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Pa. Supreme Court Enforces and Renews State's Environmental Rights Amendment

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SUMMARY

The Pennsylvania Supreme Court ruled on June 20, 2017 that Pennsylvania's Environmental Rights Amendment ("ERA") is a self-effectuating provision of the Constitution that must be adhered to by all levels of government. In doing so, it ruled that the three-part *Payne* test for deciding challenges under the ERA, devised in 1973, is no longer valid and that the proper standard of judicial review lies in the text of the ERA itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. The court also held that the ERA creates an automatic right for individuals to seek enforcement against governmental action that harms the environment. This Alert suggests the four biggest takeaways from the recent decision and poses some questions left unanswered by the court.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*,[1] the Pennsylvania Supreme Court issued a ruling that upends the standard that has been applied since 1973 by all levels of government in the Commonwealth considering their obligations under the Environmental Rights Amendment ("ERA").

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

In a 1973 decision, the Pennsylvania Commonwealth Court established a three-part test to be used by courts in determining whether a government action was consistent with the ERA. That test required courts to determine (1) whether there was compliance with applicable statutes and regulations; (2) whether the record demonstrates a reasonable effort to reduce environmental incursions to a minimum; and (3) does the environmental harm which will result from the challenged action so clearly outweigh the benefits to be derived therefrom that to proceed would be an abuse of discretion.[2]

1. 108 A.3d 140, 144 (Pa. Cmwlth. 2015), reargument denied (Feb. 3, 2015)
2. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

In 2013, a plurality of the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth* interpreted the ERA as requiring a "balancing test" in which the government must, on balance, reasonably account for the effect of a proposed action on the environmental features of an affected locale.[3]

However, in 2015, in response to a challenge filed by the Pennsylvania Environmental Defense Foundation ("PEDF") regarding the Commonwealth's leasing of state lands for oil and gas development and the resulting allocation of funds, a unanimous Commonwealth Court ruled that the Supreme Court's balancing test established in *Robinson Township*, which was backed by a plurality of only three justices, was nonbinding.[4] The court relied instead on the three-part *Payne* test. PEDF appealed to the Supreme Court.

On June 20, 2017, the Supreme Court reversed the Commonwealth Court, holding that "the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties." In so ruling, a 5-1 majority of the Supreme Court explicitly rejected the *Payne* test and held that the proper standard of judicial review lies in the text of the ERA itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. The Supreme Court's decision is available online here [http://bit.ly/2sPyPij].

This is a monumental decision that discards the almost 45-year-old *Payne* test. Here are some initial takeaways from the opinion, followed by questions:

- **The Environmental Rights Amendment is more than an aspirational statement.** It "formally and forcefully" recognizes the environmental rights of Pennsylvania citizens as "commensurate with their most sacred political and individual rights."
- **The *Payne* test is dead.** The Supreme Court rejects the *Payne* test, used for nearly 45 years, as the test for deciding challenges under the ERA. Rather, the proper standard of judicial review lies in the text of the ERA itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.
- ***Robinson Township* is alive and well.** In reviewing the text of the ERA, a 5-1 majority of the Supreme Court quotes numerous provisions from the December 2013 plurality decision in *Robinson Township*, making the provisions the law of Pennsylvania. Specifically, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of Pennsylvania's public natural resources, whether these harms might result from direct state action or from the actions of private parties. What this means in any particular instance will be subject to litigation.
- **The Environmental Rights Amendment is self-executing.** It creates an automatic right for individuals to seek to enforce its obligations in order to prevent the government from taking action that unduly harms environmental quality.

Questions raised:

- **Public vs. Private:** The ERA relates to the management of ***public*** natural resources. To what extent does government permitting on private land relate to a public natural resource?
- **Impact Fee:** The Oil and Gas Act (Act 13) establishes an impact fee. Generally, the fee is assessed on production resulting from an agreement between a private land owner and private operator. However, the Supreme Court suggests that the ERA may apply to resources not owned by the Commonwealth but which involve a public interest. If that is the case, are impact fees "generated from the sale of trust assets"?
- **Unreasonable impairment:** The Supreme Court notes that the right to clean air and pure water and the preservation of natural, scenic, historic and esthetic values of the environment are "amenable to regulation," but "any laws that unreasonably impair the right are unconstitu-

3. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).
4. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015).

tional." What is an unreasonable impairment?

- **The ERA is applicable to all levels of Commonwealth government.** This decision applied the ERA to all levels of government. What this means, exactly will have to be sorted out in litigation over the coming years.

Saul Ewing attorneys have been following and will continue to monitor changes with respect to the interpretation of the Environmental Rights Amendment. For more information on these matters, please contact the authors or the attorney at the firm with whom you are regularly in contact.

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