

Pennsylvania Supreme Court Completes Revival of Environmental Rights Amendment

By Joseph R. Brendel / Jun 27, 2017

A 5-to-1 majority of the Pennsylvania Supreme Court recently confirmed that the text of the Environmental Rights Amendment to the Pennsylvania Constitution (Article I, Section 27) is the appropriate standard of judicial review of the constitutionality of Commonwealth agency actions. *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, et al.*, No. 10 MAP 2015 (June 20, 2017) ("*PEDF*"). In so ruling, the court in *PEDF* squarely rejected the balancing test developed by the Commonwealth Court of Pennsylvania in *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. 1973), that Pennsylvania judges have used for years to determine whether an action violated the Environmental Rights Amendment. In the absence of the *Payne v. Kassab* balancing test, litigants and judges may be forced to develop new jurisprudence to apply the Environmental Rights Amendment to activities potentially impacting the environment and Pennsylvania's natural resources.

By way of background, a substantial majority of the citizens of Pennsylvania approved the Environmental Rights Amendment to Pennsylvania's Constitution in 1971. Article I, Section 27 provides as follows:

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.

In *Payne v. Kassab*, the Commonwealth Court developed the following three-part test for determining whether a Commonwealth action violated the Environmental Rights Amendment:

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?

312 A.2d at 94.

Since 1973, Pennsylvania's Environmental Hearing Board ("EHB") and trial and appellate courts have generally applied the *Payne v. Kassab* balancing test to determine whether an activity such as the issuance of a permit complied with the Environmental Rights Amendment. Along the way, critics challenged the propriety of using the *Payne v. Kassab* test, but were unsuccessful until the Pennsylvania Supreme Court's December 2013 decision in *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013) (plurality). In *Robinson Township*, the plurality decision provided an extensive history of and rationale for the Environmental Rights Amendment before relying upon the constitutional provision to strike down certain amendments to Pennsylvania's Oil & Gas Act. The plurality decision in *Robinson Township* criticized the *Payne v. Kassab* balancing test as too constrained by legislative action supporting Section 27 and concluded "that the non-textual Article I, Section 27 test established in *Payne* and its progeny is inappropriate to determine matters outside the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests."

What the plurality opinion started in *Robinson Township* was completed by the court *PEDF*. The majority opinion in *PEDF* found that the *Payne v. Kassab* test "is unrelated to the text of Section 27 and the trust principles animating it," and therefore, "strips the constitutional provision of its meaning." Rejecting the *Payne v. Kassab* test as the appropriate standard for deciding Article I, Section 27 challenges, the court in *PEDF* instead found that "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."

Relying in large part on the analysis of Article I, Section 27 from the plurality decision in *Robinson Township*, the court in *PEDF* focused on the Commonwealth's duties as the trustee of natural resources. The specific issue in *PEDF* was whether the revenues from the leasing of oil and gas rights on public lands could be used to close a budget gap instead of for conservation and maintenance purposes. Applying Pennsylvania trust law, the court noted that "[w]hen a trust asset is removed from the trust, all revenue received in exchange for the trust asset is returned to the trust as part of its corpus." Further noting that royalty payments are proceeds from the sale of oil and gas resources, the court held that such royalty payments "are part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee." Therefore, the court ruled that the royalty payments "must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27."¹

What remains to be seen is how the EHB and other courts will apply the Environmental Rights Amendment to constitutional challenges to other types of actions that potentially impact the environment and Pennsylvania's natural resources. For example, how will Article I, Section 27 and Pennsylvania trust law be applied in an appeal by neighboring landowners of the issuance of a landfill permit? Furthermore, will these types of appeals become more prevalent now that the *Payne v. Kassab* three-part balancing test is no longer the standard for review of such actions? Environmental practitioners will be following these developments closely because the impact on many activities including natural resources extraction, pipeline siting, manufacturing, real estate development and even agriculture could be quite significant.

If you have any questions regarding the content of this alert, please contact Joseph R. Brendel at (412) 394-2373 | jbrendel@clarkhill.com or another member of Clark Hill's Environment, Energy & Natural Resources practice group.

¹ The court remanded back to the Commonwealth Court the question of whether up-front bonus payments under the leases were payments for the natural gas extracted, in which case they also would belong in the corpus of the Section 27 trust, or whether the bonus payments served some other purpose.