

Understanding How State Environmental Rights Amendments May Help Protect the Chesapeake Bay

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Choose Clean Water Coalition Webinar

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What is an Environmental Rights Amendment?

- State constitutional provision that provides certain rights, duties, or policy statements related to managing or protecting quality of the environment or addressing environmental concerns in the state
- 33 states have constitutional provisions mentioning the environment
- Many existing provisions were added in the 1960s and 1970s

Types of Environmental Provisions

Protect specific priority natural resources (selective protections)

- New York – conservation of the Adirondack and Catskill parks
- California – reasonable access and use of water resources

Provide citizens with benefits of a healthy human or natural environment or guide state to protect the environment (policy directives)

- Virginia
- Louisiana

Provide citizens with a right to a healthy environment as a basic fundamental right (substantive rights)

- Pennsylvania
- Montana

Existing Environmental Rights Amendments

Bay Jurisdictions with Environmental Amendments

Pennsylvania

- Article I, Section 27

Virginia

- Article XI, Section 1 & 2

New York

- Article XIV, Sections 3 & 4

Jurisdictions without Environmental Amendments

West Virginia

Maryland

Delaware

District of Columbia

Key Features to Consider

Is the amendment self-executing

- Does the provision provide an explicit guarantee of environmental rights or a policy directive that requires the state legislature to pass laws to further define the provision?

Standing

- Who can enforce the provision – the state, citizens?

Scope of rights provided

- Does the provision protect the human or natural environment?
- Does the provision protect a specific priority resource or all public natural resources?

Standard of review

- Does the provision indicate what standard of review should be applied when a case is brought to enforce the provision?

Article I, Section 27 of the Pennsylvania Constitution

- “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.”



Environmental Rights Amendment Facts

- Contained in the “Declaration of Rights” section of the Constitution, along with religious freedom, freedom of speech, trial by jury, and the right to bear arms
- Truly bi-partisan. Approved unanimously by two sessions of the General Assembly and a by 4-1 margin of voters in 1971.
- Until 2014, courts rarely struck down government actions under the Environmental Rights Amendment



Pre-2013 Standard

- 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 clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?
- *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973)



Robinson Township v. Commonwealth



83 A.3d 901 (Pa. 2013)

- Challenge to certain provisions of Act 13, repealing and amending the Oil and Gas Act
- Challenged provisions included significant restrictions on local municipalities' ability to regulate fracking, empowering PUC to review local zoning ordinances, and limiting release of information to medical professionals
- Plurality of the Court (Justices Castille, Todd, McCaffery) relied on Article I, Section 27 to strike down several provisions of Act 13. Justice Baer concurred, based upon due process.
- Justices Saylor and Eakin dissent (Orie Melvin did not participate)
- Plurality criticized *Payne v. Kassab*, expressed a more expansive view of Article 1, Section 27

Pa. Environmental Defense Fund v. Commonwealth

161 A.3d 911 (Pa. 2017)

- Challenge to the diversion of funds from the leasing of public lands from DCNR to General Fund
- Elections have consequences
- Majority of the Court (Justices Donohue, Todd, Dougherty, Wecht) adopted reasoning from *Robinson Township*. Justice Baer concurred and dissented, based upon due process.
- Justice Saylor dissented (Eakin did not participate)



Pa. Environmental Defense Fund v. Commonwealth

- Court threw out *Payne v. Kassab* test as “unrelated to the text of Section 27 and the trust principles animating it” and “strips the constitutional provision of its meaning.”
- “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 enactment.”



Pa. Environmental Defense Fund v. Commonwealth

Two separate rights:

- First sentence is prohibitory clause that created individual right and “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amendable to regulation, any laws that unreasonably impair the right are unconstitutional.”
- Public trust, common ownership by the people of PA’s public natural resources, with Commonwealth as trustee.



Pa. Environmental Defense Fund v. Commonwealth

Commonwealth's trustee obligations:

- “**duty to prohibit** the degradation, diminution, and depletion of our natural resources, whether these harms might result from direct state action or from the actions of private parties.”
- “**must act affirmatively** via legislative action to protect the environment.” *See Wm. Penn School District v. Pa. Dept. of Education*, 170 A.3d 414 (Pa. 2017) – constitutionality of General Assembly’s funding of schools is justiciable issue.



Questions



- Are local governmental units trustees under Article 1, Section 27?
- What responsibilities do local governmental units have under Article 1, Section 27?
- Do agencies have to do more than what is required by statutes or regulations?
- How do governmental units evaluate compliance with Article 1, Section 27?
- Does Article 1, Section 27 apply to both publically owned and privately owned resources?

More Questions

- What constitutes “degradation, diminution, and depletion of our natural resources,” i.e. is any new development prohibited?
- Who has standing to raise Article 1, Section 27 claims?
- What environmental values must a governmental agency consider, e.g. limited to impacts within own borders?
- Is Article 1, Section 27 self-executing?



Why so Many Questions?

- Supreme Court's analysis in *PEDF* (how royalties should be spent) and *Robinson Township* (challenge to portions of Oil and Gas Law) does not translate well to agency actions.
- *Payne v. Kassab* test no longer applies, but no clear new standard.



Post-*PEDF* EHB Decisions

- *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (August 15, 2017), challenge to longwall mining permit revisions



Individual rights test:

- Did DEP consider environmental effects of permitting action?
- Will action cause unreasonable degradation or deterioration of protected resource – (impact v. impairment, limited in time, mitigation)?

Public trust test:

- Did DEP carry out its trustee duties of prudence, loyalty and impartiality to conserve and maintain natural resources?

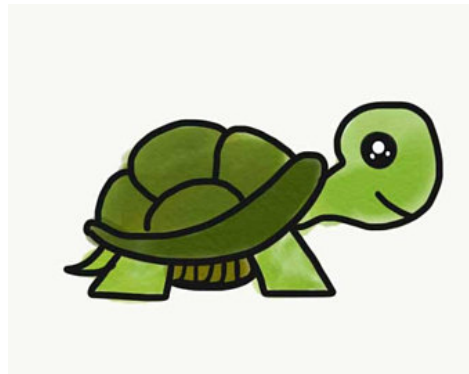
Post-*PEDF* EHB Decisions

- *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L, (November 8, 2017), landfill permit renewal under SWMA
- DEP's failure to require a groundwater assessment plan for leachate contamination was unreasonable and a violation of its duties as trustee.



Hypothetical #1

- Developer seeks to construct mixed commercial/residential project on former farm. Property is located next to Civil War battlefield and includes habitat for endangered bog turtle. Developer will need to seek a special exception and changes in Act 537 sewage plan from township. Act 537 approval and construction NPDES and stream encroachment permits are also needed from DEP.



Hypothetical #2



- Farmer would like to operate a composting operation on his agriculturally zoned property. He plans to compost agricultural and food processing wastes (FPW would otherwise go to landfill). An exceptional value stream bisects the property. This activity complies with zoning ordinance, but farmer will need to obtain building permits from township. Township is opposed because neighbors are concerned about odors and that the new structures will obscure their view of mountains. A waste permit will also be needed from DEP.

Hypothetical #3

- Faced with a significant budget shortfall, township wants to sell a public park and use the proceeds to build a new municipal building and purchase a new snow plow. Although not listed on any historic registry, the park was the site of a Revolutionary War prison camp. Neighbors are vehemently opposed to the sale of park to developer, who seeks to use the property to house a membership-only squash club (membership dues of \$200,000/year).

