

11 July 2017

Practice Groups:

**Environment, Land
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Resources**

Oil, Gas & Resources

Pennsylvania Supreme Court Issues Transformative Decision in Environmental Rights Amendment Case

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The Pennsylvania Supreme Court recently issued a landmark decision regarding Article I, Section 27 of the Pennsylvania Constitution, also known as the “Environmental Rights Amendment.” This amendment holds significance to industries throughout Pennsylvania because it bears upon all state and local permitting decisions that could impact the natural environment.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 10 MAP 2015 (June 20, 2017) (“*PEDF*”), the Pennsylvania Supreme Court nullified the three-part, judicially created “*Payne v. Kassab*” test that lower Pennsylvania tribunals had applied for over 40 years to determine if government actions violated the Environmental Rights Amendment. The court likewise illuminated some of the Commonwealth’s duties under the “public trust” clauses in the Environmental Rights Amendment. It concluded that, under those clauses, funds that the Commonwealth derives from Pennsylvania’s public natural resources must be reinvested into the conservation and maintenance of those resources and cannot be used to support other public programs.

As discussed below, however, the court has yet to resolve a number of other issues that arise out of the Environmental Rights Amendment. Agencies’ and courts’ analyses of and decisions on these issues will have a material influence on how the Environmental Rights Amendment impacts a wide range of business operations in the future.

Background

The Environmental Rights Amendment was adopted in 1971 and is made up of three sentences. The first sentence provides that “[t]he people have a right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment.”¹ The second sentence says that “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.” *Id.* And the third sentence establishes that the Commonwealth is the “trustee” of those resources and must “conserve and maintain them for the benefit of all the people.” *Id.*

In 1973, the Pennsylvania Commonwealth Court concluded in *Commonwealth v. National Gettysburg Tower, Inc.*, 302 A.2d 886 (Pa. Cmwlth. Ct. 1973) that the Environmental Rights Amendment is “self-executing,” meaning that it does not need to be implemented by legislation to be effective.² Later in the same year, in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973), Commonwealth Court announced a three-part test for determining whether a government action violates the Environmental Rights Amendment:

¹ Pa. Const. art. I, § 27.

² 302 A.2d at 892.

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1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?³

In both cases, Commonwealth Court rejected a claim that the Environmental Rights Amendment had been violated.

The Pennsylvania Supreme Court affirmed both of Commonwealth Court's decisions. The Supreme Court, however, was deeply divided in *National Gettysburg Tower* as to whether the first sentence of the Environmental Rights Amendment, which confers the "right to clean air, pure water, and the preservation of" certain environmental values, is self-executing.⁴ In *Payne v. Kassab*, moreover, the Supreme Court did not endorse or comment on Commonwealth Court's three-part test. But a majority of its justices agreed with Commonwealth Court that the public trust components of the Environmental Rights Amendment (the second and third sentences) are self-executing.⁵

In the years that followed, Commonwealth Court, Pennsylvania's common pleas courts, and the Pennsylvania Environmental Hearing Board ("EHB") applied the three-part *Payne v. Kassab* test in numerous cases.⁶

The landscape began to change in 2013, when the Pennsylvania Supreme Court decided *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). In that case, the court addressed Act 13 of 2012, a significant Pennsylvania oil and gas statute, and concluded that several of its key provisions were unconstitutional, striking them down. A plurality of the court's justices determined that the provisions violated the Environmental Rights Amendment. They criticized Commonwealth Court's *Payne v. Kassab* test and articulated a much more expansive view of the Environmental Rights Amendment. But their position — as a plurality opinion — is not binding on the Pennsylvania Supreme Court or lower Pennsylvania tribunals.

Commonwealth Court's Decision in PEDF

Against this backdrop, an environmental organization instituted the *PEDF* case in Commonwealth Court. The organization asserted that certain Pennsylvania statutes violated the public trust components of the Environmental Rights Amendment because, under the statutes, funds that the Commonwealth derived from leasing state lands for oil and gas development were not reinvested into the conservation and maintenance of Pennsylvania's public natural resources. The funds were instead funneled into the Commonwealth's general fund and used to support other public programs.

³ *Payne*, 312 A.2d at 94.

⁴ Neither a majority nor a plurality of its justices agreed on an answer to that question. See *Commonwealth v. National Gettysburg Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

⁵ See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976).

⁶ The EHB is an administrative tribunal that adjudicates challenges to actions (including permitting decisions) that the Pennsylvania Department of Environmental Protection takes.

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In addressing this challenge, Commonwealth Court reaffirmed the *Payne v. Kassab* test and its pre-*Robinson Township* mode of analyzing Environmental Rights Amendment challenges.⁷ The court explained that, “[f]or our purposes, we find the [*Robinson Township*] plurality’s construction of Article I, Section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject.”⁸ It then rejected the challenge at hand, concluding that the Pennsylvania General Assembly has wide discretion to decide which public purposes the Commonwealth’s funds from oil and gas leasing should serve. The court said that “[t]he only constraint we see on the use of monies derived from the sale or leasing of public natural resources under Article I, Section 27 is the general requirement that the monies be used ‘for the benefit of all the people.’”⁹

The environmental organization appealed the decision to the Pennsylvania Supreme Court.

Pennsylvania Supreme Court’s Decision in PEDF

In a majority opinion, the Pennsylvania Supreme Court began its analysis by dismantling Commonwealth Court’s *Payne v. Kassab* test.¹⁰ The court explained that “the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”¹¹

The court then observed that the Environmental Rights Amendment grants “two separate rights to the people of this Commonwealth.”¹² The first right, embodied in the first sentence, is the “right of the citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.”¹³ The court explained that the first sentence is a prohibitory clause that “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”¹⁴

The second right is embodied in the second sentence of the Environmental Rights Amendment. The court described this right as “the common ownership by the people, including future generations, of Pennsylvania’s public natural resources.”¹⁵ “Public natural resources,” the court explained, include state park and forest lands and the state-owned oil and gas reserves that are found in those lands. The court also pointed out that, as revealed by the legislative history of the Environmental Rights Amendment, the second sentence was amended to “include the term ‘public’ to indicate that it did not apply to purely private property rights.”¹⁶ The court, however, suggested (without deciding) that “public natural resources” might include certain privately-owned resources that “involve a public interest.”¹⁷

⁷ See Pa. Envtl. Defense Found. v. Commonwealth, 108 A.3d 140, 159 (Pa. Cmwlth. Ct. 2015).

⁸ *Id.* at 156 n.37.

⁹ *Id.* at 168 (quoting Pa. Const. art. I, § 27).

¹⁰ The court said that the test is “unrelated to the text of Section 27 and the trust principles animating it” and “strips the constitutional provision of its meaning.” PEDF, No. 10 MAP 2015, Slip Op. at 27.

¹¹ PEDF, No. 10 MAP 2015, Slip Op. at 28.

¹² *Id.* at 29.

¹³ *Id.*

¹⁴ *Id.* at 29.

¹⁵ *Id.*

¹⁶ *Id.* at 30 n.22.

¹⁷ *Id.* (quoting statement by Rep. Kury in Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271–72 (1970)).

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Next, the court concluded that “[t]he third clause of Section 27 establishes a public trust pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.”¹⁸ The court, as a corollary, stated broadly (although arguably in *dictum*) that the “Commonwealth,” as trustee, includes “both statewide and local” government agencies.¹⁹ It then interpreted the public trust clause in light of the private-trust principles that were in place when the Environmental Rights Amendment was adopted — which it had not done before. It explained, in this regard, that “the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.”²⁰ In addition, it explained, “the Commonwealth must act affirmatively via legislative action to protect the environment.”²¹

Turning to the constitutional claim at hand, the court made two main determinations. First, it determined that because the Environmental Rights Amendment creates a trust and “pursuant to Pennsylvania [private trust] law in effect at the time of enactment, proceeds from the sale of trust assets are part of the corpus of the trust,” the proceeds that the Commonwealth generates by selling its oil and gas reserves “remain in the corpus of the trust.”²² Second, the court determined that, for purposes of the third sentence of the Environmental Rights Amendment, “[t]he phrase ‘for the benefit of all of the people’ may not be read in isolation and does not confer upon the Commonwealth a right to spend proceeds on general budgetary items.”²³ The phrase, instead, when “understood in context of the entire amendment,” signals that the “assets of the trust are to be used for conservation and maintenance purposes.” *Id.* at 35–36. The court therefore concluded that, to the extent that the statutes at issue diverted the Commonwealth’s oil and gas-sale proceeds away from programs for “conserving and maintaining” public natural resources and into other public programs, they were unconstitutional.

Along the way, the court observed that, in affirming Commonwealth Court’s decision in *Payne v. Kassab*, it had concluded that the “trust provisions in the second and third sentences of Section 27” are self-executing and therefore “do not require legislative action in order to be enforced against the Commonwealth in regard to public property.”²⁴ The court expressly reaffirmed this holding. It also noted that its “prior case law has not resolved” the question of whether the Environmental Rights Amendment is self-executing “in regard to an attempt” under the first sentence “to enforce the people’s rights against the owners of private property.”²⁵

¹⁸ *PEDF*, No. 10 MAP 2015, Slip Op. at 30.

¹⁹ *Id.* at 30 n.23.

²⁰ *Id.* at 32.

²¹ *Id.* at 32–33.

²² *Id.* at 33–34.

²³ *Id.* at 35.

²⁴ *Id.* at 39 (citing *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976)).

²⁵ *Id.* In a concurring and dissenting opinion, Justice Baer criticized the majority for importing private trust principles into the public trust components of Article I, Section 27. This approach, he insisted, is not supported by the language of Article I, Section 27. He emphasized that “Section 27 is silent regarding the creation of a ‘corpus’ and in no way suggests that the proceeds from the sale of natural resources should be included in such a corpus.... The trustee’s duties are to ‘conserve and maintain’ the resources, not the money.” *PEDF*, No. 10 MAP 2015, Concurring and Dissenting Slip Op. (Baer, J.) at 13. Justice Baer also explained that “Section 27 does not require that the Commonwealth conserve and maintain the resources for the benefit of the environment, but rather for the ‘benefit of all the people,’ which includes both the enjoyment of the natural environment but also the utilization of the resources, without waste, for the current benefit of the public.” *Id.* at 14.

Justice Saylor filed a dissenting opinion in which he joined in the dissenting portion of Justice Baer’s opinion.

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Unresolved Questions

By eviscerating Commonwealth Court's *Payne v. Kassab* test and illuminating the Commonwealth's duties under the public trust components of the Environmental Rights Amendment — including the obligation to take the funds that it derives from Pennsylvania's public natural resources and reinvest them into the conservation and maintenance of those resources — the Pennsylvania Supreme Court's decision in *PEDF* is unquestionably transformative. The court, however, has yet to resolve a number of other issues that arise out of the Environmental Rights Amendment. Those issues include the following ones:

- Whether the Environmental Rights Amendment empowers any agency to take environmentally-protective actions (e.g., impose standards or requirements) that no statute authorizes it to take.
- Whether the first sentence of the Environmental Rights Amendment, which confers on individuals the “right to clean air, pure water, and the preservation of” certain environmental values, is self-executing — and whether it gives individuals a right to pursue suits for injunctive relief, damages, or other remedies against other private actors for alleged infringement of those “rights.”
- What is (i) “clean air,” (ii) “pure water,” (iii) “natural values of the environment,” (iv) “scenic values of the environment,” (v) “historic values of the environment,” (vi) “esthetic values of the environment,” and (vii) “preservation” of the values of the environment? If environmental statutes and regulations establish standards for air and water quality, is meeting those standards enough to qualify as protecting clean air and pure water, or will tribunals, on a case-by-case basis, second guess the standards?
- When does the government, in the words of the Supreme Court in *PEDF*, “unreasonably impair” the right to clean air, pure water, and the preservation of certain environmental values?
- What is the interplay between property rights (which are protected under both the Pennsylvania and federal constitutions) and the environmental rights that are enshrined in the Environmental Rights Amendment? For example, can one landowner sue to prevent her neighbor from cutting trees in a way that that would impair her view and enjoyment of the “natural” and “aesthetic” values of the environment?
- Whether and to what extent “Pennsylvania’s public natural resources,” as the corpus of the public trust, include private property interests.
- Whether the “Commonwealth,” as the trustee of the public natural resources, includes local governments. What happens if local governments disagree with Commonwealth agencies concerning the management of those resources? Which agencies are trustees of which resources?
- Given that, in *PEDF*, the Supreme Court interpreted the public trust clauses in light of private-trust principles, will the courts give government agencies, as trustees, the same level of deference that they give to private trustees?
- To what extent can the General Assembly, by statute, define the parameters and process by which the Environmental Rights Amendment is applied, addressing

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some of the above issues and clarifying the respective roles of state and local agencies and the courts in that process?

As Pennsylvania's state and local agencies take environmentally impactful actions in the future, they will undoubtedly be wrestling with these questions. So too will Pennsylvania's tribunals. It is likely that, because of the Supreme Court's decision in *PEDF*, there will be many new litigation matters, many of which will involve Environmental Rights Amendment challenges to decisions by agencies to issue permits and licenses.

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