How Will Pa. Implement the Environmental Rights Amendment?

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The Pennsylvania Supreme Court's June decision in *Pennsylvania Environmental Defense Foundation v. Wolf*, 161 A.3d 911 (Pa. 2017)("*PEDF*"), has sparked many conversations about how the newly-interpreted Environmental Rights Amendment to the Pennsylvania Constitution will be implemented. Resolving that question will take a long time, and even a first-cut set of suggestions would require more erudition and exposition than is available. However, in this column I hope to catalogue at least some of the issues to help move the conversation along.

The Environmental Rights Amendment, adopted in 1971, provides:
[1] 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. [2] Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. [3] As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people, Pa. Const., art. I, § 27.

For most of the last forty years, the courts have tested statutes, actions of the executive agencies, and decisions of municipalities under the three-part test of *Payne v. Kassab*:

(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?

In *Robinson Twp. v. Pub. Util. Comm'n*, 83 A.3d 901 (Pa. 2013), a plurality signed then-Chief Justice Castille's opinion holding that the *Payne* test did not adequately effectuate the Environmental Rights Amendment because, among other things, it made constitutionality of an enactment or governmental action dependent on compliance with statutes and regulations rather than some underlying constitutional standard. With Justice Baer concurring on other grounds, the court invalidated several provisions of the Oil and Gas Act Amendments of 2012, known as "Act 13."

In *PEDF*, a majority of the court endorsed the *Robinson* plurality. The court made clear that *Payne*'s test no longer governed. The first sentence of the Environmental Rights Amendment sets out an affirmative right of "the people" to "clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment." Government cannot take action that impinges on that right without (a) evaluating the environmental effects of its action beforehand and (b) avoiding "unreasonable" adverse effects in light of the other governmental purposes of the action.

Further, the second sentence of the Amendment creates a trust, the corpus of which is all of the *public* natural resources of the Commonwealth. The Commonwealth is the trustee of that trust, and the beneficiaries are "all the people" including "generations yet to come." When the Commonwealth sold some of that trust corpus in the form of natural gas leases in the state forests, it was obligated to use the proceeds to benefit the trusts' purposes. The proceeds of the gas leases could not be diverted to the General Fund without restriction.

Since *PEDF*, the Environmental Hearing Board has decided *Center for Coalfield Justice v. DEP*, EHB Dkt. No. 2014-072-B (Aug. 15, 2017), *appeal pending*, No. 1290 CD 2017 (Pa. Commw. Ct. filed Sept. 15, 2017), concerning two coal mine permit extensions allowing longwall mining under certain streams. The Board found that one of the permits would result in only temporary stream impacts that would not constitute an impairment of the streams' use. The other would result in permanent impairment to be mitigated by construction of an entirely new stream. The Board concluded that the former was constitutional, but the latter was not. A temporary impairment of a stream could be a reasonable incursion on the people's first-sentence constitutional right, but permanent loss of the stream would be unreasonable.

These cases seem to hold that a governmental actor must make an evaluation of the extent to which any action will affect the people's first-sentence right prior to taking any action. Assuming for the sake of argument that Article I, section 27, even applies to permit decisions and that individual people (as distinct from "the public") have a constitutional right to challenge permits issued to others, how will the constitutional evaluation of environmental impacts occur?

In *Center for Coalfield Justice*, the Board had no difficulty concluding that DEP had considered environmental impacts because the permit application process involved that very evaluation. But *Robinson Twp.* and *PEDF* each involved statutes. What sort of evaluation must underlie a statute? Further, as exemplified by *Robinson Twp.*, Article I, section 27, applies to all Commonwealth actors, such as the PUC as well as municipalities.

How will agencies or municipalities other than DEP make the evaluation? Will proponents of major projects have to complete a special permit module? Will Pennsylvania impose a requirement for something akin to an environmental impact statement as called for under the National Environmental Policy Act? Will there be some process under which a project proponent can provide the required information only once, or will each government action entail a new requirement for environmental assessment?

Will all government actors be permitted, or required, to rely on one lead agency's environmental assessment, or will each one be obligated to make its own? If the answer is to be that a lead agency can make a global assessment, how does that square with *Robinson Twp.*'s criticism of the legislature for imposing uniform maximum land use restrictions on oil and gas activities? If the answer is that the legislature or a lead agency can *not* make global evaluations binding on all other agencies, why is the Land Recycling program constitutional? Less provocatively, how would multiple assessments of the same project work?

What must a governmental actor assess? At a minimum, impacts on the cleanliness of the air and the purity of the water must be part of the task. One can measure air and water quality objectively. On the other hand, how would one measure "the natural, scenic, historic and esthetic values of the environment?" "Scenic, historic, and esthetic" values necessarily involve human use. Do "natural" values include any other values, such as the value of resources to each other, or does the word "value" necessarily imply a human user? Do commercial uses of the environment count? How can different "values" be made commensurate and weighed against each other?

Which environmental values are being "preserved" – the environment at the time of the governmental action, the environment at the time of enactment of the Amendment, the environment at the time of European settlement in Pennsylvania, or the environment before humans at all? That is, does the public's first-sentence right change over time as the environment changes?

On what scale should the environmental impact be considered? The impact in the immediate footprint of a project or immediately downwind or downstream of its discharges may be one thing, and its overall impact may be something different. Are market impacts – harmful or beneficial – relevant? Are impacts outside Pennsylvania relevant? If not, then one must have a rationale for why increased economic activity or population in Pennsylvania is ever permissible.

The Commonwealth may authorize "reasonable" encroachments on the public's first-sentence right. That implies that the government must weigh the environmental impacts against something. What counts? Will any non-arbitrary weighing of environmental impacts against other benefits suffice, or must the government offer a more substantive rationale? Recall in this regard that when the decisionmaker is DEP, the Environmental Hearing Board reviews the matter on a *de novo* record. First DEP will make an assessment, will the Board then hear a trial of the same issues? The Board typically does not have jurisdiction to assess the constitutionality of statutes or regulations. Can it make this Article I, section 27, assessment at all?

With regard to *public* natural resources, the Commonwealth has a trustee obligation. Plainly, it can sell some of the trust corpus; *PEDF* does not hold that the Commonwealth may not lease state forest lands for natural gas development. When may the Commonwealth convert a public natural resource to something else for the benefit of either the environment or some other interest of the trust beneficiaries? That is, may the Commonwealth decide to convert woods into a set of ballfields, to construct a boat launch, nature trail, or visitors' center? May the government conduct mosquito spraying? When *must* the Commonwealth take such steps? For example, if it could be shown that the climate change mitigation benefits of a natural gas pipeline outweigh any local damage the pipeline would cause, *must* the Commonwealth grant the necessary permits?

In the near term, the Commonwealth must continue to consider permit applications. Should it supplement existing procedures to establish a mechanism for project proponents to apply for permits and approvals in a way that will allow the government to satisfy the Environmental Rights Amendment?

Almost every project has at least one opponent. If every individual has a right to stop any project with *any* environmental impact, Pennsylvania will come to a grinding halt. Change will stop. The courts will clog. That only makes sense if you believe that Pennsylvania as it is today is good enough. That is almost certainly not true from either an environmental or economic perspective. The Commonwealth must devise a way to implement Article I, section 27, so that it facilitates, and does not impede, useful change. •

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