

COMMENTARY

ENVIRONMENTAL LAW

BY DAVID G. MANDELBAUM
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MANDELBAUMD@GTLAW.COM

Pennsylvania's Environmental Rights Amendment After *Robinson Township*

Last month, the Pennsylvania Supreme Court decided *Robinson Township v. Commonwealth*, No. 63 MAP 2012 (Pa. Dec. 19, 2013). The plurality's 162-page opinion calls into question a lot of what we thought we knew about the Environmental Rights Amendment to the Pennsylvania Constitution.

Most of the analysis of *Robinson Township* so far has focused on its narrow holding that declared unconstitutional the enhanced preemption of local land use regulation of oil and gas operations adopted in the 2012 Omnibus Amendments to the Oil and Gas Act, known as Act 13. That holding had political and perhaps business implications, but it did not change anything. It merely maintained the status quo ante. The constitutional basis for that holding, however, may have changed a lot.

To recap, *Robinson Township* arises out of the efforts of some municipalities to exert independent regulatory control over new natural gas wells and gathering systems in addition to the supervision exercised by the Department of Environmental Protection under the Oil and Gas Act. Two years ago, Gov. Tom Corbett signed Act 13 into law, at 2012 Pa. Laws 87 (Feb. 14, 2012), codified at 58 Pa. Cons. Stat. Ann. §§ 2301-3504.

Much of Chapter 32 and some other provisions were simply recodifications of the prior Oil and Gas Act. So, for example, new Section 3302 was simply a recodification of former 58 Pa. Stat. Ann. § 601.602. That provision prohibits local regulation of "oil and gas operations" except as authorized in flood plain, zoning and subdivision and land development ordinances. In addition, former Section 602 and new Section 3302 preempt local regulation of "the same features" of oil and gas operations as are regulated by the DEP under the Oil and Gas Act.

Our Supreme Court had held former Section 602 to permit local regulation of where oil and gas operations could proceed but to preempt local regulation of how they would be conducted, as in *Huntley &*

Huntley v. Borough Council of Oakmont, 964 A.2d 855 (Pa. 2009); *Range Resources Appalachia v. Salem Township*, 964 A.2d 869 (Pa. 2009); and *Penneco Oil v. County of Fayette*, 4 A.3d 722 (Pa. Commw. Ct. 2010).

Act 13 added new, more comprehensive preemption language in Section 3303 and also required municipal ordinances to have uniform provisions set out in Section 3304. Several local governments, environmental groups and a doctor challenged Act 13's constitutionality.

As I discussed in this space at the time, the Commonwealth Court held that Section 3304 and related provisions of Act 13 created a "spot use" that the General Assembly required to be treated differently than other uses in violation of the substantive due process protections of Article I, Section 1 of the Pennsylvania Constitution, in *Robinson Township v. Commonwealth*, 54 A.3d 463 (Pa. Commw. Ct. 2012). The Commonwealth Court brushed aside the challenge to Act 13 under the Environmental Rights Amendment, Article I, Section 27. Some wondered at the time why one constitutional provision applied and one did not.

The Environmental Rights Amendment provides: "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."

As Widener University School of Law professor John Dernbach has observed in an article in the Penn State Law Review, "Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27," the first sentence creates a right in "the people"—and, presumably, each person—to certain environ-

mental values in both public and private property. The second and third sentences set up a public trust for the benefit of all the people, including future generations, in the state's public natural resources, with the state acting as trustee.

However, the courts have been somewhat confused as to what that meant operationally. It is reasonably clear that whatever the Environmental Rights Amendment required "the commonwealth" to do, it required every in-

strumentality of the state—including municipalities—to do when they exercised their powers and duties, as in *Delaware County Community College v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975).

Act 13 did such things as require local zoning ordinances to permit oil and gas operations in every zone and imposed uniform set-back requirements for oil and gas operations. It effectively withdrew from municipalities most of their discretion in crafting land use regulation of oil and gas wells and gathering systems. That means, of course, that whatever it is that the Environmental Rights Amendment requires municipalities to do when making land use decisions generally, Act 13 prohibited municipalities from doing when the use being regulated was an oil and gas operation.

The *Robinson Township* plurality held that the General Assembly cannot require by statute a municipality to violate its obligations under Article I, Section 27. Therefore, several provisions of Chapter 33 of Act 13 are unconstitutional, and the case was remanded for a determination as to whether those provisions were severable.

The plurality also upended the understanding of what the Environmental Rights Amendment requires of a municipality, or the DEP, or any other state agency. Prior to the *Robinson Township* decision there was confusion on some issues. However, the lower courts seemed to agree that when reviewing an administrative decision they should apply a three-part test, as in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct.

1973), *aff'd*, 468 Pa. 226 (Pa. 1976):

"(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?"

The *Robinson Township* plurality disagreed. That test, said Chief Justice Ronald D. Castille, has "the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control."

Instead, the plurality appeared to hold that individual citizens have a right to enforce the duty of any state agency to refrain from infringing on their environmental rights. Further, when the state acts as trustee for public natural resources, individual citizens have the right to insist that the state act as a prudent trustee would act to preserve the public environmental rights.

The opinion itself does acknowledge that there should be balancing, but exactly how courts are to manage the rights to challenge decisions is not clear. The plurality calls for a whole new jurisprudence.

Importantly, the *Robinson Township* opinion is not consistent with treating Article I, Section 27 as a constitutionalized precautionary principle. One cannot simply say that the state should not permit new development or new action unless there is no unacceptable impingement on environmental values.

That follows because not allowing new things also has environmental impacts. If a new power plant is not built, what will happen? Will it be environmentally better or worse than building the power plant? If a new housing development is not built, is that environmentally better or worse than building it? These are not easy questions. They will spawn litigation. We do not really have standards for that litigation.

Those lawsuits are the legacy of *Robinson Township*, and they really have very little to do with development of the Marcellus Shale. The state has sought reconsideration in *Robinson Township*. There may be more to come. •

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David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches Oil and Gas Law and Environmental Litigation: Superfund in rotation at Temple University's Beasley School of Law, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. Follow him on Twitter @mandelbaumd.