

The Pennsylvania Supreme Court, the Environment, and the 2025 Vote For Retention

By Jacqueline Sailer*

On Nov. 4, Pennsylvania voters will decide if three Pennsylvania Supreme Court Justices should remain on the bench: Justices Christine Donohue, Kevin Dougherty, and David Wecht.

A “YES” vote favors keeping them on the bench. If you haven’t already done so, please mark the date and vote.

Justices Christine Donohue, Kevin Dougherty, and David Wecht were initially elected to their seats in 2015. Only seven judges sit on the PA Supreme Court. They are elected and reappointed to 10-year terms at regular general election cycles. There are no term limits on their seats; typically, jurists are retained for additional terms and leave the bench at the mandatory retirement age of 75.

The past 10 years has shown that these three jurists are not afraid to enforce the Commonwealth’s environmental rights amendment, Article I, § 27 (“ERA”), that Pennsylvania’s citizens voted into existence in 1971. By enforcing the constitutional provisions of the ERA, they are achieving the goals of the ERA: environmental and natural resource protection and preservation. Based on their environmental record, these Justices deserve to be retained.

Although the ERA is a constitutional amendment whose terms are mandatory, and a landmark state Supreme Court environmental decision in 2013 laid out a thoughtful enforcement framework for applying the ERA’s provisions, the ERA was largely ignored when the Pennsylvania Supreme Court’s majority consisted of Republican Justices.

It was only in 2017, two years after joining the highest bench, that Justices Donohue, Dougherty and Wecht finally had an opportunity to address the ERA as a majority block. They joined Justice Todd in *Pennsylvania Environmental Defense Fund v. Commonwealth* and declared unconstitutional state legislation that diverted proceeds from gas leases to general state funds and away from funds specifically set up to cover environmental cleanup costs, because income derived from

Pennsylvania's natural resources could be used solely to conserve and maintain those natural resources. They also reaffirmed the earlier landmark *Robinson* decision as binding precedent in Pennsylvania environmental rights jurisprudence. In this case and the others that have followed, Justices Donohue, Dougherty, and Wecht have sent the message that the ERA was meant to be enforced and that they would enforce it.

As an example of their focus on the intent and meaning of the ERA, Justice Donahue supports broadly defining the term "public natural resources," noting in one concurring decision that this term was always intended to be flexibly defined "to capture the full array of resources implicating the public interest." Justice Donohue also believes that the ERA "implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations."

Under the ERA, the public natural resources are to be held in trust for the citizens by the DEP as trustee. The importance of the DEP's role under the ERA was highlighted by the Pennsylvania Supreme Court in *Shirley v. PA. LEGISLATIVE REF. BUREAU*. This decision resolves two appeals arising out of ongoing litigation over the DEP's rulemaking in connection with Pennsylvania's participation in the Regional Greenhouse Gas Initiative (RGGI), a cooperative effort among 11 states to reduce carbon dioxide levels. (DCS filed a Friend of Court brief in connection with this litigation.)

The Supreme Court was asked to decide whether certain nonprofits, including the Sierra Club and Clean Air Council, could join the plaintiff DEP in bringing the RGGI lawsuit. They wanted to participate on behalf of their individual members, because they did not think the DEP would adequately represent them in the lawsuit.

Writing for the majority in July 2024, Justice Dougherty, over vociferous opposition by the defendants in the case, allowed the nonprofits to join the lawsuit as plaintiffs. Justice Dougherty found that their interests would likely not be represented by the DEP, which had failed to mention the ERA, let alone its obligations as trustee under the ERA, in its submissions. Justice Donohue and Chief Justice Wecht agreed. Justice Donahue observed that "as beneficiaries of the public trust established by the ERA, Nonprofits' members possess a legally

enforceable interest in [...] the natural resources of our Commonwealth. In my view, this [is a] legally enforceable interest in the existing natural resources which, according to Nonprofits, stand to be altered, if not diminished or destroyed, as a result of the efforts to enjoin the RGGI Regulation.” In contrast, Republican Justices Mundy and Brobson found that the nonprofits were adequately represented by the DEP and should not be permitted to intervene. They were not disturbed by the DEP’s disregard for the ERA.

As a final note, in 2023, Justice Wecht, joined by Justices Dougherty, Donohue and Todd, penned a decision that made it easier for nonprofits and individuals to recover legal fees and expenses incurred in expensive environmental rights cases under the Clean Streams Law. Here too, Republican Justice Mundy dissented. Republican Justice Brobson, who had just joined the Pennsylvania Supreme Court in 2022, abstained because he was the lower court judge whose decision the Supreme Court reversed.

It is the job of the judges sitting on Pennsylvania’s highest court to interpret and implement all of the Commonwealth’s constitutional provisions. By requiring parties to address and contend with the provisions of the Environmental Rights Amendment, Justices Wecht, Donohue and Dougherty are doing their jobs and should be retained.

*Jacqueline Sailer is a New York attorney who spends a lot of time on the Delaware river.