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## ENERGY AND ENVIRONMENTAL LAW

# Pa. High Court Addresses Scope of the Environmental Rights Amendment

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*Special to the Legal*

On June 20, the Pennsylvania Supreme Court issued a significant and potentially far-reaching opinion in *Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth of Pennsylvania*, 2017 Pa. LEXIS 1393, No. 10 MAP 2015 (June 20, 2017). While initial attention has been paid to the decision's potential monetary impact via the use of oil and gas lease funds, a more detailed analysis reveals that the longer lasting impact of PEDF will be found in its pronouncements on the scope of judicial review of government actions and, perhaps, implicating the separation of powers among the three branches of the government.

### BACKGROUND

On its face, the case involved the challenge by PEDF to the Legislature's transfer of certain funds from the Oil and Gas Lease Fund to general governmental purposes. PEDF argued that those transfers were unconstitutional as being contrary to the commonwealth's duties as a trustee



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under the Environmental Rights Amendment (ERA), (Pa. Env'tl. Def. Found., 2017 Pa. LEXIS 1393 at \*26). The ERA 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

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resources, the commonwealth shall conserve and maintain them for the benefit of all the people.

The Commonwealth Court had held (*Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015)), that since the transferred funds were used for the general benefit of the public (i.e., "the benefit of all the people"), there was no constitutional infirmity. The Supreme Court reversed. Four justices (Christine

Donohue, Debra Todd, Kevin Dougherty and David Wecht) held that the challenged provisions of prior fiscal codes were unconstitutional because the funds were not transferred to uses consistent with the trust purposes, namely for conserving and maintaining public natural resources. Justice Max Baer concurred in part but dissented from the majority's application of private trust principles to the analysis, arguing that public trust principles should apply and that, accordingly, the Commonwealth Court's decision should be affirmed. Chief Justice Thomas Saylor joined in the dissenting portion of Justice Baer's opinion only.

## THE IMPACT OF PEDF

Most of the initial media attention has been focused on the monetary implication of the decision. However, that aspect of the decision may have limited impact. While they found the challenged fund transfers to be unconstitutional, the majority noted that DCNR is not the only agency committed to conserving and maintaining public natural resources and specifically noted: "the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27." One can readily envision multiple uses of oil and gas lease funds that would not violate the court's limitations. For example, the Department of Environmental Protection's (DEP) entire function is essentially "dedicated to effectuating Section 27." More narrowly, the DEP has historically been in need of more funds to address acid mine drainage from abandoned coal mines which date back to the 19th century, some of

which are located on public lands, and the very popular "Growing Greener" program is always searching for a secure funding source. Either of these purposes would seem to satisfy the court's holding. To the extent that PEDF was looking to limit the use of monies in the Oil and Gas Lease Fund to expenditures for state parks and forest lands, they may have achieved a limited victory.

Arguably, the constitutional limitation on the use of funds derived from the lease of oil and gas resources under state parks and forests was all the court needed to examine to address the PEDF challenge. However, on appeal the court specifically elected to examine the "proper standards for judicial review of government actions and legislation challenged under [the ERA] in light of *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality)" (Pa. Envtl. Def. Found., 2017 Pa. LEXIS 1393 at \*33-34). This portion of the court's decision has the potential to have a far greater and far longer lasting impact than the question of how to spend lease funds. The majority opinion will be prime fodder for law review articles and will likely spawn much litigation. Depending on how broadly the opinion is read and applied in the future, it is not too extreme to see a potential constitutional crisis brewing between the court and the Legislature.

Initially, the court definitively struck down the long-standing three-part test first established in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), aff'd 361 A.2d 263 (Pa. 1976)). As the court noted, that test did not enjoy much support among the litigants and there

are few environmental practitioners, regardless of their client base, who will lament it passing. However, it is far from clear what test has replaced *Payne*. After rejecting *Payne* the court stated: "when reviewing challenges to the constitutionality of commonwealth actions under Section 27, 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 its enactment." That statement is certainly appropriate in the context of PEDF where the commonwealth's trust obligations under the second and third sentences of the ERA were at issue, but it is not clear how that statement applies to the first sentence of the ERA.

As the court itself notes there are two separate parts to the ERA. The first sentence grants certain rights to the people as a limitation on the power of the government, much like other grants of rights found in Article I of the Constitution. The second and third sentences address the commonwealth's public natural resources and place a duty on the commonwealth to act as trustee of those public natural resources. Is the court suggesting that the commonwealth is a trustee for the air and water and land in general, including natural resources on private property? The plain language of the ERA certainly does not say that.

One of the conundrums that plagued the *Payne* three-part test is that *Payne* involved impact to a traditional public resource—a park. Practitioners struggled with applying the *Payne* test to government action that implicated the environment generally but did not implicate publicly owned resources.

Unfortunately, the decision in *PEDF* is not much help in this regard, as the court does not clearly explain what it considers a public natural resource.

The court notes, in a footnote, that a draft version of the ERA was amended to specifically insert the word “public.” That would suggest the intent to limit the trusteeship to publicly owned resources. However, the court also cites a statement by then Rep. Franklin Kury suggesting that the trust applies to resources not owned by the commonwealth, “which involve a public interest.” Given the long line of authority holding that the comments of a single legislator are not evidence of legislative intent, the significance of footnote 22 is unclear. As the court goes on to discuss the commonwealth’s duty as trustee it consistently refers to public natural resources. Given that the subject matter of the case at bar was unquestionably a public resource, it would be reasonable to conclude that the court’s discussion regarding the trustee’s duties is, and should be, limited to traditional publicly owned natural resources. Indeed, when the court addresses the question of whether Article I, Section 27 is self-executing it states, “Accordingly, we reaffirm our prior pronouncements that the public trust provisions of Section 27 are self-executing,” apparently differentiating those provisions from the first sentence of the ERA. However, the court’s statement of the standard of judicial review, as quoted above, appears to be much broader referring to “commonwealth actions” generally. Interested parties will likely draw differing conclusions on this question depending on their perspective and one can expect more litigation to follow.

The majority opinion cites to and quotes from *Robinson* with frequency. Perhaps the most potentially disruptive concepts derived from the *Robinson* plurality is found in footnote 20. The quoted passage states, in part, that executive agencies and the judiciary are empowered to carry out “their constitutional duties independent of legislative control.” While no one would question the power of the judiciary to review the constitutionality of legislation and regulations, the concept that executive agencies, which have no constitutional foundation and are created by the legislature, have powers beyond those granted by the legislature is nothing short of revolutionary. Clearly, executive agencies have a duty under the ERA and their actions can be challenged by the people on that basis. However, to suggest that the ERA somehow gives an agency the power to ignore limitations or enlarge authority granted by the legislature threatens to upset the separation powers among the three branches of government.

In *National Solid Waste Association v. Casey*, 600 A.d 260 (Pa. Cmwlth. 1991), aff’d Per Curium 619 A.2d 1063 (Pa. 1993), the Commonwealth Court held that Article I, Section 27 did not give the governor authority to impose a moratorium and additional procedures on the permitting of solid waste facilities contrary to the requirements of the Solid Waste Management Act. The Commonwealth Court noted that the executive branch implements laws, it does not make them, and when the legislature has extensively regulated an activity by statute the executive is not authorized to alter that process.

It is not clear how the *PEDF* court would view the *Casey* decision. The legislature already grants agencies such as DEP broad rulemaking authority that allows it to supplement legislative enactments. However, to suggest that DEP, for example, has the power under the ERA to regulate in a manner different from the enabling legislation would introduce significant uncertainty and arbitrariness into environmental regulation, not to mention undermining the constitutional role of the legislature. It is not clear to what degree the *PEDF* court is adopting or endorsing this statement from *Robinson*.

There is no doubt that the *PEDF* decision will lead to more challenges to government actions and challenges to legislation or regulations relating to the environment as different stakeholders find different meanings in the decision. There is also no doubt that the three-part *Payne* test will not be applicable to those challenges. It is clear that when those challenges implicate the use of or the impact to publicly owned natural resources the standard of review will involve the private trust principles discussed in the opinion. What is less clear is what standard of review will apply to government actions or government authorizations for private actions that impact the environment generally.

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