

## What's Happening With the Environmental Rights Amendment?

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A decision rendered last month by the Supreme Court of Pennsylvania reinterpreted the commonwealth's obligations under Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA). The Supreme Court sided with the appellant, Pennsylvania Environmental Defense Foundation (PEDF), in [PEDF v. Commonwealth of Pennsylvania, 10 MAP 2015](#), and held that the commonwealth had violated the fiduciary duty imposed on it by the ERA. Pursuant to this decision, Pennsylvania and its agencies must prohibit the degradation of public natural resources resulting from state or private activity, and must act affirmatively by passing legislation intended to protect the environment. These duties do not, however, prohibit outright the commonwealth from utilizing its public property in ways that promote the general welfare of its citizens. Included in the commonwealth's fiduciary duty is the duty of prudence, requiring it to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." This duty tempers—somewhat unclearly—an interpretation of the ERA requiring preservation of Pennsylvania's public natural resources to the exclusion of their reasonable use.

Incorporated into the Pennsylvania Constitution in 1971, the Environmental Rights Amendment establishes two separate rights. First, the people of Pennsylvania have rights in the environment—rights "to clean air, pure water, and to preservation of natural, scenic, historic and aesthetic values of the environment." Second, the ERA establishes a public trust composed of the natural resources of the commonwealth, of which the commonwealth must serve as trustee, for the benefit of "all the people including generations yet to come." PEDF addressed the scope of this second right and the nature of this public trust.

PEDF filed suit against the commonwealth to challenge legislation allowing royalties received for oil and gas drilling on public lands to be transferred or appropriated into the General Fund, claiming that the ERA requires those monies to be dedicated to conservation and maintenance of Pennsylvania's natural resources. In coming to its decision, the court reviewed the history of the ERA and prior interpretations of its meaning. An early case concerning whether a particular use of public land violated the ERA was *Payne v. Kassab*, 312 A.2d (Pa. Commw. 1973), [aff'd 361 A.2d 263](#) (Pa. 1976). The Commonwealth Court in *Payne* developed a three-part test for determining constitutionality under Article I, Section 27:

- Was there compliance with all applicable statutes and regulations relevant to the protection of the commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- 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?

Pennsylvania courts consistently followed the *Payne* test until December 2013, when the Supreme Court decided [Robinson Township v. Commonwealth, 83 A.3d 901](#) (Pa. 2013). Robinson Township's plurality opinion held the *Payne* test to be too restrictive, having "the effect of minimizing the constitutional duties of executive agencies and the judicial branch," and allowing legislation to sidestep the requirements of the ERA so long as it satisfies the balancing test. As has been addressed previously by others in this column, Robinson Township set the stage for an uncertain expansion of the scope of ERA litigation, and did not entirely sound a death knell for the *Payne* test. Indeed, in addressing and rejecting

PEDF's challenge, the Commonwealth Court found Robinson Township's plurality opinion not to overturn Payne's three-part test, and followed Payne's guidance in deferring to the Legislature's determination that monies derived from oil and gas leases on public lands could be used for the general "benefit of all the people."

On appeal, however, the Supreme Court overturned the lower court's ruling and more forcefully reiterated the jurisprudence of the Robinson Township plurality, declaring that the Payne test "is unrelated to the text of Section 27 and the trust principles animating it, [and] strips the constitutional provision of its meaning." Instead of applying a balancing test to constitutional challenges to commonwealth actions based on the ERA, the court held, the proper standard of judicial review requires examining the text of the amendment itself, and identifying the rights of citizens and the obligations of the commonwealth provided thereunder.

The commonwealth's action challenged in this case—the appropriation of funds received as oil and gas royalties—was taken in the context of the commonwealth's role as trustee of its natural resources. The natural resources of Pennsylvania, including oil and gas found beneath public forests and parks, constitute the corpus of the public trust. Pennsylvania's citizens—and future citizens—are the beneficiaries. As trustee, the commonwealth owes these beneficiaries a fiduciary duty to act with prudence, loyalty, and impartiality with respect to the corpus of the trust, and to conserve and maintain the corpus. It's important to note that the requirement to "conserve and maintain" does not outright preclude the commonwealth's taking or allowing actions that result in negative environmental impacts. PEDF was not a challenge to the constitutionality of leasing public lands for drilling; it was a challenge to the diversion of the resulting royalties from the public trust to be used elsewhere. The purpose of a public trust is that the corpus be used to benefit the people, the trust's beneficiaries. The commonwealth's duties of loyalty and impartiality require it to consider how the corpus may benefit its citizens today, as well as in the future.

Trust law dictates that oil and gas royalties derived from drilling on public lands be treated as part of the corpus, and therefore subject to the commonwealth's fiduciary duty as well. Diverting these royalties to uses other than maintaining and conserving the commonwealth's natural resources violates this fiduciary duty, and thus violates Article I, Section 27 of the Pennsylvania Constitution. Following the Robinson Township plurality's opinion, the Supreme Court struck down the legislation allowing appropriation of these funds based on an interpretation of the ERA itself and the principles of trust law, rather than a balancing test comparing benefits and harms.

The Supreme Court's decision in PEDF seems to have finally laid to rest the precedent set by Payne, and to have strengthened and broadened the Environmental Rights Amendment. Exactly how these principles will play out in future litigation is, of course, uncertain, but it's clear that PEDF has opened the door to more constitutional challenges to legislation, permitting, and even inaction by the commonwealth, when such actions or inactions arguably constitute a violation of the fiduciary duty by endangering or imprudently using the corpus of the public trust. Whether a particular action or inaction violates the ERA, however, is not so simple a question. As first established in Robinson Township, and as set forth above, the commonwealth's duty as trustee is severalfold: not only must it prevent public or private actions or inactions that degrade Pennsylvania's public natural resources and pass legislation intended to protect those resources; it must also fulfill its fiduciary duties by ensuring the trust corpus benefits the people of Pennsylvania, both present and future. Public lands, the corpus of the trust in question, are meant to be used by the people—they cannot be fully closed off, made inaccessible in order to guarantee their preservation. In the absence of Payne's three-part test, the commonwealth and

the courts will need to develop a new sort of calculus to determine whether a particular proposed use of public resources is an appropriate use of the trust property. PEDF holds that the commonwealth's failure to uphold its fiduciary duties may be found to be a constitutional violation, but does not make clear what actions the commonwealth must take or avoid to ensure it upholds these duties.

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