for fees and costs.

10. On February 11, 2021, Petitioners filed their Second Amended Petition for Review in accordance with the Court's Order.

11. Also on February 11, 2021, Petitioners filed an Application for Amendment of the Court's January 12, 2021 Order pursuant to Pennsylvania Rule of Appellate Procedure 1311 to expressly state that the Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter" pursuant to 42 Pa. C.S. § 702(b).

12. After Respondents filed a Response to the Application for Amendment, the Commonwealth Court issued an Order, dated March 3, 2021, denying Petitioners' Application for Amendment.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Commonwealth Court err in ruling that DEP's failure to evaluate a petition to establish a MCL was within its discretion under the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1–.17?

Suggested Answer: Yes. *Answer Below: No.*

2. Did the Commonwealth Court err in relying on *Funk v. Wolf*, 144 A.3d 228 (Commw. Ct. 2016) in ruling that an agency's mandatory duties under Article I, Section 27 of the Pennsylvania Constitution (Environmental Rights Amendment) depend on whether the General Assembly articulated those duties in a statute, despite this Court's holding in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), that all agencies and entities of the Commonwealth are trustees under the Environmental Rights Amendment with fiduciary duties to act toward the corpus of the trust with prudence, loyalty, and impartiality, and that the Environmental Rights Amendment is self-executing?

Suggested Answer: Yes *Answer Below: No*

3. Did the Commonwealth Court err in failing to recognize that a breach of the Respondents' duties under Section 1920-A of the Administrative Code of 1929, 71 P.S. § 510-20, to respond to a rulemaking petition could also provide a basis for finding that Respondents breached their fiduciary duties under the Environmental Rights Amendment?

Suggested Answer: Yes *Answer Below: No*

STATEMENT OF REASONS FOR AN IMMEDIATE APPEAL

When filing for permission to appeal an interlocutory order for which certification pursuant to 42 Pa. C.S. § 702(b) was denied, Petitioners are required to demonstrate three things. It must first be shown that the interlocutory order meets the 42 Pa. C.S. § 702(b) criteria. In other words, that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." *Id.* Petitioners must further establish that the Commonwealth Court's refusal of the certification was an abuse of the court's . . . discretion so egregious as to justify prerogative appellate correction. Pa. R.A.P. 1312(a)(5)(ii).

A. The Interlocutory Order Involves a Controlling Question of Law as to Which There is Substantial Ground for Difference of Opinion.

The Commonwealth Court's January 12, 2021 Order involves no less than three controlling questions of law as to which there is substantial ground for difference of opinion.

1. DEP's Mandatory Duties Under the Pennsylvania Safe Drinking Water Act

First, the question of whether DEP's failure to evaluate a petition to establish a MCL was within its discretion under the Pennsylvania Safe Drinking Water Act,

35 P.S. §§ 721.1–.17, is a controlling question of law as to which there is substantial ground for difference of opinion. Respondents argued below, and the Commonwealth Court agreed, that although Section 5 of the Safe Drinking Water Act imposed a nondiscretionary duty to "adopt and implement a public water supply program," including maximum contaminant levels, Respondents fulfilled that duty in 1985 when U.S. EPA found DEP's water supply program adequate for the state to assume primary enforcement responsibilities under the Federal Safe Drinking Water Act. *See* Appendix A at 10. Previous judicial interpretation of statutory mandates similar to that found in Section 5 of the Safe Drinking Water Act,[1] however, is at odds with the interpretation employed by the Commonwealth Court in its January 12, 2021 Order, demonstrating substantial ground for difference of opinion.

Based on the use of "*includes but is not limited to* those program elements necessary to assume State primary enforcement responsibility under the Federal act," the duty imposed under Section 5 of the Safe Drinking Water Act represents a floor and not a ceiling. (emphasis added). This Court has explained:

---

[1] "State to assume primary enforcement.--The department shall adopt and implement a public water supply program which includes, but is not limited to, those program elements necessary to assume State primary enforcement responsibility under the Federal act. The public water supply program shall include, but not be limited to, maximum contaminant levels or treatment technique requirements establishing water quality standards. . .." 35 P.S. § 721.5(a).

> [T]he term "include" is "to be dealt with as a word of 'enlargement and not limitation,'" ... this [is] "especially true" when followed by the phrase "but not limited to."
>
> . . . .
>
> [T]he introductory verbiage "including, but not limited to," generally reflects the intent of the legislature to broaden the reach of a statute, rather than a purpose to limit the scope of the law to those matters enumerated therein.

Dechert, LLP v. Commw., 998 A.2d 575, 580–81 (Pa. 2010) (quoting *Pa. Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n*, 306 A.2d 881, 885 (Pa. 1973)); *Dep't of Envtl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014) (finding the general term "including" or "including but not limited to" means the list is not meant to be exhaustive so long as the other items are within the same general class). Thus, when reading the powers and duties contained in Section 5 of the Safe Drinking Water Act in conjunction with the General Assembly's declaration that the Safe Drinking Water Act's purpose is to further the intent of the Environmental Rights Amendment of the Pennsylvania Constitution by "establishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards," 35 P.S. § 721.2(b)(1), it is clear that the legislative intent behind granting the broad powers under Section 5 of the Safe Drinking Water Act is directly at odds with the Commonwealth Court's narrow reading of the statute.

2. *Respondents' Independent Duties Under the Environmental Rights Amendment*

Second, the question of whether an agency's mandatory duties under the Environmental Rights Amendment depend on the General Assembly's articulation of those duties in a statute, or whether all agencies and entities of the Commonwealth are trustees under the self-executing Environmental Rights Amendment with fiduciary duties to act toward the corpus of the trust with prudence, loyalty, and impartiality, is a controlling question of law as to which there is substantial ground for difference of opinion. Relevant and governing law contradicts the legal conclusions contained in the Commonwealth Court's January 12, 2021 Order concerning the Environmental Rights Amendment.

This Court has found, and subsequently affirmed, that the Environmental Rights Amendment places an affirmative duty on the Commonwealth and all its agencies and entities, including DEP, to "prevent and remedy the degradation, diminution, or depletion of our public natural resources" and to act towards those resources "with prudence, loyalty, and impartiality." *Pa. Envtl. Def. Found.v. Commw.*, 161 A.3d 911, 931 n.23, 932 (Pa. 2017) (quoting *Robinson Twp. v. Commw.*, 83 A.3d 901, 956–57 (Pa. 2013) (plurality)). This Court has also conclusively established that the Environmental Rights Amendment is self-executing. *See id.* at 936–37. Thus, DEP's failure to act in accordance with its constitutionally-imposed fiduciary duties, independent of any statutory provision

requiring it to do so, can provide the basis for a violation of the Environmental Rights Amendment.

The Commonwealth Court's reasoning in support of its January 12, 2021 order flies in the face of this established understanding of the Environmental Rights Amendment. The Commonwealth Court concluded that because "the relevant statute, which embodies the General Assembly's judgment about the Agencies' duties under the Environmental Right Amendment, does not require the action sought in the Petition," then "the amendment itself does not require that action." *See* Appendix A at 18.

The Commonwealth Court's error is two-fold: (1) it inaccurately found that Petitioners did not state an independent basis for the duty under the Environmental Rights Amendment,[2] and (2) its continued reliance on *Funk*, which, based on the overruled *Payne v. Kassab*[3] test, held that agencies' Environmental Rights Amendment duties are necessarily defined by the environmental statute relevant to the claim at hand, here, the Pennsylvania Safe Drinking Water Act.

---

[2] Paragraph 114 of Petitioners' Amended Petition for Review, attached hereto at Appendix C, claims that DEP's failure to timely evaluate DRN's Rulemaking Petition or otherwise propose an MCL to respond to the health risk posed by PFOA contamination is a violation if its Constitutional obligations, independent of the Safe Drinking Water Act's requirements.

[3] 312 A.2d 86 (Pa. Commw. Ct. 1973), *overruled by Pa. Envt'l Def. Found. v. Commw.*, 161 A.3d 911 (Pa. 2017).

3. *Respondents' Failure to Comply with the Administrative Code of 1929 as a Basis for an Environmental Rights Amendment Claim.*

Finally, the question of whether a breach of the Respondents' duties under Section 1920-A of the Administrative Code of 1929 to respond to a rulemaking petition could also provide a basis for finding that Respondents breached their fiduciary duties under the Environmental Rights Amendment is a controlling question of law as to which there is substantial ground for difference of opinion.

Although it is this Court's precedent that the Environmental Rights Amendment is self-executing, even if the Commonwealth Court's argument that the trustee duties must be grounded in statute, it already found a statutory obligation imposed on DEP to respond to the Rulemaking Petition. The Commonwealth Court determined, and Petitioners agree, that Section 1920-A of the Administrative Code of 1929 imposes a mandatory duty on the Agencies to respond to a Rulemaking Petition like the one submitted by Petitioners in 2017, concluding that, "unlike in *Funk*, [here] there is a statutory source of obligation on which to base declaratory relief." Appendix A at 23.

The Commonwealth Court dismissed the Environmental Rights Amendment claims first because it failed to recognize that the Environmental Rights Amendment is self-executing, and second because it found that the statute (referring to the Safe Drinking Water Act) it believed necessary to support the constitutional claim did not require the action sought in the Petition, and thus the Environmental Rights

Amendment could not require that action. Turning to the Amended Petition, however, the relief requested by Petitioners was the issuance of an Order requiring DEP to comply with its obligations "by promptly issuing the DEP Report in response to DRN's [Rulemaking] Petition." Appendix C at 27. This is the same action that is required by Section 1920-A of the Administrative code of 1929. Therefore, DEP's failure to comply with the mandatory duty of Section 1920-A of the Administrative Code of 1929 supports an Environmental Rights Amendment claim under the Commonwealth Court's own reasoning.

Here, it is abundantly clear that the Commonwealth Court's January 12, 2021 Order involves multiple controlling questions of law as to which there is substantial ground for difference of opinion.

B. An Immediate Appeal from the Order May Materially Advance the Ultimate Termination of the Matter.

An immediate appeal on the issues presented in the instant petition would materially advance the ultimate termination of this matter in a more expedient manner than denying such opportunity. A determination by the Supreme Court as to the issues presented in the "Questions Presented for Review" section, *supra*, as well as the subsidiary issues comprised therein and outlined in Section A above, will necessarily inform Respondents of their duty to take the action sought by Petitioners in filing the initial Petition in the Commonwealth Court. Not only would this

materially advance the ultimate termination of the matter, but it would also advance the interests of both judicial economy and public health.

C. The Commonwealth Court's Refusal of Certification was an Abuse of the Court's Discretion That is so Egregious as to Justify Prerogative Appellate Correction.

Each of the three issues presented in the controlling questions of law section are questions of law, not fact. As such, the Commonwealth Court committed egregious error in its refusal to certify and amend its January 12, 2021 Order to state that the Order involves "controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. C.S. § 702(b). The failure to adhere to the governing precedent of this Court and the inherent contradictions contained within the Commonwealth Court's January 12, 2021 decision would benefit from the Supreme Court's guidance, also rendering the Court's refusal to certify its Order for review an abuse of the Court's discretion so egregious as to justify prerogative appellate correction.

Further, the lower Court's inaccurate application of the constitutional duties imposed upon Respondents through the Environmental Rights Amendment, and continued reliance on *Funk's* application of the *Payne v. Kassab* test, represents a clear misunderstanding of the law by the Commonwealth Court. "Notwithstanding the lower tribunal's refusal or failure to certify its interlocutory order pursuant to 42

Pa. C.S. § 702(b), appellate courts have permitted interlocutory appeals from orders that address and resolve *unsettled and important issues* of law." 20 G. Ronald Darlington *et al*, *West's Pa. Prac., Appellate Practice* § 1312:4.7 (2020) (emphasis added).

In spite of this Supreme Court's affirmation of the duties imposed upon the Commonwealth and its agencies under the Environmental Rights Amendment, the Commonwealth Court continues to misinterpret the Environmental Rights Amendment and its mandates. Not only does this result in the muddying of legal precedent, but it works to deprive the people of the Commonwealth of their constitutionally-guaranteed right to seek redress in court as enshrined in the Environmental Rights Amendment—a right that is on par with other fundamental and dearly held civil rights. *Robinson Twp., Washington County v. Commw.,* 83 A.3d 901, 947–48 (Pa. 2013). The Commonwealth Court would benefit greatly from the additional guidance that this Supreme Court could provide on this unsettled and important issue of law.

Finally, and perhaps most importantly, failure to grant this petition for permission to appeal the Commonwealth Court's interlocutory order only serves to delay the inevitable appeal of a final order and will result in an injustice that no later appeal can correct. Any additional delay in this matter necessarily results in exacerbating the already-prolonged exposure to PFOA experienced by residents of

the Commonwealth as a direct result of Respondents' inaction. Many of these communities, as identified on Respondents' website, also happen to be environmental justice communities that already suffer disproportionately from cumulative environmental harms. Appendix C at ¶ 32. This prolonged exposure will also continue to impact infants, children and pregnant women, vulnerable populations that are known to be at increased risk to the dangers of PFOA. *See* Appendix C at ¶¶ 27, 37-40.

Thus, when taken as a whole, the Commonwealth Court's refusal of certification of its January 12, 2021 interlocutory order was an abuse of discretion so egregious as to justify prerogative appellate correction.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for Permission to Appeal the Commonwealth Court's January 12, 2021 Order pursuant to Pa. R.A.P. 1311(a)(1).

Respectfully submitted,

Date: April 2, 2021

/s/ Kacy C. Manahan
Kacy C. Manahan, Esquire
Attorney Id. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007

(215) 369-1188 x115
kacy@delawareriverkeeper.org

Attorney for Petitioners

CERTIFICATE OF COMPLIANCE PURSUANT TO Pa. R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

Date: April 2, 2021

/s/ Kacy C. Manahan
Kacy C. Manahan, Esquire
Attorney Id. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188 x115
kacy@delawareriverkeeper.org

Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Kacy C. Manahan, hereby certify that on April 2, 2021, the foregoing Petition for Permission to Appeal Interlocutory Order was served upon the following by electronic service and email:

Brian G. Glass, Esq.
briaglass@pa.gov

Alexandra C. Chiaruttini, Esq.
achiarutti@pa.gov

Attorneys for Respondent Pennsylvania Department of Environmental Protection

Robert A. Reiley, Esq.
rreiley@pa.gov

Attorney for Respondent Pennsylvania Environmental Quality Board

Date: April 2, 2021

/s/ Kacy C. Manahan
Kacy C. Manahan, Esquire
Attorney Id. No. 329031
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188 x115
kacy@delawareriverkeeper.org

Attorney for Petitioners

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum, Petitioners	:	
v.	:	No. 285 M.D. 2019
	:	Argued: September 15, 2020
Pennsylvania Department of Environmental Protection of the Commonwealth of Pennsylvania and Environmental Quality Board of the Commonwealth of Pennsylvania, Respondents	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge[1]
HONORABLE ANNE E. COVEY, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: January 12, 2021**

Before the Court in our original jurisdiction are the amended preliminary objections of the Pennsylvania Department of Environmental Protection (DEP) and the Environmental Quality Board (EQB) (collectively, the Agencies[2]) to an amended

---

[1] This case was assigned to the opinion writer prior to January 4, 2021, when Judge Brobson became President Judge.

[2] In *Arsenal Coal Co. v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984), the Pennsylvania Supreme Court explained:

petition for review (Petition) filed by the Delaware Riverkeeper Network (DRN) and Maya van Rossum, who is the Delaware Riverkeeper and executive director of DRN, (collectively, Riverkeeper). Riverkeeper filed the Petition in the nature of a mandamus action, seeking declaratory and injunctive relief to compel DEP to respond to a petition for rulemaking that Riverkeeper submitted to the Agencies (Rulemaking Petition). For the reasons set forth below, we sustain, in part, and overrule, in part, the Agencies' preliminary objections.

I. BACKGROUND

In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the Petition and any reasonable inferences that we may draw from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). The Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the complaint. *Id.* We may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and we must resolve any doubt in favor of the petitioner. *Id.* "We review preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted." *Armstrong Cnty. Mem'l Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

> The environmental law of this Commonwealth is administratively regulated by three separate bodies. The [EQB] has as its primary purpose and power to formulate, adopt and promulgate rules and regulations which become the rules and regulations of the Department of Environmental Resources [(now DEP)], which then has the duty of enforcing the regulations. The third body, the Environmental Hearing Board [(EHB),] is empowered to review orders, permits, licenses and decisions of [DEP] in its enforcement role.

Arsenal Coal, 477 A.2d at 1336 n.3 (citation omitted).

With the above standard in mind, we accept as true the following allegations of the Petition. DRN is a nonprofit organization with approximately 20,000 members that undertakes, *inter alia*, environmental advocacy to protect and restore the Delaware River and its tributaries, habitats, and resources. (Pet. ¶ 10.) On behalf of DRN and its members, Riverkeeper has petitioned the Agencies for regulatory action—and has instituted this action—with respect to contamination of water with the chemical perfluorooctanoic acid (PFOA). (*Id.* ¶¶ 2, 12.)

PFOA is part of a family of chemical compounds known as per- and polyfluoroalkyl substances (PFAS). (*Id.* ¶ 2.) These man-made chemicals were manufactured from the 1950s until recently and are used in various industrial applications and as an ingredient in aqueous firefighting foam. (*Id.* ¶ 3.) PFAS, once released, may contaminate surface water, groundwater, and other parts of the natural environment, and they resist biodegradation. (*Id.*) They are also toxic to humans, animal life, and ecosystems generally. (*Id.* ¶¶ 4, 21.) When ingested, PFAS persist in the body for many years, causing, *inter alia*, diseases of the liver, thyroid, and pancreas. (*Id.* ¶ 4.) Exposure in humans—even at very low levels—is linked to a host of diseases, such as cancers, high cholesterol, complications of pregnancy, and immune-system disorders. (*Id.* ¶¶ 3, 27, 39-40.) Infants, children, and individuals with compromised immune systems are particularly vulnerable to the adverse health effects of PFAS, which include decreased effectiveness of childhood vaccines. (*Id.* ¶¶ 4, 37-38.) No medical procedure exists to remove PFAS from the body once they are ingested. (*Id.* ¶ 41.)

Some members of DRN live in Bucks and Montgomery Counties, Pennsylvania, where DEP is currently investigating water supplies that are contaminated with significantly elevated levels of PFAS. (*Id.* ¶¶ 5, 11, 32.)

Water from one municipal well in Warminster, Pennsylvania, contained 1,440 parts per trillion (ppt) of PFOA, whereas a safe concentration for drinking water might be between 1 ppt and 6 ppt. (*Id.* ¶ 5.) Much of the worst contamination is located near sites where PFAS-based firefighting foam was used, including former and current military air stations in the area of the Delaware River. (*Id.* ¶¶ 11, 28, 32.) Members of DRN—and, by implication, members of the public—have been and continue to be adversely affected by drinking water contaminated by PFAS, which they often ingest without knowledge of the contamination. (*Id.* ¶ 6.) Beginning in 2014, numerous public and private wells in Bucks and Montgomery Counties were closed due to high PFOA levels but not before many people consumed the contaminated water. (*Id.* ¶ 30.)

DRN first became aware of PFAS contamination in Pennsylvania in 2005 and has advocated for regulation of PFAS in drinking water since that time in both New Jersey and Pennsylvania. (*Id.* ¶¶ 13-14.) In 2012, the United States Environmental Protection Agency (EPA) added PFOA to an unregulated contaminants rule, requiring water providers to monitor PFOA levels. (*Id.* ¶ 31.) EPA initially set a nonbinding health advisory level for PFOA at 400 ppt, but, in 2016, EPA revised the advisory level downward to 70 ppt. (*Id.* ¶¶ 35-36.) Many public and private water supplies in Pennsylvania far exceed that level of contamination. (*Id.* ¶ 31.) Scientific studies—including assessments by the federal Agency for Toxic Substance and Disease Registry—have concluded that the current advisory level of 70 ppt is inadequate to protect human health and that safe levels are significantly lower. (*Id.* ¶ 37.) In August 2018, the New Jersey Drinking Water Quality Institute voted to set binding maximum contaminant levels (MCL) for PFAS generally at 13 ppt and for PFOA at 14 ppt. (*Id.* ¶ 49.) Those MCLs were based on

safe levels of exposure for adults, but they may not adequately protect children, who are more sensitive to lower levels of exposure. (*Id.* ¶¶ 49-55.) EPA has not yet established a binding federal limit on PFAS concentrations. (*Id.* ¶ 42.)

On May 8, 2017, DRN submitted the Rulemaking Petition, requesting that the Agencies exercise their authority under the Pennsylvania Safe Drinking Water Act (Act)[3] to establish an MCL of between 1 ppt and 6 ppt for PFOA in drinking water. (*Id.* ¶ 55.) In accordance with regulations governing the Agencies' response to petitions for establishing an MCL,[4] DRN was permitted to present the Rulemaking Petition at the next meeting of the EQB, which was held on August 15, 2017. (*Id.* ¶ 61.) At the meeting, DEP officials recommended that the Rulemaking Petition be accepted for further evaluation and represented that DEP would produce and present a report on the Rulemaking Petition no later than June 2018. (*Id.* ¶ 62.) The EQB voted unanimously to accept the Rulemaking Petition for review. (*Id.* ¶ 63.)

Despite DEP's representation, it did not produce a report on the Rulemaking Petition in June 2018, and it still has not done so. (*Id.* ¶ 65.) On June 1, 2018, counsel for DRN contacted Patrick McDonnell, who serves as DEP Secretary and Chair of the EQB, in writing to request action on the Rulemaking Petition. (*Id.* ¶ 66.) The Agencies did not respond directly to DRN's letter. (*Id.* ¶ 67.) At the June 19, 2018 meeting of the EQB, DEP represented that it would need an undefined amount of additional time to respond to the Rulemaking Petition and that it was then attempting to hire a toxicologist to assist with production of the report. (*Id.* ¶ 68.) On September 19, 2018, Pennsylvania Governor Tom Wolf announced the creation

---

[3] Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1-.17.

[4] *See* 25 Pa. Code §§ 23.1-.8.

of a PFOA action team and that he would prioritize hiring toxicologists to establish drinking water limits for PFOA. (*Id.* ¶¶ 75-76.) On May 3, 2019, Secretary McDonnell suggested to the press that DEP would complete an MCL proposal for PFOA within three years. (*Id.* ¶ 86.) At another meeting of the EQB on June 11, 2019, the Rulemaking Petition appeared on the agenda but was not discussed during the public portion of the meeting, and DRN representatives present at the meeting were not permitted to address the EQB. (*Id.* ¶¶ 69-70.) The Agencies have pursued no regulation of PFAS in drinking water below the EPA health advisory level of 70 ppt—which is not a safe drinking water level—and, for unknown reasons, have required further testing of wells with a concentration of at least 40 ppt of PFAS. (*Id.* ¶¶ 73-74, 85.) Nor have the Agencies acted on or responded to the Rulemaking Petition in any way, despite DEP possessing sufficient information to establish an MCL for PFOA, even if only on an interim basis. (*Id.* ¶¶ 83, 92.)

On July 11, 2019, Riverkeeper filed the Petition, which consists of three counts. In Count I, Riverkeeper brings a claim under the citizen suit provision in Section 13(b) of the Act, 35 P.S. § 721.13(b), for injunctive relief requiring DEP to produce a report evaluating and responding to the Rulemaking Petition. (*Id.* ¶¶ 106, 109.) Riverkeeper avers that, in failing to issue such a report, DEP has breached its mandatory duty under Section 5 of the Act, 35 P.S. § 721.5, to adopt and implement a public water supply program, including through establishing MCLs. (*Id.* ¶¶ 98-100, 105.) Additionally, Riverkeeper cites EQB regulations governing the Agencies' responses to petitions for rulemaking (EQB policy), which, Riverkeeper contends, require DEP to produce the requested report within a certain, defined timeframe. (*Id.* ¶¶ 101-03, 106 (citing 25 Pa. Code § 23.6).) Riverkeeper

claims that DEP's persistent inaction in response to the Rulemaking Petition amounts to DEP's failure to perform a nondiscretionary act required by the Act, with that failure to act forming the basis of Riverkeeper's citizen suit under Section 13(b) of the Act.

In Count II, Riverkeeper alleges that Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, imposes an affirmative fiduciary duty on DEP to preserve, *inter alia*, safe drinking water within the Commonwealth. (*Id.* ¶¶ 111-14 (citing *Pa. Env't Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)).) Riverkeeper contends that DEP has breached that duty by failing to respond to the Rulemaking Petition or otherwise propose an MCL for PFOAs, and Riverkeeper essentially seeks an injunction requiring DEP to evaluate the Rulemaking Petition and/or propose an MCL in response. (*Id.* ¶¶ 115-17.)

In Count III, Riverkeeper seeks a declaration that DEP, by its inaction, is violating its duty to respond to the Rulemaking Petition, which duty, in Riverkeeper's view, is found in the Act and the Environmental Rights Amendment. (*Id.* ¶¶ 119-21.) Riverkeeper also seeks payment of its attorney's fees and costs. (*Id.* ¶ 121.)

II. ISSUES

The Agencies responded to the Petition by filing preliminary objections in the nature of a demurrer. With respect to Count I of the Petition, the Agencies assert that the Act does not impose a nondiscretionary duty on them to produce the report Riverkeeper seeks, to adopt an MCL for any specific contaminant, or to perform any other duty alleged by Riverkeeper; thus, the Act cannot serve as a legal basis for Riverkeeper's claim. The Agencies also claim that the EQB policy is not binding

on the Agencies and, even if it was binding, cannot give rise to a cause of action under the Act. With respect to Count II, the Agencies insist that they are complying with their duties under the Environmental Rights Amendment because they are currently undertaking a scientific evaluation of the Rulemaking Petition. They claim that setting a specific deadline for agency action would hinder their proper discharge of those duties and be inconsistent with their constitutional obligations. With respect to Count III, the Agencies first assert that Riverkeeper's request for attorney's fees and costs is insufficiently specific, and they ask this Court to direct Riverkeeper to replead Count III with greater specificity as to that request. They also demur to Count III, arguing that Riverkeeper is not entitled to declaratory relief based on the Agencies' arguments as to Counts I and II and that Riverkeeper has articulated no basis for its request for attorney's fees and costs.

In addition to their demurrer to each individual count of the Petition, the Agencies demur to all counts as to the EQB in particular. They argue that the EQB is not a necessary and indispensable party to this action, because Riverkeeper demands no action from the EQB and essentially admits in the Petition that it makes no allegations directly against the EQB.

III. DISCUSSION

A. The Act (Count I)

DEP first argues that Riverkeeper has failed to state a claim under the citizen suit provision found in Section 13(b)(1) of the Act, which provides:

> (b) **Civil action to compel compliance.**--Any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit *issued pursuant to this act*:
>
> (1) against [DEP] where there is alleged a failure of [DEP] to perform any act *which is not discretionary with [DEP]*.

(Emphasis added.) Also relevant to our analysis are Sections 4(a), 5(a), and 5(b) of the Act, 35 P.S. §§ 721.4(a), 721.5(a)-(b). Section 4(a) of the Act provides, in relevant part:

> (a) **[EQB] to establish standards, rules and regulations.**--The [EQB] . . . shall . . . adopt such rules and regulations of [DEP], governing the provision of drinking water to the public, as it deems necessary for the implementation of the provisions of this act. The [EQB] *shall* adopt [MCLs] and treatment technique requirements no less stringent than those promulgated under the [the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-27 (FSDWA)], for all contaminants regulated under the national primary and secondary drinking water regulations. The [EQB] *may* adopt maximum contaminant levels or treatment technique requirements for any contaminant that a maximum contaminant level or treatment technique requirement has not been promulgated under the national primary and secondary drinking water regulations.

(Emphasis added.) Section 5(a)-(b) of the Act provides, in relevant part:

> (a) **State to assume primary enforcement.**--[DEP] shall adopt and implement a public water supply program which includes, but is not limited to, those program elements necessary to assume State primary enforcement responsibility under the [FSDWA]. The public water supply program shall include, but not be limited to, [MCLs] or treatment technique requirements establishing drinking water quality standards . . . .
>
> (b) **[DEP] to establish compliance procedures.**--[DEP] shall develop and implement procedures as may be necessary and appropriate in order to obtain compliance with this act or the rules and regulations promulgated, or permits issued hereunder.

Furthermore, the EQB's regulations governing responses to petitions for rulemaking provide, in relevant part:

> If the EQB accepts [a petition for rulemaking], a notice of acceptance will be published in the Pennsylvania Bulletin within 30 days. In addition, a report will be prepared in accordance with one of the following procedures:
>
> (1) *Petitions other than stream redesignation petitions.* [DEP] will prepare a report evaluating the petition within 60 days. If the report cannot be completed within the 60-day period,

> at the next EQB meeting [DEP] will state how much additional time is necessary to complete the report. [DEP's] report will include a recommendation on whether the EQB should approve the action requested in the petition. If the recommendation is to change a regulation, the report will also specify the anticipated date that the EQB will consider a proposed rulemaking.

25 Pa. Code § 23.6.

In support of their argument that Riverkeeper has failed to state a claim under Section 13(b) of the Act, the Agencies first argue that nothing in the Act imposes a nondiscretionary duty on DEP to produce a report in response to the Rulemaking Petition. They note that Section 5(a) of the Act generally imposes a nondiscretionary duty to "adopt and implement a public water supply program," including, *inter alia*, MCLs, but they argue that the Agencies fulfilled that duty long ago when EPA found DEP's water supply program adequate, such that DEP could assume primary enforcement responsibility under the FSDWA. The Agencies emphasize that Section 5 of the Act does not affirmatively require the adoption of an MCL for any particular pollutant. In support of this argument, the Agencies emphasize that Section 4(a) of the Act, which affirmatively requires the EQB (not DEP) to establish MCLs for some pollutants, clearly makes establishing an MCL for PFAS discretionary with the EQB, because no federal MCL exists for PFAS.

Second, the Agencies focus on DEP's duty to "develop and implement procedures" for obtaining compliance with the Act, which is located in Section 5(b) of the Act. The Agencies claim that Riverkeeper has not shown how issuance of the DEP report is a procedure necessary to obtain compliance with the Act, and they essentially argue that issuance of that report is merely discretionary under the Act. In support, they note that the statutory provision authorizing submission of the Rulemaking Petition—Section 1920-A(h) of The Administrative

Code of 1929,[5] 71 P.S. § 510-20(h)—was enacted in 1980, before the Act. The Agencies argue that, because the General Assembly could have explicitly referenced the Section 1920-A(h) petition process as a ground for a citizen suit under Section 13(b) of the Act but did not do so, the General Assembly cannot have intended for agency inaction on a rulemaking petition to support a citizen suit under Section 13(b).

Finally, the Agencies argue that the EQB's regulation requiring a report on a certain timeline cannot support a cause of action under Section 13(b) of the Act, because (1) that regulation is a nonbinding statement of policy, not an enacted rule, and (2) even if the regulation was binding, it was not "issued pursuant to [the Act]," as is required for a regulation to form the basis of a Section 13(b) suit.

In response, Riverkeeper first concedes that DEP is not required by the Act, the EQB policy, or otherwise, to take any particular action requested in the Rulemaking Petition and that actually adopting an MCL for PFAS is, at this point, discretionary with the Agencies. Riverkeeper emphasizes, however, that in this litigation, it does not seek to require the Agencies to adopt an MCL, but rather it seeks to compel DEP to comply with the "statutory duty . . . to take *some* action" on the Rulemaking Petition. (Riverkeeper's Br. at 19 n.13 (emphasis added).) Riverkeeper identifies the nondiscretionary duty on which its claim is based as residing in Section 5 of the Act. It notes that the mandate that DEP "adopt and implement a public water supply program" is expressly and purposefully broad, such that it "includes, *but is not limited to*" compliance with federal requirements. Section 5(a) of the Act (emphasis added). Riverkeeper identifies similarly broad language throughout Section 5 of the Act, including such an expansion of DEP's

[5] Added by the Act of Dec. 3, 1970, P.L. 834.

duty in Section 5(b) of the Act to "develop and implement procedures" to effect compliance with the Act.

Based on these expansive descriptions of DEP's duties under the Act, Riverkeeper reasons that the EQB policy at issue is essentially the mechanism or procedure through which DEP discharges its duty to consider discretionary MCLs under the Act. Riverkeeper maintains that DEP's refusal to follow that procedure timely is a failure of its duty to implement a public water supply program and concludes that the Act imposes "a mandatory obligation on . . . DEP to engage in (at [the] very least) *the evaluation of* [the Rulemaking Petition] . . . or to take such other action to implement a public water supply that assures the provision of safe drinking water." (Riverkeeper's Br. at 26 (emphasis added).)

We agree with the Agencies. It is undisputed that, in order to proceed with a citizen suit under Section 13(b) of the Act, Riverkeeper must identify some nondiscretionary duty assigned to DEP under the Act and allege that DEP has breached that duty. Riverkeeper first relies on the duty enumerated in Section 5(a) of the Act, which requires DEP to "adopt and implement a public water supply program" that includes two components: (1) whatever elements are necessary for the Commonwealth to assume primary enforcement responsibility under the FSDWA, and (2) MCLs or treatment techniques for pollutants. Riverkeeper does not allege that DEP's inaction on the Rulemaking Petition endangers its primary enforcement role under the FSDWA but focuses on the second prong of DEP's duty—that DEP's public water supply program must include setting MCLs or treatment techniques. Riverkeeper also emphasizes Section 4(a) of the Act, which provides that the EQB (not DEP) "*shall* adopt" MCLs and/or treatment techniques no less stringent than those established under the FSDWA and that the EQB "*may*

adopt" MCLs and/or treatment techniques that are more stringent than those federal limits. 35 P.S. § 721.4(a) (emphasis added). In the relevant terminology, adoption of MCLs such as that proposed in the Rulemaking Petition is *discretionary* with the EQB, not nondiscretionary with DEP, as is required to support an action under Section 13(b) of the Act. In keeping with this analysis, Riverkeeper admits that adoption of the MCL it seeks is discretionary, not mandatory. (*See* Pet. ¶ 47 ("The [Act] provides that an MCL must be no less stringent than those promulgated under the [FSDWA,] but explicitly *permits* . . . DEP to establish additional and/or more stringent levels for . . . PFOA . . . ." (emphasis added)); Riverkeeper's Br. at 19 n.13 ("DEP has the *discretion* to issue an MCL in accordance with [Riverkeeper's] Rulemaking Petition . . . ." (emphasis added)).)

Nevertheless, Riverkeeper attempts to locate the requisite nondiscretionary duty within the Agencies' discretionary power to adopt MCLs under the Act, essentially arguing that this power somehow implies a nondiscretionary duty for DEP to evaluate and/or respond to petitions asking it to exercise its discretion. We find no such duty in the Act itself. As the Agencies point out, the Act does not mention rulemaking petitions or the EQB policy, let alone establish affirmative duties concerning them. (*See* Agencies' Br. at 24.) Nor does it require the Agencies to adhere to any particular rationale or timeframe in exercising the discretion afforded them under the Act to adopt—or not to adopt—MCLs more stringent than the federal MCLs.

Finally, we disagree with Riverkeeper's assertion that compliance with the EQB policy is somehow incorporated as a nondiscretionary duty within the Act. First, the EQB policy is not, as Riverkeeper argues, a procedure which DEP must adopt and implement pursuant to Section 5(b) of the Act. That section requires DEP

to implement procedures "as may be necessary and appropriate in order to obtain compliance with" the Act. But it also enumerates specific examples of the policies DEP must implement.[6] These examples obviously all relate to enforcement of existing laws or regulations against entities other than the Agencies, which is the purpose of Section 5(b) (*i.e.*, to "obtain compliance with" the Act). 35 P.S. § 721.5(b). We decline Riverkeeper's invitation to read Section 5(b) so broadly as to require DEP's compliance with a procedure that the General Assembly omitted from the lengthy list of examples it provided, and which is a procedure for regulatory change, not enforcement of existing regulations. Second, the EQB policy and the petition process generally are not "rules" or "regulations" promulgated *under the Act*—they are independent of the Act and preexisted it. Section 5(b), therefore, does not require DEP to implement procedures for enforcement of the EQB policy.

Simply put, DEP's consideration and adoption of the MCL Riverkeeper seeks are exercises of the discretion committed to the Agencies by the Act, and the Act

---

[6] These include:

> (1) Monitoring and inspection.
>
> (2) Maintaining an inventory of public water systems in the Commonwealth.
>
> (3) A systematic program for conducting sanitary surveys of public water systems throughout the Commonwealth.
>
> (4) The establishment and maintenance of a program for the certification of laboratories conducting analytical measurements of drinking water contaminants specified in the drinking water standards . . . .
>
> (5) The establishment and maintenance of a permit program concerning plans and specifications for the design and construction of new or substantially modified public water systems . . . .

35 P.S. § 721.5(b).

does not impose any nondiscretionary duty on DEP in conjunction therewith.[7] The General Assembly was aware when it enacted the Act that Section 1920-A(h) of The Administrative Code of 1929 requires the Agencies to accept petitions for rulemaking. We have recognized that, pursuant to that provision, "private citizens may request that the EQB issue regulations by filing a petition for rulemaking with DEP." *Funk v. Dep't of Env't Prot.*, 71 A.3d 1097, 1099 (Pa. Cmwlth. 2013). The General Assembly did not, however, choose to include DEP's role in accepting or responding to petitions for rulemaking within the ambit of its nondiscretionary duties under the Act. "A court has no power to insert words into statutory provisions where the legislature has failed to supply them." *Amendola v. Civil Serv. Comm'n of Crafton Borough*, 589 A.2d 775, 777 (Pa. Cmwlth. 1991). Accordingly, we conclude that the Petition fails to allege any breach of a nondiscretionary duty under the Act by DEP. Accordingly, Riverkeeper has failed to set forth a cause of action under Section 13(b) of the Act.

B. The Environmental Rights Amendment (Count II)

In support of their demurrer to Count II of the Petition, the Agencies first rely on their position with respect to Count I—that the Act does not impose a mandatory duty on the Agencies to pursue any specific regulatory action. Based on this position, the Agencies assert that Riverkeeper's Environmental Rights Amendment

---

[7] As Riverkeeper points out, the Petition is in the nature of a mandamus action. (*See* Riverkeeper's Br. at 29 n.19.) We acknowledge that mandamus is an appropriate remedy when an agency is "sitting on its hands" in the face of a *mandatory* duty, *Chanceford Aviation Props., L.L.P. v. Chanceford Township Board of Supervisors*, 923 A.2d 1099, 1108 (Pa. 2007), but we find no mandatory duty under the Act relevant to the allegations in the Petition. We also emphasize the extraordinary nature of mandamus relief, which can compel only an action that, unlike here, "involves no discretion on the part of" the agency. *Barndt v. Pa. Dep't of Corr.*, 902 A.2d 589, 592 (Pa. Cmwlth. 2006). Although we analyze Riverkeeper's Section 13(b) claim under the Act itself, and not on common law mandamus principles, we note that the result here is consistent with those principles, which would not support mandamus relief in this matter.

claim in this matter is legally insufficient, because the relevant statutory scheme—*i.e.*, the Act—cannot be displaced by general obligations under the amendment and the Act does not impose any mandatory duty supporting Riverkeeper's claims. (*See* Agencies' Br. at 29-30 (citing *Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016) (*Funk*), *aff'd*, 158 A.3d 642 (Pa. 2017)).)

The Agencies also claim that the facts, as alleged in the Petition, demonstrate that they are acting consistently with their obligations under the Environmental Rights Amendment. In support, they cite DEP's initial announcement that a report would take more time, the creation of the PFAS action team, the hiring of toxicologists, and the implementation of a statewide sampling plan to gather data. The Agencies appear to dispute the factual allegation that they already possess sufficient scientific information to respond to the Rulemaking Petition, including by stating that agencies in other jurisdictions have come to differing conclusions about how or whether to adopt MCLs for PFAS. (*See id.* at 31.)

Riverkeeper's argument in response rests on its view that the Act imposes a mandatory, statutory duty on DEP to respond to the Rulemaking Petition. Indeed, Riverkeeper states that it is "[the Act,] read in conjunction with [the Environmental Rights Amendment, that] provides a cognizable basis" for Riverkeeper's Count II claim. Accordingly, Riverkeeper argues, the reasoning in *Funk* on which the Agencies rely is factually inapposite, because the respondent agencies in *Funk* did not have a mandatory duty to perform the action sought. Citing the Agencies' responsibilities as trustees under Pennsylvania courts' interpretations of the Environmental Rights Amendment, Riverkeeper argues that agency inaction in the face of egregious environmental and health harms is a breach of the Agencies' recognized fiduciary duties and, thus, is cognizable in an action pursuant to the

Environmental Rights Amendment. In response to the Agencies' other arguments—concerning whether DEP has, in fact, complied with its constitutional duties in a timely manner—Riverkeeper argues that such "factual excuses" are not an appropriate basis for preliminary objections. (*See* Riverkeeper's Br. at 49.)

In *Funk*, various individuals filed a petition for review in the nature of a mandamus action seeking to compel Commonwealth agencies to develop a comprehensive plan to reduce greenhouse gas emissions. *Funk*, 144 A.3d at 233-34. The petitioners' claims relied on the Commonwealth's duties under the Environmental Rights Amendment. *Id.* We observed:

> Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the [Environmental Rights Amendment] . . . , [the amendment] must be understood in the context of the structure of government and principles of separation of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action.

Id. at 235. We explained that, although agencies sometimes must make such balancing judgments themselves, they must always do so within the larger balance that the General Assembly strikes when it passes legislation applicable to the agency. *Id.* In other words, the legislative process produces a statute that already reflects and incorporates agencies' relevant duties under the Environmental Rights Amendment. *Id.* at 249-50. Based on that reasoning, we held that the Environmental Rights Amendment "does not authorize [the agencies] to disturb the legislative scheme" for greenhouse gas regulation established in two relevant statutes—the Pennsylvania Climate Change Act[8] and the Air Pollution Control Act.[9] *Id.* at 250. After examining

---

[8] Act of July 9, 2008, P.L. 935, 71 P.S. §§ 1361.1-.8.

[9] Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015.

the mandatory duties they imposed on the agencies, we concluded that the statutes did not require performance of the acts the petitioners sought and that the Environmental Rights Amendment, therefore, also did not do so, and we dismissed the petitioners' mandamus claim. *Id.*

Significantly, Riverkeeper bases its claim in Count II squarely upon the mandatory duty of evaluation it purports to find in the Act and DEP's alleged breach thereof. In other words, the constitutional violation Riverkeeper asserts necessarily implies a violation of the Act. Significantly, Riverkeeper does not argue that the Act itself is somehow inconsistent with the Environmental Rights Amendment or that the Agencies' compliance with the Act would be insufficient to meet their constitutional obligations. Based on our analysis of Count I of the Petition, we have concluded that the Act does not impose any mandatory duty on DEP to respond to the Rulemaking Petition. Thus, this matter is analogous to *Funk*—the relevant statute, which embodies the General Assembly's judgment about the Agencies' duties under the Environmental Rights Amendment, does not require the action sought in the Petition, so the amendment itself does not require that action. Accordingly, Riverkeeper's theory of Count II, in the form in which it is before us now,[10] is not sufficient to state a claim under the Environmental Rights Amendment.

---

[10] Our disposition of Count II should not be understood to foreclose the possibility that a claim under the Environmental Rights Amendment might ripen once the Agencies take further action on the Rulemaking Petition. At that point, the "duty to evaluate," which Riverkeeper purports to find in the Act as critical support for its Count II claim, will no longer be relevant. Instead, and unlike now, the Agencies will have exercised their discretion under the Act, in one way or another, concerning setting MCLs beyond the federal requirements. Only then can we determine whether the Agencies' actions were an *abuse* of that discretion under the Act (and under the Environmental Rights Amendment, to the extent its duties are not coextensive with those under the Act). This is particularly important given our analysis of Count III, below, where we hold that the Agencies are obligated by statute to respond to the Rulemaking Petition, as outlined in the EQB policy. Once the Agencies undertake the necessary response and complete the rulemaking

Because we so conclude, we need not address the Agencies' argument that, as a matter of fact, they are in compliance with their duties under the Environmental Rights Amendment. We note in passing, however, that the Agencies' factual allegations are not relevant at the preliminary objection stage because we must accept the averments in the Petition as true. *See Meier*, 648 A.2d at 600.

C. Declaratory Relief (Count III)

The Agencies demur to Count III on the basis of their position that, in Counts I and II, Riverkeeper has failed to state legally sufficient claims, and, therefore, there is no actual controversy remaining to be settled by declaratory judgment. Because of this alleged lack of underlying claims and based on their allegation that the Agencies are in compliance with their duties, the Agencies essentially claim that there is no dispute left for this Court to resolve. In support, the Agencies again cite *Funk*, where we sustained the agencies' preliminary objection to the petitioners' request for declaratory relief after we determined that the petitioners had failed to state a mandamus claim.

In response, Riverkeeper insists that it has an actual controversy with the Agencies based on the underlying claims in Counts I and II and characterizes its actual dispute with the Agencies as relating to the urgency of remediating PFOA contamination. Riverkeeper also states, however, that it "seeks a judicial determination regarding the obligations and liability of DEP *to issue a report in response to DRN's Rulemaking Petition* or to otherwise regulate and abate PFOA contamination in drinking water." (Riverkeeper's Br. at 51 (emphasis added).) Thus, although the regulation of PFOA contamination is the subject matter of the

---

petition process, we can evaluate the constitutional (as well as the statutory) merits of that response and the exercises of discretion it involves.

parties' dispute, Riverkeeper explains, throughout its brief, that its actual controversy with DEP essentially concerns process, not substance.[11] (*See, e.g.*, Riverkeeper's Br. at 19 n.13 (explaining that, while method of regulatory action lies within DEP's discretion, DEP is obligated to take *some action* in response to Rulemaking Petition).) In Riverkeeper's view, a declaratory judgment is proper because it "will practically help to end the controversy." (Riverkeeper's Br. at 52 (quoting *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1103 (Pa. Cmwlth. 2014))).

The Declaratory Judgments Act[12] provides for declaratory judgments "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." 42 Pa. C.S. § 7541(a). Declaratory relief is limited, however, by certain justiciability concerns, including that a petitioner "must allege an interest which is direct, substantial and immediate, and must demonstrate the existence of a real or actual controversy." *Off. of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014). In *Funk*, we noted that declaratory relief is appropriate only where the declaratory judgment, if granted, would materially address the actual controversy between the parties, independently of the petitioners' other claims. We stated:

> "[D]eclaratory judgment must not be employed . . . as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist.* . . . , 587 A.2d 699, 701 ([Pa.] 1991). "Courts generally should refuse to grant requests for declaratory judgment where it would not resolve the controversy or uncertainty which spurred the request." *Rendell v. Pa. State Ethics Comm'n.*, 938 A.2d 554, 559 (Pa. Cmwlth. 2007).

---

[11] Consistent with this, at oral argument on this matter, counsel for the Agencies conceded the seriousness of PFOA contamination and emphasized that it was only the manner in which the Agencies must address that serious problem that is at issue.

[12] 42 Pa. C.S. §§ 7531-7541.

Funk, 144 A.3d at 251. We reasoned that, because the petitioners' underlying mandamus claim failed, granting the requested declaratory judgment might "provide a legal predicate to the success of their mandamus claims, but would otherwise have no independent significance." *Id.* (quoting *Stackhouse v. Pa. State Police*, 892 A.2d 54, 63 (Pa. Cmwlth.), *appeal denied*, 903 A.2d 539 (Pa. 2006)). We also observed that, on the facts in *Funk*, there was "no indication that future litigation between the parties will turn on the questions raised by the petitioners' requests for declaratory relief," and we dismissed the request for declaratory relief on that basis. *Id.*

The instant matter differs significantly from the declaratory relief analysis in *Funk*. There, the petitioners sought to compel agencies to take action, and we found no statutory basis for that request whatsoever. Here, although neither the Act nor the Environmental Rights Amendment compels the Agencies to respond to the Rulemaking Petition, a different statute effectively does require a response. Specifically, Section 1920-A of The Administrative Code of 1929 provides:

> (b) The [EQB] shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of [DEP] . . . .
>
> . . . .
>
> (h) *Any person may petition the [EQB]* to initiate a rule making proceeding for the issuance, amendment or repeal of a regulation administered and enforced by [DEP].

(Emphasis added.)

Although Section 1920-A of The Administrative Code of 1929 does not explicitly impose a duty on the Agencies to respond to a petition submitted pursuant to subsection (h) thereof, we conclude that such a duty is present for two reasons. First, the obvious purpose of subsection (h) is to permit the public to influence the

Agencies' decisions to create or change regulations. This purpose would be fatally frustrated if the Agencies have no duty under Section 1920-A to evaluate and respond to rulemaking petitions in at least some way. Such a duty is, therefore, necessarily implicit in subsection (h)'s creation of a statutory rulemaking petition process. *See* 1 Pa. C.S. § 1922(1)-(2) (establishing legal presumptions that "General Assembly does not intend . . . result that is absurd, *impossible of execution* or unreasonable" and "intends . . . entire statute to be *effective* and certain." (emphasis added)). Second, the only explanation of *how* and *when* the Agencies respond to subsection (h) rulemaking petitions is the EQB policy, which is self-imposed by the Agencies. Regardless of whether the EQB policy is a binding regulation or merely a statement of policy, it is the only method of responding to rulemaking petitions that the parties have discussed in this matter. The Agencies have identified no other interpretation of, or regulation or policy concerning, the subsection (h) petition process. Instead, the Agencies appear to take the position that, despite their statutory duty to accept (and, therefore, to consider) rulemaking petitions, they may simply pause, indefinitely, in the middle of the rulemaking petition process. Riverkeeper, on the other hand, insists that DEP is bound by the EQB policy to issue a report or other response to the Rulemaking Petition within some finite period of time and alleges in the Petition that DEP has not acted in accordance with its policy.

There is, therefore, an actual controversy between the parties, which is an appropriate subject for declaratory relief. *Gulnac by Gulnac*, 587 A.2d at 701. Furthermore, if granted, a declaration that the Agencies have a duty to engage in—and not frustrate—the *statutory* subsection (h) petition process by following the DEP policy will meaningfully clarify what the Agencies must do and will resolve the

controversy. Such declaratory relief would be independently significant—it would require DEP to respond to the petition, which is all that Riverkeeper seeks at this point in the regulatory process (and is independent of the substance of DEP's response, which is governed by the Act, not the DEP policy). DEP's response to the Rulemaking Petition would also allow the subsection (h) process to move forward and achieve its intended purpose. Thus, unlike in *Funk*, there is a statutory source of obligation on which to base declaratory relief, independent of Riverkeeper's claims in Counts I and II. Accordingly, we conclude that Riverkeeper has stated a claim for declaratory relief in Count III, and we will overrule the Agencies' preliminary objections in the nature of a demurrer thereto.

D. Attorney's Fees and Costs (Count III)

In addition to their demurrer, the Agencies argue that, because Riverkeeper cites no authority or reason for its request for attorney's fees and costs in Count III, we should either dismiss that claim or require Riverkeeper to replead it with greater specificity. Riverkeeper responds that its request is proper because DEP has acted "arbitrarily and vexatiously" by its persistent failure to issue a report or affirmatively state when it will do so. (Riverkeeper's Br. at 52 n.28.) In support, Riverkeeper cites a decision of this Court in which we held that a litigant was liable for attorney's fees because of its "arbitrary," "dilatory[,] and obdurate" conduct during the pendency of the action. *KIPP Phila. Charter Sch. v. Dep't of Educ.*, 161 A.3d 430, 445 (Pa. Cmwlth. 2017) (*KIPP*), *aff'd sub nom. Richard Allen Preparatory Charter Sch. v. Dep't of Educ.*, 185 A.3d 984 (Pa. 2018).

We came to that conclusion, however, only after emphasizing that "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties[,] or some other established

exception." *Id.* at 443. We then engaged in a thorough discussion of the potential authority for payment of fees in that matter, including a review of the circumstances under which fee awards are authorized pursuant to Section 2503 of the Judicial Code, 42 Pa. C.S. § 2503, in declaratory judgment actions and mandamus actions. *KIPP*, 161 A.3d at 444-45. Here, the Petition itself sets forth no specific basis on which we can judge the legal sufficiency of Riverkeeper's claim for fees and costs, so neither we nor the Agencies can determine how to respond. Accordingly, we will dismiss Count III of the Petition to the extent it requested payment of attorney's fees and costs, and we will allow Riverkeeper leave to replead that portion of Count III with greater specificity, as the Agencies requested, should it choose to do so.

E. Claims Against the EQB

Finally, the Agencies argue that we should dismiss all counts of the Petition against the EQB because Riverkeeper demands no action of and makes no allegations against the EQB individually. They point out that, in the Petition itself, Riverkeeper admits that "[the] EQB is not accused of direct wrongdoing but is protectively included since it *may* be a necessary and indispensable party." (Agencies' Br. at 35 (quoting Pet. ¶ 24).) They emphasize that DEP—not the EQB—would issue the report and/or response Riverkeeper seeks. Riverkeeper argues in response that the EQB is an indispensable party because, if DEP is required to proceed as Riverkeeper requests, the EQB will be required to cooperate in the regulatory process.

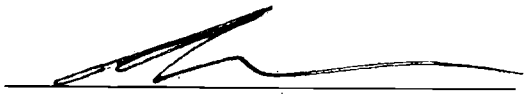
"A party is deemed to be indispensable when 'his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.'" *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Cmwlth. 2002) (quoting *Vernon Twp. Water Auth. v. Vernon Twp.*, 734 A.2d 935,

938 n.6 (Pa. Cmwlth. 1999)). Here, the remaining claim (Count III) seeks a declaratory judgment concerning the Agencies' obligations to respond to the Rulemaking Petition pursuant to the subsection (h) process and the EQB policy. Although the immediate next step in that process is, as Riverkeeper has made clear, a report to be issued by DEP alone, the EQB is also an active participant in the petition process, both at this stage and at later stages. *See* 25 Pa. Code §§ 23.6 (requiring DEP report to set forth date on which EQB will consider proposed rulemaking and requiring DEP to make presentation at EQB meeting), 23.8 (providing that EQB will consider proposed rulemaking, if any, based on DEP report). As Riverkeeper points out, any relief affecting the rights or obligations of DEP concerning the EQB policy will also affect the rights and obligations of the EQB, and the two Agencies may have distinct positions and interests regarding any forthcoming declaratory relief. (*See* Riverkeeper's Br. at 53-54.) Accordingly, the EQB is an indispensable party, and we will not dismiss it from this matter.

IV. CONCLUSION

Based on the foregoing analysis, we will sustain the Agencies' preliminary objections in part and overrule them in part. First, with respect to Counts I (the Act) and II (the Environmental Rights Amendment) of the Petition, we will sustain the Agencies' preliminary objections in the nature of a demurrer and dismiss Riverkeeper's claims. With respect to Count III (declaratory relief), we will overrule the preliminary objections in the nature of a demurrer, both as to claims against DEP and as to claims against the EQB. We will, however, sustain the preliminary objection as to Riverkeeper's request for attorney's fees and dismiss the portion of

Count III requesting fees and costs and grant Riverkeeper leave to replead that portion of Count III.



P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum, Petitioners	:	
v.	:	No. 285 M.D. 2019
Pennsylvania Department of Environmental Protection of the Commonwealth of Pennsylvania and Environmental Quality Board of the Commonwealth of Pennsylvania, Respondents	:	

ORDER

AND NOW, this 12th day of January, 2021, upon consideration of Respondents' preliminary objections, the preliminary objections are SUSTAINED, IN PART, and OVERRULED, IN PART, as follows:

1. Respondents' preliminary objections in the nature of a demurrer to Counts I and II of the Petition are SUSTAINED, and Counts I and II of the Petition are DISMISSED.

2. Respondents' preliminary objection to Count III of the Petition based on insufficient specificity of a pleading is SUSTAINED as to Petitioners' claim for attorney's fees and costs, the portion of Count III requesting attorney's fees and costs is DISMISSED, and Petitioners are hereby granted leave to amend Count III of the Petition in accordance with the attached opinion.

3. In all other respects, Respondents' preliminary objections are OVERRULED.

4. Petitioners' amended Petition for Review, should they choose to file one, shall be filed within 30 days of the date of this Order.

P. KEVIN BROBSON, Judge

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya Van Rossum, Petitioners	:	
v.	:	No. 285 M.D. 2019
Pennsylvania Department of Environmental Protection of the Commonwealth of Pennsylvania and Environmental Quality Board of the Commonwealth of Pennsylvania, Respondents	:	

ORDER

NOW, this 3rd day of March, 2021, upon consideration of Petitioners' Application for an Amendment of the Court's January 12, 2021 Order for Certification Under 42 Pa. C.S. §702(b) (Application) and Respondents' answer in opposition thereto, the Application is hereby DENIED.

P. KEVIN BROBSON, President Judge

Order Exit
03/03/2021

APPENDIX C

Received 7/11/2019 6:53:50 PM Commonwealth Court of Pennsylvania

Filed 7/11/2019 6:53:00 PM Commonwealth Court of Pennsylvania
285 MD 2019

Deanna Kaplan Tanner, Esquire (Attorney Id. No. 60258)
Delaware Riverkeeper Network
925 Canal Street,
Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE RIVERKEEPER NETWORK, and the DELAWARE RIVERKEEPER, MAYA VAN ROSSUM	)	
Petitioner,	)	No. 285 M.D. 2019
v.	)	
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Of THE COMMONWEALTH OF PENNSYLVANIA and ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA	)	
Respondents		

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief within thirty days of service hereof, or within such other time as established by Order of the Court, or a judgment may be entered against you.

Date: 7/11/19

Jordan B. Yeager, Esq.
Attorney Id. No. 72947
Curtin & Heefner LLP
2005 South Easton Road, Suite 100
Doylestown, PA 18901
(267) 898-0570

Deanna K. Tanner, Esq.
Attorney Id. No. 60258
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188

Attorneys for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE RIVERKEEPER NETWORK, and the DELAWARE RIVERKEEPER, MAYA VAN ROSSUM	)	
Petitioner,	)	No. 285 M.D. 2019
v.	)	
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Of THE COMMONWEALTH OF PENNSYLVANIA and ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA	)	
Respondents		

Amended Petition for Review in the Nature of An Action for Injunctive and Declaratory Relief

I. Introduction

1. This is a Petition for Review brought by a community nonprofit organization for injunctive and declaratory relief, pursuant to the Citizen Suit Provision of the Pennsylvania Safe Drinking Water Act, 35 P.S. §721.13(b) and the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution.

2. Petitioners seek injunctive relief regarding the Department of Environmental Protection's ("DEP" or "Department") failure and refusal to comply with its legal duties and obligations to evaluate maximum contaminant

levels (MCLs) by issuing a report in response to DRN's, May 8, 2017, Petition to the Environmental Quality Board to establish an MCL for Perfluorooctanoic Acid (PFOA) between 1 parts per trillion and 6 parts per trillion and/or to otherwise propose an MCL to address the widespread and dangerous toxic contamination of Pennsylvania's public drinking water with per- and poly-fluoroalkyl substances (PFAS), such as PFOA, at levels known to create a health risk and/or harm.

3. PFAS are synthetic carbon-chain compounds that contain large amounts of the element fluorine that repel oil and water. These toxic chemical compounds are presently banned from manufacture due to their known resistance to biodegradation and toxicity. From the 1950's until recently, companies such as DuPont and 3M used these chemical compounds to make products more stain-resistant, waterproof, and/or nonstick (e.g., Teflon). They were also used as a component of aqueous firefighting foam on military bases and have been discharged into groundwater, surface water, and aquifers causing contamination of the public's water supply systems and pollution of the Commonwealth's natural resources.

4. PFAS persist for many years in the human body once ingested. In animal studies, exposure to these compounds at high levels results in changes in function of the liver, thyroid, pancreas and hormones levels. In humans, exposure, even at very low levels, has been linked with significant health consequences

including, among others, kidney cancer, testicular cancer, thyroid disease, high cholesterol, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis.

5. PFOA is significantly elevated in many Bucks and Montgomery County water supplies. Fifteen public and two hundred private wells supplying approximately 84,000 people with water were impacted with some of the highest contamination in the United States. For example, a municipal well in Warminster tested at 1,440 parts per trillion whereas a "safe" maximum contaminant level, per scientific evidence, is between 1 parts per trillion to 6 parts per trillion (over 200 times lower than the tested well).

6. Members of the Delaware Riverkeeper Network have and continue to be impacted by the contamination of their drinking water with PFAS, and members have unwittingly and unknowingly ingested it, to their severe detriment.

7. DEP has failed to take steps necessary to protect health and to prevent degradation of the environment, by refusing to regulate PFAS in drinking water. In particular, the DEP failed and refused to propose and seek to establish an MCL for PFOA to ameliorate the known risks from contaminants entering the water system.

8. This failure has resulted in contamination of drinking water and has further stymied appropriate and protective cleanup goals for degraded and contaminated ground and surface waters.

II. Jurisdiction

9. This Honorable Court has original jurisdiction over this matter, pursuant to 42 P.S. §761 and 35 P.S. §721.13, because this is a lawsuit against Commonwealth agencies and specifically against the DEP for its failure to perform an act required by the Pennsylvania Safe Drinking Water Act.

III. Parties

10. Petitioner Delaware Riverkeeper Network ("DRN") is a Pennsylvania non-profit organization with its principal place of business at 925 Canal Street, 7th Floor, Suite 3701, Bristol, Pennsylvania. It was established in 1988 and has approximately 20,000 members. DRN's mission is to protect and restore the Delaware River and its tributaries, habitats, and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the four states of the Delaware River watershed and, when necessary, at the national level.

11. Some members of DRN live in Bucks and Montgomery County, including members who live near and are impacted by PFOA contamination from the former Naval Air Station Joint Reserve Base at Willow Grove, the current Horsham Air Guard Station in Horsham, and the site of the former Naval Air Warfare Center in Warminster. Other members live near other PFAS

contamination sites including in Doylestown, Harrisburg and Pittsburgh. DRN members have drunk, cooked, washed dishes, and/or gardened with PFAS-contaminated water.

12. DRN brings this action on behalf of the organization and on behalf of its impacted members.

13. DRN has petitioned and advocated to have PFAS regulated in both Pennsylvania and New Jersey drinking water law. DRN has been working on the problems posed by the presence of PFAS in the local and regional environment since 2005, when DRN staff first collected tap water samples in the neighborhoods close to DuPont's Chambers Works facility in Deepwater, NJ, on the Delaware River. DRN suspected that there was a problem because of news reports about attorney Robert Bilott's lawsuit that had been brought in West Virginia against DuPont, a manufacturer of PFOA, for releasing the contaminant into the environment.

14. DRN has actively worked since 2005 to bring the health harms and environmental degradation caused by PFAS to the public's attention through its website and via press outreach. Since it began this advocacy campaign DRN has submitted technical information, scientific analysis, and policy analysis, through comments, testimony, and correspondence to government agencies, as well as

making public appearances and public statements to highlight these issues for affected communities.

15. As set forth in full below, DRN has invested its time and resources to bring a Petition to Set a Pennsylvania Drinking Water MCL for PFOA between 1 parts per trillion and 6 parts per trillion.

16. Petitioner Maya van Rossum, the Delaware Riverkeeper, is the full-time Executive Director of DRN and is responsible for the organization's mission: championing the rights of our communities to a Delaware River and tributary streams that are free-flowing, clean, healthy, and abundant with a diversity of life.

17. Ms. van Rossum is also a member of DRN and a supportive financial donor.

18. Ms. van Rossum, as the Delaware Riverkeeper, regularly visits the Delaware River, its tributaries and communities and areas affected by PFAS.

19. Ms. van Rossum has also authored a book, The Green Amendment, Securing Our Right to a Healthy Environment (2017), which discusses Pennsylvania's Environmental Right Amendment and constitutional environmentalism as a response to the degradation of the environment and harms of contamination, including those created by the presence of PFOAs.

20. The Delaware River is a source of drinking water for the Commonwealth of Pennsylvania and impacted by its tributaries, some of which are

known to suffer PFAS contamination via samples of the Delaware River waters and its aquatic life.

21. DRN and the Delaware Riverkeeper are gravely concerned by the potential health harms and environmental degradation caused by the ever-growing PFAS contamination within groundwater, surface water, and drinking water in the Commonwealth. While the most alarming impact for human health consequences is to drinking water, PFAS contamination of ground water, surface water, and air also results in adverse impacts to aquatic creatures, animals, vegetation, and the overall ecosystem.

22. Respondent Pennsylvania Department of Environmental Protection is a Commonwealth agency with a principal office at the Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA, 17101, and is entrusted with a fiduciary and legal duty to protect and preserve the environment and to establish and enforce rules and regulations governing water quality, including the provision of safe drinking water standards. The Department also governs the cleanup of hazardous substances in the Commonwealth of Pennsylvania.

23. Respondent, the Environmental Quality Board (hereinafter the "EQB"), is a 20-member independent departmental administrative board of the Commonwealth of Pennsylvania, having its principal office and place of business located at the Rachel Carson State Office Building, 400 Market Street, 16th Floor,

Harrisburg, Pennsylvania 17105 and is legally empowered to promulgate rules and regulations as may be determined by the EQB for the proper performance of the work of the DEP. 71 P.S. §510-20.

24. Respondent EQB is not accused of direct wrongdoing but is protectively included since it may be a necessary and indispensable party, as the DEP's compliance with its legal obligations may also require the EQB's cooperation and/or the EQB's regulatory authority may be affected by an Order entered in this case. See 35 P.S. § 721.4 (Pennsylvania Safe Drinking Water Act, EQB Duties).

IV. Operative Facts

25. PFAS contamination from harmful and/or defective products has been released into the environment of the Commonwealth of Pennsylvania causing contamination to soil, air, groundwater and surface water and migration into drinking water.

26. PFAS contamination is recognized as a growing problem throughout the nation and in the Commonwealth of Pennsylvania, with numerous affected sites, municipalities and water authorities.

27. PFAS is toxic to humans in even very small amounts (parts per trillion).

28. Among the Sites severely impacted in the Commonwealth are the former Naval Air Station Joint Reserve Base at Willow Grove, the current Horsham Air Guard Station in Horsham and the site of the former Naval Air Warfare Center in Warminster. These facilities used firefighting foam (aqueous film-forming foam) containing PFAS, such as PFOA, for various purposes, including training with test "fires" that were put out with the foam, sometimes on a weekly basis.

29. Sampling done in Warminster, Warrington, and Horsham Township demonstrated that the groundwater that feeds public and private wells was among the worst in the nation, most all in the vicinity of the aforementioned military facilities.

30. Beginning in 2014, numerous public and private wells in Horsham, Warrington, and Warminster Township have been closed due to the PFOA levels recorded in the water but unfortunately not before the unknowing public, including DRN members, consumed the contaminated drinking water.

31. In 2012, the EPA included PFOA in its Third Unregulated Contaminant Monitoring Rule, which required certain water providers, including Warminster Municipal Authority, Warrington Township Water and Sewer Authority, and Horsham Water and Sewer Authority, to test their waters for PFOA.

Many of the samples exceeded or far exceeded the EPA's now-enacted Health Advisory Level of 70 parts per trillion.

32. There are numerous PFAS contamination sites throughout the Commonwealth under investigation by the DEP, including the following sites, per the DEP's Website:

NORTH-CENTRAL
- AVCO-Lycoming NPL Site
- Penn State Former Fire Training Site

NORTHEAST
- High Quality Plating HSCA Site
- Tobyhanna Army Depot TCE NPL Site
- Valmont TCE Superfund NPL Site

SOUTHWEST
- Pittsburgh Air National Guard Base
- Pittsburgh Air Reserve Station

SOUTH-CENTRAL
- Letterkenny Army Depot NPL Site
- Susquehanna Area Regional Airport Authority (HIA) Site

SOUTHEAST
- ChemFab NPL Site
- CRC Industries
- Easton Road HSCA Site
- Former Naval Air Station Joint Reserve Base Willow Grove - Horsham (NPL Site)
- Former Naval Air Warfare Center - Warminster (NPL Site)
- Horsham Air National Guard Station
- Lower Darby Creek NPL Site
- Nike PH 98/99 (Control) - Warrington
- North Penn Area 5 NPL Site
- North Penn US Army Reserve Center (Nike PH 91 - Launch)
- Ridge Run HSCA Site

See https://www.dep.pa.gov/Citizens/My-Water/drinking_water/Perfluorinated%20Chemicals%20%E2%80%93PFOA%20a

nd%20PFOS%20%E2%80%93%20in%20Pennsylvania/Pages/PFC%20Sites%20Under%20DEP%20Investigation.aspx.

33. The lack of a binding and appropriately low Pennsylvania MCL means that homeowners on well-water and other drinking water system operators will have difficulty in their efforts to recover the costs of adopting necessary treatment and cleanup from responsible polluters.

34. The delivery of contamination-free water is not uniform in the Commonwealth, with municipalities having set different policies and not implementing uniform treatment techniques. In fact, some water companies and municipal authorities are blending water that contains a higher level of PFAS with cleaner water to dilute the concentrations, instead of implementing treatment of the contamination.

35. Initially, the Federal Environmental Protection Agency had a non-binding health advisory level (guidance value) of .2 ug/L (200 parts per trillion) for PFOS and .4 ug/L (400 parts per trillion) for PFOA.

36. In May 2016, EPA revised its level and set a combined lifetime health advisory level ("HAL") of 0.07 ug/l (70 parts per trillion) for PFOA and PFOS.

37. Scientific studies – including extrapolations of the research released by the U.S. Department of Health and Human Services, Agency for Toxic

Substance and Disease Registry ("ATSDR") on the Toxicological Profile of Perfluoroalkyls – have concluded that the EPA's 2016 health advisory level is not adequately protective and that a safe level should be many times lower (7 parts per trillion for PFOS and 11 parts per trillion for PFOA), since even a low level of exposure could cause significant health harms, especially in infants and children as well as other sensitive individuals, including those with a compromised immune system.

38. In addition to other health harms, epidemiologic studies have shown PFOA immunotoxicity suppresses the immune response. This is particularly important to children and infants who are being vaccinated, because a study in Norway (Granum et al. 2013) found strong evidence of decreased rubella-induced antibodies in young children whose mothers were exposed to PFOAs during pregnancy.

39. According to the ATSDR 2018 Draft Toxicological Profile, epidemiologic studies have also linked PFOAs to immune system hypersensitivity (asthma) and autoimmune disorders.

40. According to the ATSDR 2018 Draft Toxicological Profile, epidemiologic studies have also linked PFOAs to decreased fertility and to decreased birth weight in offspring.

41. Alarmingly, after exposure, there are no medical treatments that can remove PFAS from the human body, and the half-life of PFOA in humans is approximately 4 years, depending on a variety of factors.

42. Upon information and belief, despite the wealth of scientific evidence of the need for regulation and significant public outcry, the Federal Government has been unwilling to establish standards for PFAS, in part because of numerous law suits throughout the Country against the Federal Department of Defense, who used the firefighting foam for decades, and are being sued for cleanup and tortious injury to persons and property.

43. The Federal Safe Drinking Water Act requires the EPA to establish certain national standards for common contaminants in a public water supply, but also allows states to regulate additional contaminants and establish more stringent standards as necessary to protect their citizens.

44. The Pennsylvania Constitution recognizes that the people have a constitutional right to pure water and that the Commonwealth has an affirmative duty to ensure the preservation and maintenance of the Commonwealth's natural resources from degradation. Pennsylvania Constitution, Article I Section 27.

45. Pennsylvania also has a State Drinking Water Act ("SDWA"), in which the General Assembly declared that "an adequate supply of safe, pure drinking water is essential to the public health, safety and welfare and that such a

supply is an important natural resource in the economic development of the Commonwealth." 35 P.S. § 721.2.

46. The General Assembly further declared that the purpose of the Safe Drinking Water Act was "to further the intent of section 27 of Article I of the Constitution of Pennsylvania by: Establishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards and developing a State program to implement and enforce the standards." 35 P.S. 721.2.

47. The Pennsylvania SDWA provides that an MCL must be no less stringent than those promulgated under the Federal Act and regulations but explicitly permits the DEP to establish additional and/or more stringent levels for target contaminants, such as PFOA, which is not regulated at the Federal level.

48. Because PFAS contamination has plagued the nation, other states faced with the toxic contamination have issued state guidance levels or adopted maximum contaminant levels to safeguard their residents and inform cleanup response. Eighteen states have taken some governmental action regarding PFAS contamination. Ten states have promulgated regulation, including New Jersey.

49. On August 2018, the New Jersey's Drinking Water Quality Institute ("NJDWQI") unanimously voted to approve a recommendation for an MCL for PFOS of 13 parts per trillion and PFOA of 14 parts per trillion.

50. New Jersey Drinking Water Quality Institute's review was a thorough analysis. The complete report, in excess of 450 pages, is set forth on the New Jersey Drinking Water Quality Institute's Web Site. https://www.state.nj.us/dep/watersupply/pdf/pfoa-appendixa.pdf.

51. The report highlighted the fact that negative health outcomes, including but not limited to the cancers and diseases in paragraph 4, were linked with exposure to PFOA contaminated drinking water.

52. The NJDWQI report highlighted that "PFOA has been measured in amniotic fluid, maternal serum, umbilical cord blood, and breast milk" and that "breast-fed infants whose mothers ingest contaminated drinking water and infants fed with formula prepared with contaminated drinking water receive much greater exposures to PFOA than older individuals who consume drinking water with the same PFOA concentration."

53. To reach its conclusion, the NJDWQI report reviewed animal toxicology data and 54 epidemiological studies from the general population, and communities with drinking water exposures including the C8 Health Study, a large study of about 70,000 Ohio and West Virginia residents exposed to a wide range of PFOA concentrations in drinking water.

54. The New Jersey Department of Environmental Protection is proposing the amendment of New Jersey's Safe Drinking Water Act with

NJDWQI's MCL and has emphasized (among other factors) the economic benefit to its residents from avoiding medical costs and the loss of productivity due to illness.

55. On May 8, 2017, DRN petitioned the DEP and EQB to establish a maximum contaminant level for drinking water in Pennsylvania of between 1 parts per trillion to 6 parts per trillion for drinking water for PFOA. The intention of this level – one lower than proposed by New Jersey -- was to offer protection for the population's most vulnerable exposure group, children. The NJDWQI MCL of 14 parts per trillion was based on an adult exposure value.

56. DRN's Petition was a thorough and well researched document in support of the MCL and contained scientific studies and references including the draft 2016 NJDWQI PFOA Report and the technical analysis of DRN's independent consultant, Cambridge Environmental Consulting. (Attached hereto as Exhibit "A" is a true and correct copy of DRN's Petition including all the attachments.)

57. The procedure for establishing an MCL in Pennsylvania is governed by regulations of the Environmental Quality Board, 71 P.S. § 510-20, 25 Pa. Code §§ 23.1–23.8.

58. Under the EQB's petition process, after the DEP determines that a petition is complete, the petition is sent to the EQB. 25 Pa. Code § 23.2.

59. At the next scheduled EQB meeting, the petitioner and the DEP make presentations. 25 Pa. Code § 23.4. If the EQB accepts the petition, then the next required step is for the Department to prepare a report within sixty days and to make a recommendation on rulemaking to the EQB. 25 Pa. Code § 23.6.

60. The petitioner has the right to receive a copy and to respond to the DEP's report. 25 Pa. Code § 23.7, 25 Pa. Code § 23.8. Afterward the report is sent to the EQB, who votes on whether or not to adopt any proposed regulation. If so, public notice and comment and rulemaking procedures follow.

61. In accordance with the aforesaid procedures, at the August 15, 2017, EQB meeting, DRN's Petition was presented. Attached hereto as Exhibit "B" is a true and correct copy, of the DEP's letter of June 22, 2017, by Laura Edinger, regarding the presentation of the DRN's Petition to the EQB, on August 15, 2017.

62. The DEP recommended that the Petition be accepted for further evaluation to inform what measures were necessary to protect public health, and provided that the DEP's report on the Petition would be presented by June of 2018.

63. The Board voted and unanimously accepted the Petition for review.

64. Typically, a report on a Petition (not related to a stream) would have been due within sixty days, but there is the option for the DEP to specify a different date, to be accepted by the EQB. With regard to DRN's Petition, the DEP specified June of 2018.

65. Unfortunately, the DEP has failed to issue its Report, and accordingly there has been no further action on DRN's Petition for over two years, despite the evidence of the compelling and exigent need for an MCL to protect Pennsylvanians (including DRN members) from health harms due to PFOAs in their drinking water.

66. On June 1, 2018, the undersigned counsel for DRN contacted Patrick McDonnell, Secretary of Environmental Protection and Chairman of the EQB, by email and mail to request further action on DRN's Petition and to offer DRN's assistance. Attached hereto as Exhibit "C" is a true and correct copy of DRN's letter dated June 1, 2018.

67. Respondent DEP did not respond to DRN's letter of June 1, 2018.

68. Notwithstanding the failure to respond to DRN's letter and without any notice to DRN, the DEP, at the June 19, 2018 Environmental Quality Board Meeting, provided an "update" that DEP needed an undefined amount of additional time "to evaluate the science of the petition" and had been working for the past six months to hire a toxicologist.

69. Approximately one year later, on June 11, 2019, after being alerted by an environmental blog post that DRN's Petition was on the agenda for the June 18, 2019 EQB meeting to be addressed by way of a DEP "update", DRN staff again contacted the EQB via an emailed letter to offer assistance to the EQB

regarding the Petition, and to request the ability to address the Board at the June 18, 2019 meeting. Attached hereto as Exhibit "D" is a true and correct copy of DRN's letter dated June 11, 2019.

70. DRN Deputy Director, Tracy Carluccio, attended the June 18, 2019 EQB meeting, and, despite the fact that the "update" on DRN's Petition appeared on the agenda, it was not addressed at the public session, and Ms. Carluccio was not permitted to address the Board.

71. Subsequent to attending the June 18, 2019 meeting, Ms. Carluccio received a letter in the mail from DEP Policy Director, Jessica Shirley, denying her request to address the EQB and providing no information regarding if and when DEP would address DRN's Petition via a Report.

72. The DEP has not otherwise proposed an MCL on its own initiative to address the growing and serious PFAS and PFOA contamination in the Commonwealth.

73. The DEP and Department of Defense are using the EPA HAL in the Commonwealth as if it were a safe drinking water level – which it is not – and refusing action unless PFOA and PFOS concentrations exceed 70 parts per trillion.

74. Further, for reasons unknown, the DEP also appears to have selected the target level of 40 parts per trillion as a measure that requires water wells to undergo further testing.

75. On September 19, 2018, Pennsylvania Governor Tom Wolf created a PFOA "action team" but thus far the meetings have not led to concrete results, including but not limited to the filing of the aforementioned DEP Report on the DRN's MCL Petition, or the establishment of any Interim MCL or required treatment technique.

76. The Governor announced on September 19, 2018 that the government will "prioritize" hiring toxicologists to establish drinking water limits and strategy.

77. On January 4, 2019, Jessica Shirley informed Ms. Carluccio that the DEP was conducting interviews to hire a toxicologist.

78. On April 29, 2019 at the Department of Health blood study report meeting, they announced that a toxicologist was hired but would not begin working until July and that they would be interviewing to hire a second toxicologist.

79. Ms. Carluccio has also been told by the Department of Health's Sharon Watkins, the state's epidemiologist, that multiple toxicologists may be necessary and DEP will not be able to even begin any analysis until they have a qualified staff person.

80. DEP's lengthy delay in proposing a protective MCL for the Commonwealth and even filing the requisite Report on DRN's Petition is a derogation of the Department's mandatory duty to assure the provision of safe

drinking water to the public by establishing drinking water standards. 35 P.S. 721.2.

81. The Pennsylvania Department of Health has done a recent health impact study in impacted areas in Bucks and Montgomery County that shows their PFAS blood levels exceed national averages. This report is on the Pennsylvania Department of Health website, https://www.health.pa.gov/topics/envirohealth/Pages/PFAS.aspx.

82. The DEP has long been aware of the toxicity of PFOA and the PFAS contamination to ground and surface waters and to drinking water supplies and resultant health harms from consumption of contaminated water.

83. The Department could have relied upon NJDWQI's Report for its MCL and/or could have relied upon DRN's experts, Cambridge Environmental Consulting, to reach a report conclusion with respect to establishing an MCL or Interim MCL.

84. The Department also could have created a state science advisory board with volunteers from science and academia.

85. The Department instead has taken no meaningful action to regulate PFOAs in the Commonwealth's drinking water, aside from the announcement of a statewide sampling plan.

86. On May 3, 2019, DEP Secretary Patrick McDonald was quoted in the Philadelphia Inquirer as indicating that an MCL proposal should be completed within three years.

87. This matter is ripe for review, because the failure and refusal of DEP to take any action in the past two years to either accept or reject the DRN's Petition for an MCL, means that the Pennsylvania Environmental Hearing Board did not have administrative jurisdiction over the action and that it could languish without final decision, to the severe detriment of DRN's members and DRN's ability to fulfill its mission of protecting its members' health through assurance of unadulterated safe drinking water and protection of the environment, including the Delaware River and its tributaries.

88. DRN's interest in DEP's fulfillment of its duties and the establishment of an MCL is substantial, direct, and immediate.

89. DRN's interest is substantial, because of its work in filing the aforesaid Rulemaking Petition and because of the aforesaid health harm and threat of harm to its members by the unconscionable delay in acting on its Petition.

90. DRN's interest is direct and immediate, because without Court intervention its Petition will remain unaddressed and DEP will not take necessary, immediate and requisite action to address the continuing and emergent situation

causing harm and threat of harm to its members' health, property and to the environment.

91. There is no adequate monetary remedy at law that can compensate for the resulting harms to people, property, and the degradation of natural resources.

92. DEP had sufficient information to establish a state-wide MCL for PFOAs to protect the public water supply.

93. DEP retains some discretion as to the magnitude of the MCL, but does not have the option of simply ignoring DRN's Petition and the known hazardous contamination of drinking water and health risks, which imperils the health of DRN members, and/or adversely impacts their property and/or degrades the surrounding environment to their detriment.

94. DEP has acted arbitrarily and vexatiously at all relevant times via its unlawful refusal to issue the report evaluating DRN's Petition for an MCL and/or to otherwise propose regulation necessary for the implementation and enforcement of a public water supply program, free from unsafe contamination with PFOAs.

Count I: Pennsylvania Safe Drinking Water Act

(Against all Respondents)

(Failure to Assure the Provision of Safe Drinking Water and to Implement a Public Water Supply Program by establishing drinking water standards)

95. All preceding paragraphs are incorporated herein by reference as if fully set forth.

96. The General Assembly has declared that "an adequate supply of safe, pure drinking water is essential to the public health, safety and welfare." 35 P.S.§ 721.2(a).

97. The General Assembly further stated that the purpose of the Pennsylvania Safe Drinking Water Act is to "further the intent of section 27 of Article I of the Constitution of Pennsylvania by:

> (1) Establishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards and developing a State program to implement and enforce the standards....

35 P.S. §721.2(b).

98. The DEP's mandatory role and obligation under the Commonwealth's Safe Drinking Water Act is to be the administrator for the Commonwealth's primary enforcement responsibility under the Federal Act. 35 P.S.§721.5.

99. The Department is obligated "to adopt and implement a public water supply program." "The public water supply program shall include but not be limited to maximum contaminant levels or treatment technique requirements establishing drinking water quality standards, monitoring, reporting, recordkeeping and analytical requirements, requirements for public notifications, standards for construction, operation and modification to public water systems, emergency procedures, standards for laboratory certification and compliance and enforcement procedures." 35 P.S. §721.5(a).

100. The DEP's broad and encompassing obligation is to develop and implement procedures as may be necessary and appropriate to obtain compliance with the Act or rules and regulations promulgated under it. 35 P.S. §721.5(b).

101. Contrary to the DEP's mandatory duties necessary for the implementation and enforcement of a public water supply program under the Commonwealth's Safe Drinking Water Act, the DEP has failed and refused to comply with the EQB's Petition Process, 25 Pa. Code § 23.6, and to issue its substantive report evaluating DRN's Petition for the MCL within a sixty-day time period or alternatively within the defined time period that DEP requested of the EQB, June, 2018.

102. Section 23.6 provides as follows:

> If the EQB accepts the petition, a notice of acceptance will be published in the *Pennsylvania Bulletin* within 30 days. In addition, a report will be prepared in accordance with one of the following procedures:
>
> > (1) *Petitions other than stream redesignation petitions.* **The Department will prepare a report evaluating the petition within 60 days. If the report cannot be completed within the 60-day period, at the next EQB meeting the Department will state how much additional time is necessary to complete the report.** The Department's report will include a recommendation on whether the EQB should approve the action requested in the petition. If the recommendation is to change a regulation, the report will also specify the anticipated date that the EQB will consider a proposed rulemaking...

25 Pa. Code § 23.6 (emphasis added).

103. To this date, contrary to its clear statutory and/or regulatory duties, the DEP has not prepared the report and has not given any indication if or when it will complete the report.

104. Because of the known and grave health risks presented by the yet-regulated PFOAs in the Commonwealth's drinking water, DEP should have completed its evaluation and issued its report in a time is of the essence manner.

105. The Department's failure and omission violates its duty to implement a public water supply program, which includes the evaluation of maximum contaminant levels.

106. DEP has the mandatory and ministerial duty aforementioned to respond to and evaluate a Petition to set an MCL and to abide by EQB Petition Process and to issue its Report evaluating the MCL within a clear and definitive time period.

107. A citizen may bring an action against the Department where there is a failure of the Department to perform any nondiscretionary act. 35 P.S. §721.13.

108. Petitioners have repeatedly reached out to the DEP regarding the violation of its duties and have no adequate remedy at law.

109. The aforesaid conduct of DEP subjects it to injunctive relief in the form of an order that the DEP issue their Report on DRN's MCL Petition in sixty days or such other clearly defined time as the Court deems reasonable.

WHEREFORE, DRN and Maya van Rossum respectfully request that this Honorable Court enter judgment in their favor and against Respondents and to Order DEP to comply with its obligations under said environmental laws and fulfill its duty to implement a public water supply program and accordingly evaluate maximum contaminant levels, including by promptly issuing the DEP Report in response to DRN's MCL Petition within sixty days or other defined time period, and that the Court grant such other and further relief as may be necessary and appropriate.

Count II. Violation of The Environmental Rights Amendment (Against all Respondents)

110. The preceding paragraphs are incorporated herein by reference as if fully set forth.

111. Article 1, Section 27 of the Pennsylvania Constitution guarantees the following:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic 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.

112. The Environmental Rights Amendment places an affirmative duty on the Commonwealth, including DEP, to "prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Pennsylvania Environmental Defense Foundation v. Commonwealth,* 161 A.3d 911, 934–35 (Pa. 2017) ("PEDF") quoting *Robinson Township, Delaware Riverkeeper Network et al. v. Com.*, 83 A.3d 901 (Pa. 2013) (plurality).

113. Protection of "safe, pure drinking water is essential to public health, safety and welfare" and is an integral part of Section 27. See 35 P.S. §721.2.

114. Our Pennsylvania Supreme Court found in PEDF that a trustee of the Commonwealth's natural resources has the fiduciary duty to act toward the "corpus" with prudence, loyalty, and impartiality. The surface, subsurface and the drinking water of the Commonwealth are part of that "corpus."

115. DEP has violated its Constitutional obligations by failing to timely evaluate DRN's Petition for an MCL for PFOA or otherwise propose an MCL requirement to respond to the health risk and reality that PFOA contaminants have and will enter the drinking water supply and to inform necessary treatment and cleanup.

116. Regulation, treatment and cleanup of drinking water to remove PFOAs will also assist in addressing the continued degradation of groundwater, surface water and the environment.

117. DEP's above-referenced failures have violated and continue to violate DRN members' Constitutional rights.

WHEREFORE, DRN and Maya van Rossum respectfully request that this Honorable Court enter judgment in their favor and against Respondents and to Order DEP to comply with its obligations under the Pennsylvania Constitution and fulfill its duty to act as a trustee to the Commonwealth's natural resources and its duty to protect residents from PFOA contamination in drinking water by evaluating and proposing an MCL in response to DRN's MCL Petition, and that the Honorable Court grant such other and further relief as may be necessary and appropriate.

Count III: Declaratory Judgment Act
(Against all Respondents)

118. The preceding paragraphs are incorporated herein by reference as if fully set forth.

119. An actual controversy exists between the Petitioners and Respondent, the DEP, because Respondent DEP denies the obligation and legal liability to

evaluate, regulate and/or abate PFOA contamination in drinking water via proposal of an MCL, and that Respondent has the aforesaid legal duties.

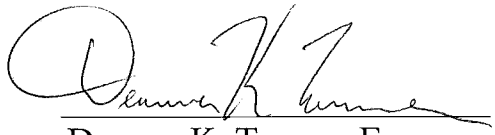
120. Respondent DEP has acted or refrained from action in violation of their aforesaid obligations under the Pennsylvania Safe Drinking Water Act and the Pennsylvania Constitution's Environmental Rights Amendment.

121. Petitioners request a judicial determination of the rights and obligations of the DEP.

WHEREFORE, DRN respectfully requests that this Honorable Court enter judgment in its favor and against Respondents and declare that the DEP via its actions and failures to act has violated its duties under the Pennsylvania Safe Drinking Water Act and under the Environmental Rights Amendment of the Pennsylvania Constitution and that the DEP is obligated to comply with its aforesaid legal obligations, including the obligation to evaluate DRN's Petition for an MCL for PFOAs and/or otherwise propose regulations to implement a public water supply program that provides for safe drinking water not contaminated with levels of PFOAs that cause health risk and harms. The Honorable Court should also order such other and further relief as the Court may deem just and proper under the

circumstances, including payment of DRN's attorneys fees and costs.

Respectfully Submitted,



Date: 7/11/19

Jordan B. Yeager, Esq.
Attorney Id. No. 72947
Curtin & Heefner LLP
2005 South Easton Road, Suite 100
Doylestown, PA 18901
(267) 898-0570

Deanna K. Tanner, Esq.
Attorney Id. No. 60258
Delaware Riverkeeper Network
925 Canal Street, Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188

Attorneys for Petitioners

VERIFICATION

I, Maya van Rossum, hereby verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 C.S. § 4904 relating to unsworn falsification to authorities.

Date: 7/11/19

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently from non-confidential information and documents

Respectfully submitted,

Date: 7/11/19

Deanna Kaplan Tanner
Attorney Id. No. 60258)
Delaware Riverkeeper Network
925 Canal Street,
Suite 3701 (7th Floor)
Bristol, PA 19007
(215)369-1188

Deanna Kaplan Tanner, Esquire (Attorney Id. No. 60258)
Delaware Riverkeeper Network
925 Canal Street,
Suite 3701 (7th Floor)
Bristol, PA 19007
(215) 369-1188

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE RIVERKEEPER NETWORK, and the DELAWARE RIVERKEEPER, MAYA VAN ROSSUM Petitioner, v. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Of THE COMMONWEALTH OF PENNSYLVANIA and ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA Respondents	)	No. 285 M.D. 2019

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Amended Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief upon the persons and in the manner indicated below, which satisfies the requirements of Rules 121 of the Pennsylvania Rules of Appellate Procedure.

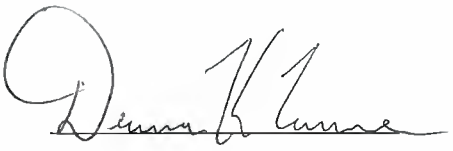
Via electronic service as follows:

Brian Glass
Hannah Leone
PADEP, Office of Chief Counsel

2 East Main Street
Norristown, PA 19454
briaglass@pa.gov
haleone@pa.gov

Robert A. Reiley
Bureau of Regulatory Counsel
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101
rreiley@pa.gov

Date: 7/11/19



Deanna K. Tanner
Attorney Id. No. 60258
Delaware Riverkeeper Network
925 Canal Street,
Suite 3701 (7th Floor)
Bristol, PA 19007
(215)369-1188

APPENDIX D

42 Pa.C.S. § 702

Pa.C.S. documents are current through 2021 Regular Session Act 6; P.S. documents are current through 2021 Regular Session Act 6

§ 702. Interlocutory orders.

(a) ***Appeals authorized by law.*** **—**An appeal authorized by law from an interlocutory order in a matter shall be taken to the appellate court having jurisdiction of final orders in such matter.

(b) ***Interlocutory appeals by permission.*** **—**When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

(c) ***Supersedeas.*** **—**Except as otherwise prescribed by general rules, a petition for permission to appeal under this section shall not stay the proceedings before the lower court or other government unit, unless the lower court or other government unit or the appellate court or a judge thereof shall so order.

History

Act 1976-142 (S.B. 935), P.L. 586, § 2, approved July 9, 1976, See section of this act for effective date information; Act 1978-53 (H.B. 825), P.L. 202, § 10, approved Apr. 28, 1978, eff. in 60 days.

APPENDIX E

35 P.S. § 721.5

Pa.C.S. documents are current through 2021 Regular Session Act 6; P.S. documents are current through 2021 Regular Session Act 6

§ 721.5. Powers and duties of department

(a) STATE TO ASSUME PRIMARY ENFORCEMENT. —The department shall adopt and implement a public water supply program which includes, but is not limited to, those program elements necessary to assume State primary enforcement responsibility under the Federal act. The public water supply program shall include, but not be limited to, maximum contaminant levels or treatment technique requirements establishing drinking water quality standards, monitoring, reporting, recordkeeping and analytical requirements, requirements for public notification, standards for construction, operation and modifications to public water systems, emergency procedures, standards for laboratory certification, and compliance and enforcement procedures.

(b) DEPARTMENT TO ESTABLISH COMPLIANCE PROCEDURES. —The department shall develop and implement procedures as may be necessary and appropriate in order to obtain compliance with this act or the rules and regulations promulgated, or permits issued hereunder. Such procedures shall include, but not be limited to:

(1) Monitoring and inspection.

(2) Maintaining an inventory of public water systems in the Commonwealth.

(3)A systematic program for conducting sanitary surveys of public water systems throughout the Commonwealth.

(4) The establishment and maintenance of a program for the certification of laboratories conducting analytical measurements of drinking water contaminants specified in the drinking water standards; and the assurance of the availability to the department of laboratory facilities certified by the administrator and capable of performing analytical measurements of all contaminants specified in the drinking water standards.

(5) The establishment and maintenance of a permit program concerning plans and specifications for the design and construction of new or substantially modified public water systems, which program:

(i) Requires all such plans and specifications, or either, to be first approved by the department before any work thereunder shall be commenced.

(ii) Requires that all such projects are designed to comply with any rules and regulations of the department concerning their construction and operation; and once completed will be capable of compliance with the drinking water standards; and will deliver water with sufficient volume and pressure to the users of such systems.

(c) DEPARTMENT TO ENFORCE DRINKING WATER STANDARDS. —The department shall have the power and its duties shall be to issue such orders and initiate such proceedings as may be necessary and appropriate for the enforcement of drinking water standards, any other provision of law notwithstanding. These actions shall include, but are not limited to, the following:

(1) To institute in a court of competent jurisdiction, proceedings against any person to compel compliance with the provisions of this act, or the drinking water standards or conditions of permits issued hereunder.

(2) To initiate criminal prosecutions, including issuance of summary citations by agents of the department.

(3) To do any and all things and actions not inconsistent with any provision of this act for the effective enforcement of this act, rules and regulations or permits issued hereunder.

(d) DEPARTMENT TO KEEP RECORDS. —The department shall keep such records and make such reports as may be required by regulations established by the administrator pursuant to the Federal act.

(e) DEPARTMENT MAY REQUIRE INFORMATION FROM PUBLIC WATER SYSTEMS. —The department may require any public water system to install, use and maintain such monitoring equipment and methods to perform such sampling, to maintain and retain such records of information from monitoring and sampling activities, to submit such reports of monitoring and sampling results and to provide such other information as may be required to determine compliance or noncompliance with this act or with regulations promulgated pursuant to this act.

(f) DEPARTMENT HAS RIGHT TO ENTER PREMISES. —The department and its agents shall have the right to enter any premise under the control of the public water system upon presentation of appropriate credentials at any reasonable time in order to determine compliance with this act, and to that end may test, inspect or sample any feature of a public water system and inspect, copy or photograph any monitoring equipment or other feature of a public water system, or records required to be kept under provisions of this act.

(g) SEARCH WARRANTS. —An agent or employee of the department may apply for a search warrant to any Commonwealth official authorized to issue a search warrant for the purposes of inspecting or examining any property, building, premise, place, book, record or other physical evidence, of conducting tests or taking samples. Such warrant shall be issued upon probable cause. It shall be sufficient probable cause to show any of the following:

(1)the inspection, examination, test or sampling is pursuant to a general administrative plan to determine compliance with this act;

(2)the agent or employee has reason to believe that a violation of this act has occurred or may occur; or

(3)the agent or employee has been refused access to the property, building, premise, place, book, record or physical evidence, or has been prevented from conducting tests or taking samples.

(h) DELEGATION OF FUNCTIONS AND FISCAL MATTERS. —The department is authorized to:

(1) Enter into agreements, contracts or cooperative arrangements under such terms and conditions as may be deemed appropriate with other State agencies, Federal agencies, interstate compact agencies, political subdivisions or other persons, including agreements with local health departments to delegate one or more of its regulatory functions to inspect, monitor and enforce the act and drinking water standards. The department shall monitor and supervise activities of each local health department conducted pursuant to such an agreement, for consistency with the department's rules, regulations and policies. A local health department, where it exists in each of the counties of the Commonwealth, may elect to administer and enforce any of the provisions of this act together with the department in accordance with the established policies, procedures, guidelines, standards and rules and regulations of the department. Local health departments electing to administer and enforce the provisions of this act shall be funded through contractual agreements within the department whenever program activity exceeds the minimum program requirements established under the former act of April 22, 1905 (P.L. 260, No. 182), entitled "An act to preserve the purity of the waters of the State, for the protection of the public health," adopted by the Advisory Health Board under the provisions of the act of August 24, 1951 (P.L. 1304, No. 315), known as the Local Health Administration Law. The department is authorized to provide funds to local health departments entering into an agreement to contract pursuant to this

paragraph which shall be considered to be agents of the department for the purpose of enforcement of this act.

(2) Notwithstanding the grant of powers in paragraph (1), in any case where administration and enforcement of this act by a local health department shall conflict with administration and enforcement by the department, the department shall so notify the local health department of the conflict and administration and enforcement by the department shall take precedence over administration and enforcement by a local health department.

(3) Receive financial and technical assistance from the Federal Government and other public or private agencies where appropriate.

(4) Establish fiscal controls and accounting procedures.

(5) Establish and collect fees for conducting inspections, laboratory analyses and certifications as may be necessary.

History

Act 1984-43 (S.B. 201), P.L. 206, § 5, approved May 1, 1984, See section of this act for effective date information.

End of Document

APPENDIX F

35 P.S. § 721.13

Pa.C.S. documents are current through 2021 Regular Session Act 6; P.S. documents are current through 2021 Regular Session Act 6

§ 721.13. Penalties and remedies

(a) DUTY TO COMPLY WITH ORDERS OF THE DEPARTMENT. —It shall be the duty of any person to proceed diligently to comply with any order issued pursuant to section 5. If such person fails to proceed diligently or fails to comply with the order within such time, if any, as may be specified, the person shall be guilty of contempt and shall be punished by the court in an appropriate manner and for this purpose, application may be made by the department to the Commonwealth Court, which court is hereby granted jurisdiction.

(b) CIVIL ACTION TO COMPEL COMPLIANCE. —Any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act:

(1)against the department where there is alleged a failure of the department to perform any act which is not discretionary with the department. Jurisdiction for such actions is in Commonwealth Court; or

(2)against any other person alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act. Any other provision of law to the contrary notwithstanding, the courts of common pleas shall have jurisdiction of such actions and venue in such actions shall be as set forth in the Rules of Civil Procedure concerning actions in assumpsit.

(c) SUMMARY OFFENSE. —Any person who violates any provision of this act, or any rule or regulation of the department, any order of the department, or any condition of any permit of the department issued pursuant to this act, is guilty of a summary offense and, upon conviction, shall be subject to a fine of not less than $ 50 nor more than $ 5,000, and costs, for each separate offense and, in default of the payment of such fine or costs, a person shall be subject to imprisonment for not less than 30 days nor more than 90 days.

(d) MISDEMEANOR OF THE THIRD DEGREE. —Any person who willfully or negligently violates any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to the act is guilty of a misdemeanor of the third degree and, upon conviction, shall be subject to a fine of not less than $ 1,250 nor more than $ 12,500 for each separate offense or to imprisonment for a period of not more than one year, or both.

(e) MISDEMEANOR OF THE SECOND DEGREE. —Any person who, after a conviction of a misdemeanor for any violation within two years as above provided, willfully or negligently violates any provision of this act, any rule or regulation of the department, any order of the department, or any condition of any permit issued pursuant to this act is guilty of a misdemeanor of the second degree and, upon conviction, shall be subject to a fine of not less than $ 1,250 nor more than $ 25,000 for each offense or to imprisonment for a period of not more than two years, or both.

(f) PREENFORCEMENT CONFERENCE. —Notwithstanding any other provision of this act, before the department shall institute any criminal proceedings against any person pursuant to subsections (c), (d) and (e) it shall, in writing, provide such person with an opportunity for a preenforcement conference.

(g) CIVIL PENALTIES. —In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department or any

term or condition of any permit issued by the department, the department may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful or negligent. When the department assesses a civil penalty, it shall inform the person of the amount of the penalty. The person charged with the penalty shall then have 30 days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, the person shall within the 30-day period, file an appeal of the action with the Environmental Hearing Board. Failure to appeal within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty. The maximum civil penalty which may be assessed pursuant to this section is $ 5,000 per day for each violation. Each violation for each separate day and each violation of any provision of this act, any rule or regulation under this act, any order to the department or any term or condition of the permit shall constitute a separate and distinct offense under this section.

(h) PENALTIES TO BE CONCURRENT. —The penalties and remedies prescribed by this act shall be deemed concurrent and the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy hereunder, at law or in equity.

(i) SEPARATE OFFENSES. —Violations on separate days shall constitute separate offenses for purposes of this act.

(j) TAMPERING WITH PUBLIC WATER SYSTEMS. —

(1) Any person who endangers the health of persons by knowingly introducing any contaminant into a public water system or tampering with a public water system shall be fined not more than $ 50,000 or imprisoned for not more than five years, or both.

(2) Any person who attempts to endanger or makes a threat to endanger the health of persons by knowingly introducing any contaminant into a public water system or tampering with a public water system shall be fined not more than $ 20,000 or imprisoned for not more than three years, or both.

(3) The department may bring a civil action in the appropriate court of common pleas against any person who endangers, attempts to endanger or makes a threat to endanger the health of persons or otherwise renders the water unfit for human consumption by the introduction of any contaminant into a public water system or tampering with a public water system. The court may impose on such person a civil penalty of not more than $ 50,000 for each day that such endangerment or inability to consume the water exists.

History

Act 1984-43 (S.B. 201), P.L. 206, § 13, approved May 1, 1984, See section of this act for effective date information.

End of Document

APPENDIX G

Pa. Const. Art. I, § 27

Pa.C.S. documents are current through 2021 Regular Session Act 6; P.S. documents are current through 2021 Regular Session Act 6

§ 27. Natural resources and the public estate.

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.

APPENDIX H

71 P.S. § 510-20

Pa.C.S. documents are current through 2021 Regular Session Act 6; P.S. documents are current through 2021 Regular Session Act 6

§ 510-20. Environmental Quality Board (Adm. Code § 1920-A)

(a) The Environmental Quality Board shall have the responsibility for developing a master environmental plan for the Commonwealth.

(b) The Environmental Quality Board shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department, and such rules and regulations, when made by the board, shall become the rules and regulations of the department.

(c) The board shall continue to exercise any power to formulate, adopt and promulgate rules and regulations, heretofore vested in the several persons, departments, boards and commissions set forth in section 1901(a) of this act, and any such rules and regulations promulgated prior to the effective date of this act shall be the rules and regulations of the Department of Environmental Resources until such time as they are modified or repealed by the Environmental Quality Board.

(d) The board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such other order as the circumstances require.

(e) The board shall receive and review reports from the Department of Environmental Resources and shall advise the Department and the Secretary of Environmental Resources on matters of policy.

(f) The board shall establish such rules and regulations, not inconsistent with law, for the control, management, protection, utilization, development, occupancy and use of the lands and resources of State parks, as it may deem necessary to conserve the interests of the Commonwealth. Such rules and regulations shall be compatible with the purposes for which State parks are created. Whenever the board imposes fees or charges for activities, admissions, uses or privileges, including charges for concessions, at or relating to State parks, such charges or fees shall be used solely for the acquisition, maintenance, operation or administration of the State parks systems, and are hereby appropriated for such purposes. The board shall not adopt or impose any charges or fees for parking or general admission to State parks unless the charges were imposed prior to January 1, 1984. The board may continue to impose and modify parking charges and fees applicable to specific services or units within the State park system which were imposed prior to January 1, 1984, and may impose charges or fees for admission to and for use of specific services and facilities in State parks.

(g) The board shall establish such rules and regulations, not inconsistent with law, for the control, management, protection, utilization, development, occupancy, and use, of the lands and resources of the State forests, as the department deems proper, to conserve the interests of the Commonwealth. Such rules and regulations shall be compatible with the purposes for which the State forests are created, namely to provide a continuous supply of timber, lumber, wood, and other forest products, to protect the watersheds, conserve the waters, and regulate the flow of rivers and streams of the State and to furnish opportunities for healthful recreation to the public.

(h) Any person may petition the Environmental Quality Board to initiate a rule making proceeding for the issuance, amendment or repeal of a regulation administered and enforced by the department.

(i) The chairman of the Environmental Quality Board may suspend any regulation promulgated solely to meet a requirement of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, when the requirement is no longer binding upon Pennsylvania. Notice of the suspension shall be published in the Pennsylvania Bulletin. Within sixty days after the suspension, the Environmental Quality Board shall reconsider the suspended regulation and shall promulgate, amend or repeal the regulation pursuant to the requirements of the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law.

(j) The board shall promulgate regulations under the act of June 22, 1937 (P.L.1987, No.394), known as "The Clean Streams Law," or other laws of this Commonwealth that require that the water quality criteria for manganese established under 25 Pa. Code Ch. 93 (relating to water quality standards) shall be met, consistent with the exception in 25 Pa. Code § 96.3(d) (relating to water quality protection requirements). Within ninety (90) days of the effective date of this subsection, the board shall promulgate proposed regulations.

History

Act 1970-275 (H.B. 2213), P.L. 834, § 20, approved Dec. 3, 1970, eff. Jan. 1, 1971; Act 1980-153 (S.B. 988), P.L. 805, § 1, approved Oct. 10, 1980, eff. in 60 days; Act 1981-51 (H.B. 1517), P.L. 177, § 1, approved July 1, 1981, eff. immediately; Act 1984-242 (S.B. 1476), P.L. 1275, § 2, approved Dec. 21, 1984, eff. Jan. 1, 1985; Act 2017-40 (H.B. 118), § 6, approved October 30, 2017, eff. October 30, 2017.

End of Document

APPENDIX I

25 Pa. Code § 23.6

This document is current through the March 2021 supplement changes effective through 51 Pa.B. 172 (January 2, 2021)

§ 23.6. Notice of acceptance and Department report

If the EQB accepts the petition, a notice of acceptance will be published in the *Pennsylvania Bulletin* within 30 days. In addition, a report will be prepared in accordance with one of the following procedures:

(1) ***Petitions other than stream redesignation petitions.*** The Department will prepare a report evaluating the petition within 60 days. If the report cannot be completed within the 60-day period, at the next EQB meeting the Department will state how much additional time is necessary to complete the report. The Department's report will include a recommendation on whether the EQB should approve the action requested in the petition. If the recommendation is to change a regulation, the report will also specify the anticipated date that the EQB will consider a proposed rulemaking.

(2) ***Stream redesignation petitions.*** The Department will publish notice of its intent to assess the waters subject to evaluation. The notice will include a request for submittal of technical data that interested persons have. Following the assessment and review of all technical data, the Department will prepare a draft evaluation report.

History

SOURCE:

The provisions of this § 23.6 amended September 22, 2000, effective September 23, 2000, 30 Pa.B. 4935. Immediately preceding text appears at serial page (243349).