



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



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

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

### **Friends of Lackawanna v. PA DEP 2017 EHB 1123 (Adjudication).**

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

A community organization challenged the Pennsylvania Department of Environmental Protection’s approval of a renewal permit for a 714-acre landfill; the renewal allowed the facility to continue operating for the default period of ten years, without any additional conditions, despite a history of groundwater contamination and other problems at the facility. The landfill sought summary judgment, arguing lack of standing and that the appellants’ claim that the approval violated the Environmental Rights Amendment was in fact a challenge to the solid waste management regulatory framework. The permittee also claimed that once the General Assembly passes an environmental statute, no one - not even the courts - “have any further role to play with respect to the [Environmental Rights Amendment].” The permittee also argued

that the Environmental Hearing Board (EHB) could only consider compliance with statutes and regulations as part of its Environmental Rights Amendment analysis. The EHB denied the motion.

The EHB ultimately found that the landfill renewal was improper due to an approximately 14-year unresolved groundwater contamination inquiry. The Board modified the permit to include a condition relative to the permittee's regulatory obligations. Although the EHB rejected the appellant's remaining claims, it did acknowledge merit in the appellant's claims that the PADEP had failed to oversee the landfill in a manner consistent with the PADEP's constitutional obligations. Specifically the EHB wrote:

"We do have some doubts about whether the Department has fulfilled its responsibilities as a prudent, loyal, and impartial trustee of the public natural resources. The record does not demonstrate that it has consistently exercised vigorous oversight of the landfill consistent with its regulatory and constitutional responsibilities with just as much concern about the rights of the landfill's neighbors as the rights of the landfill. The Department appears to have been rather tolerant of chronic odor and leachate management issues. At one point, a Department witness cynically speculated that community complaints regarding odors seem to go up when Keystone has a permit application pending. (T. 1309.) The record does not support that allegation. The witness was not willing to opine on the extent to which odor complaints go down when it becomes clear that they are falling on deaf ears. (T. 1310.) Aside from the odor issue, it is difficult to understand how the Department could allow the groundwater degradation being seen at MW-15 to go unresolved for 14 years. The Department's limited oversight has in turn resulted in what appears to be a less than comprehensive review of the landfill's compliance history in support of the renewal decision. Article I, Section 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day operating in such close proximity to densely populated areas. If the Department is unable or unwilling to exercise that responsibility, the permit cannot be renewed consistent with Section 27. The lack of effective oversight will almost certainly

lead to an impingement of the neighbors' constitutionally assured rights.”

Among its findings the EHB determined that: “Renewing Keystone’s permit without requiring that the violation at MW-15 be corrected and the longstanding groundwater degradation be addressed as a condition of the renewal in the form of a groundwater assessment plan was unreasonable and a violation of the Department’s duties as trustee of the Commonwealth’s natural resources. PA. CONST. art I, § 27.

As it had done at summary judgment, the permittee challenged the appellant’s standing, and raised a new argument in its post-hearing briefing that the appellant lacked standing to assert Environmental Rights Amendment claims. The Board rejected this, noting that it did not find any separate inquiry for standing in constitutional claims. It further stated, “The individual members of FOL [the appellant], on whose behalf FOL is litigating, are precisely the sort of people that Article I, Section 27 is designed to protect, and FOL unquestionably has standing to advance Article I, Section 27 challenges on their behalf.”

The EHB expressly rejected the permittee’s notion that Environmental Rights Amendment compliance must be equivalent to statutory and regulatory compliance. The EHB confirmed that the constitutional obligation is in addition to, and separate from, the obligation to comply with state statute and regulations: “ In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. “

The permittee had argued that state action must be required for the Environmental Rights Amendment to apply. The EHB stated, “If that is true, the state action here is obvious: the Department’s permitting action, without which Keystone would no longer be able to operate a landfill. The state may not sanction the use of private property that will impermissibly infringe upon the constitutional rights of others.”

The EHB also recognized that offsite landfill odors can unreasonably interfere with residents' constitutional environmental rights, although it did not find that an interference had occurred in the case.