

## Court Weighs In on the ERA After 'Robinson Township' Written By: Kaitlyn R. Maxwell

On July 26, the Commonwealth Court denied a petition seeking declaratory and mandamus relief to require the Pennsylvania Public Utility Commission (PUC) and a group of executive government officials to regulate greenhouse gases consistent with Article I, Section 27, of the Pennsylvania Constitution in *Funk v. Wolf*, No. 467 M.D. 2015 (Pa. Commw. Ct. July 26, 2016). Article I, Section 27, is commonly referred to as the Environmental Rights Amendment (ERA).

The ERA contains three sentences. The first sentence provides that the people of the commonwealth have a right to clean air and water, and to the preservation of certain environmental values. The second and third sentences establish that the public natural resources are held in trust for the benefit of all people, including future generations, and the commonwealth is designated the trustee of those resources. It follows that the ERA has been interpreted to provide a citizen rights to the resources held in trust as well as a government obligation to conserve and maintain Pennsylvania's public natural resources.

In *Funk*, petitioners sought affirmative action by respondents, rather than constitutional restraint. That is, petitioners challenged the government's failure to affirmatively act in accordance with the government's trusteeship duties under the second and third sentences of the ERA. In denying the petition, the court doubled down on its prior finding that the court is not bound by the plurality opinion in *Robinson Township, Washington County v. Pennsylvania Public Utilities Commission*, 83 A.3d 901 (Pa. 2013), regarding judicial review of government decisions that implicate the ERA. The Robinson Township plurality had found that the traditional three-prong test for examining the ERA fell short in carrying out the purpose of the ERA.

Until *Robinson Township*, courts in Pennsylvania consistently asked three primary questions set forth in [Payne v. Kassab](#), 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), aff'd, 361 A.2d 263 (Pa. 1976), when determining whether a government decision complied with the ERA:

- 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 there from that to proceed further would be an abuse of discretion?

Robinson Township rejected this three-prong approach and declined to adopt a bright-line test. Instead, the plurality sought to establish a "principled analysis." As identified previously in this column by David Mandelbaum in Pennsylvania's entitled, "Environmental Rights Amendment After Robinson Township," (Jan. 14, 2014), the Robinson Township plurality opinion called for a new jurisprudence and created uncertainty for future litigation.

According to the plurality, the Payne test narrowed the commonwealth's obligations beyond the text of the constitutional provision, made assumptions about the availability of judicial review, and limited the constitutional duties of the executive and judicial branches of government. The plurality increased the availability of citizen suits to limit government action without defining a legal standard to review those challenges.

Robinson Township created uncertainty as to how state government actors were expected to apply the ERA, but last week's decision in Funk indicates the Payne test is still alive and well—at least for now. In Funk, the Commonwealth Court relied on its decision last year in [Pennsylvania Environmental Defense Foundation v. Commonwealth](#), 108 A.3d 140 (Pa. Commw. Ct. 2015), appeal pending, No. 10 MAP 2015 (Pa. filed Feb. 6, 2015), to find the plurality opinion in Robinson Township rejecting the Payne test is not binding precedent. It is anticipated that the effect of Robinson Township on judicial decisions involving the ERA will be clarified once the Supreme Court rules on the pending appeal in Pennsylvania Environmental Defense Foundation. On March 9, the Supreme Court heard oral argument on the proper standards of judicial review involving the ERA in light of the opinion in Robinson Township and the Supreme Court has not yet issued a decision.

Last week's decision in Funk showed a repeated attempt by the Commonwealth Court to curtail the reach of the Robinson Township plurality. The court acknowledged the ERA contains expansive language, but the ERA was not intended to provide unlimited government power to prohibit development that may provide economic benefits to people in the commonwealth. The court raised concerns about the challenges of enforcing the ERA after Robinson Township due to the difficulties faced by government actors in "weighing conflicting environmental and social concerns." Relying on the pre-Robinson Township legacy, the court emphasized "decisions implicating the ERA 'must be realistic and not merely legalistic.'"

Even though the court found the Payne test controls, the court acknowledged that when a petitioner challenges the government's failure to act affirmatively to fulfill its trusteeship duties, the court must look to the context in which the Payne test was established. In other words, the courts must review the ERA while keeping in mind government structure and the separation of powers. The ERA establishes a public trust of natural resources and appoints the commonwealth as the trustee for public natural resources, but that establishment does not translate to an absolute right of citizen relief whenever a protected natural resource may be invaded by activity. The court relied on the traditional notions of separation of powers to explain the General Assembly—Pennsylvania's state legislature—weighed environmental and societal concerns when constructing an agency or department's enabling act and the ERA does not expand agency powers beyond that structure. In Funk the court was asked to look beyond the commonwealth's duty to conserve and maintain public resources as defined by the ERA and determine whether that obligation required the specific action requested by petitioners. The court examined Pennsylvania's existing legislative scheme for climate change—the Pennsylvania Climate Change Act (CCA) and the Air Pollution Control Act (APCA)—and the duties imposed by that scheme. While the CCA and APCA mandate certain affirmative duties, including submitting reports and action plans on climate change to the governor every three years and establishing regulations to reduce carbon dioxide and greenhouse gas emissions, the court found there was no mandate in the legislative structure for respondents to act in the way demanded by petitioners. The court found the specific actions requested by petitioners were either left up to the discretion of government officials, or were tasks reserved for the General Assembly. Therefore, petitioners lacked a clear right to require respondents to act as requested and the court denied the request for mandamus.

Likewise, the court denied declaratory relief. Petitioners sought a declaration that the ERA protected the right to safe levels of carbon dioxide and greenhouse gases, Respondents had a duty not to act contrary to, and to protect that right, and respondents did not meet those obligations. The court concluded that the requested relief was inappropriate because it would require an advisory opinion without an independent significance on the petitioners.

The Commonwealth Court has demonstrated a desire to close the opening for a more expansive reading of the ERA established by the Robinson Township plurality. By relying on the separation of powers arguments, the court expresses an unwillingness to require the executive branch to act affirmatively to fulfill obligations under the ERA unless specifically directed by the existing legislation regulating the activity in question. The court appears to retreat to the prior precedent that limited ERA claims to whether the General Assembly had acted, and what the policy of the legislation enacted by the General Assembly required, rather than an independent claim for relief based on the

language of the ERA. Where the plurality in Robinson Township emphasized the General Assembly's pronouncement of policy does not control judicial inquiry into the constitutionality, the Commonwealth Court seems to suggest the General Assembly's pronouncement does in fact control. To read a more expansive executive power than contemplated by the General Assembly in the enacting legislation would be an infringement on the separation of powers between the branches of government.

We have to wait to see how the Supreme Court decides the pending appeal of Pennsylvania Environmental Defense Foundation to fully predict how citizen suits under the ERA will be resolved in the coming years, and whether the Supreme Court will follow the lead of the Commonwealth Court in retreating to a more limited review of the rights and obligations imposed by the ERA.

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