

A Breath of Fresh Air for The Keystone State:
Pa. Env'tl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017)

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Abstract

This case note addresses recent changes in Pennsylvania's interpretation of its Constitutional Environmental Rights Amendment (ERA) by Environmental Defense Foundation v. Commonwealth. Section I of this case note discusses a recent Pennsylvania Supreme Court Decision, Pa. Env'tl. Def. Found. v. Commonwealth, which requires certain natural gas revenues be used by the state for conservation purposes. Section II will discuss the stochastic development of the ERA's interpretation in the Commonwealth. Finally, Section III will discuss the authors opinion of the Court's reasoning for remanded a portion of the case.

Introduction

Pennsylvania – as most of the Commonwealth’s fourth graders will tell you, means Penn’s Woods. The natural bounty of what is now Pennsylvania has been realized by humans since before recorded history. As many eras progressed, so did man’s efficiency at harvesting the natural wonders of this area. Timber, iron, coal, wildlife, oil, and gas have all played instrumental roles in both the formation of the Commonwealth and its marked environmental follies. A land of abundance was shortsightedly driven to the brink disaster. As any maturing society does, the citizens and the government of Pennsylvania recognized the dangers of irresponsible exploitation and acted through the legislative system. Pennsylvania ratified an amendment to its constitution, providing greater environmental protection. This amendment is Article I section 27 of the Pennsylvania constitution, commonly referred to as the Environmental Rights Amendment (ERA). The ERA establishes the rights of Pennsylvania’s citizens to the natural scenic and historic resources of the commonwealth. The effect of this amendment then became a question for the judicial system. Over the following years, the ERA’s interpretation has ranged from merely purporting legislative policy, to being a self-executing constitutional right. The cases which follow reflect some of the archaic interpretations of the ERA, as well as the modern interpretation established in *Environmental Defense Foundation v. Commonwealth*.

Section I

Article I, Section 27 of the Pennsylvania Constitution was ratified by the citizens of this Commonwealth in 1971. Thereby solidifying their rights to the natural world around them.¹

Article I, Section 27 of the Pennsylvania constitution is commonly referred to as the Environmental Rights Amendment (ERA).² The ERA states:

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.³

This case defines some of the ERA's mechanisms and establishes the power of the words used in its legislation.⁴ The issues particular to this case arise out of the leasing of state forest and park lands for oil and gas extraction.⁵ In accordance with the Oil and Gas Lease Fund Act of 1955 (Lease Fund), "all rents and royalties from oil and gas leases of Commonwealth land [are] to be deposited in the "Oil and Gas Lease Fund".⁶ These rents and royalties in the Lease Fund are to be used for conservation, recreation, dams, and flood control.⁷ Over the course of several years, the funds generated by these leases were transferred from the Oil and Gas Lease Fund to subsidize some of the scarcity in the state's General Fund.⁸ In May of 2014, the Governor of Pennsylvania imposed a moratorium against the leasing of state lands and allowed only some minimal

¹ *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (PA 2017)

² *Id.*

³ *Pa. Const. art. 1. § 27*

⁴ *Pa. Env'tl. Def. Found.*, 161 A.3d at 916

⁵ *Id.* at 917

⁶ *Id.* at 919

⁷ *Id.*

⁸ *Id.* at 921-22

disturbance leasing.⁹ In addition, this moratorium required that the funds from new leases would be used to repair the infrastructure on state owned lands, purchase new state lands of heightened ecological value, and purchase the mineral rights to the forest land's substrate, which was currently in the hands of private parties.¹⁰ Thus, a significant portion of the funds being allocated to the Department of Conservation and Natural Resources (DCNR) were not able to be used for conservation and were tied up in other energy extraction activities.¹¹

The Environmental Defense Foundation filed suit against the Commonwealth and the Governor, alleging that the decision to transfer money out of the Oil and Gas Fund and into the General Fund violated Article I, Section 27 of the Pennsylvania Constitution, under the Declaratory Judgment Act.¹² The Foundation brought numerous claims against the Commonwealth, three of which were heard by the Commonwealth Court.¹³ They are as follows: (1) Whether the conditional appropriations to the DCNR violated the ERA (2) Whether the transfers from the lease fund to the general fund violated the ERA and (3) Who bears the ultimate duty to make decisions regarding oil and gas leases on state owned land.¹⁴

In deciding the constitutional precedent for the ERA, the commonwealth court first looked to the recent Pennsylvania Supreme Court decision, *Robinson Township v. Commonwealth*.¹⁵ Because that particular case resulted in a plurality decision, the Commonwealth Court noted that the interpretation of the ERA established in *Robinson* would be

⁹ *Pa. Env'tl. Def. Found.*, 161 A.3d at 923

¹⁰ *Id.* at 924

¹¹ *Id.* at 924

¹² *Id.* at 925

¹³ *Id.* at 926

¹⁴ *Id.*

¹⁵ *Id.* at 926

persuasive, and only as far as it is consistent with the binding precedent in *Payne v. Kassab*.^{16 17} The test for ERA compliance was thus: “(1) was there any violation of statutes or regulations which are intended to protect the Commonwealth’s natural resources, (2) Does the record show an effort to minimize environmental damage, and (3) does the damage that will result so clearly outweigh the benefit as to be considered an abuse of discretion?”¹⁸ Under this standard, the court found that there must be a showing that the conditional appropriations to the DCNR are so lacking that it prevents the DCNR from operating properly.¹⁹ The Foundation could not prove such a lofty burden, thus the Commonwealth Court held the appropriations to be constitutional.²⁰ The court similarly found no evidence that the funds generated in by the leases could not be used for the benefit of all people through spending other than conservation.²¹ The Foundation filed a direct appeal which was the case at bar in front of the Supreme Court of Pennsylvania.²² The court considered two issues on appeal, (1) What was the proper standard of Judicial review of actions challenged under the ERA and (2) The constitutionality of the various transfers from the Lease Fund to the General Fund.²³

In order to address these issues, the Supreme Court of Pennsylvania first established that the language of the constitution must be interpreted as it was understood at the time of its enactment.²⁴ If that interpretation is unclear, then the court may rely on the circumstances under

¹⁶ *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973)

¹⁷ *Pa. Env'tl. Def. Found.* 161 A.3d at 926

¹⁸ *Payne*, 312 A.2d at 94

¹⁹ *Pa. Env'tl. Def. Found.*, 161 A.3d at 928

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 929

²³ *Id.*

²⁴ *Id.*

which the amendment was established, the problem that it was attempting to fix, the goals that the amendment was trying to reach, and the contemporaneous legislative history.²⁵

The court held that the proper standard of review would be in the text of the ERA itself and the fundamental standards of Pennsylvania trust law at the time it was enacted.²⁶ The court observed that the test given in *Payne* fit the ERA's text poorly and that it had failed to provide any cohesive environmental rights case law.²⁷ The court subsequently rejected the *Payne* test.²⁸

Next, the court established that the ERA restricts the General Assembly's legislative authority.²⁹ The court noted that the legislative power vested in the General Assembly is limited by the rights vested in the people by Article I of the Pennsylvania Constitution.³⁰ The ERA sets out two of these enumerated rights.³¹ The first of which is the right of all people "to clean air, pure water, and the preservation of natural scenic historic and esthetic values of the environment."³² The second right is the common ownership of all public natural resources in Pennsylvania, including prospective generations.³³ The third clause of the ERA creates a public trust, which facilitates the previously mentioned rights of the Citizens.³⁴

In the public trust, the commonwealth is the trustee, the citizens of Pennsylvania are the beneficiaries, and the natural resources are the corpus of the trust.³⁵ This third clause is also

²⁵ *Pa. Env'tl. Def. Found.*, 161 A.3d at 929

²⁶ *Id.* at 930

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 931

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 931-32

³⁵ *Id.*

deemed to be self-executing.³⁶ As such the Commonwealth must act as the fiduciary over this trust.³⁷ In acting as the fiduciary, the Commonwealth must “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property” to accomplish the trust’s purpose.³⁸ The ERA establishes two duties of the Commonwealth – to prevent the degradation of its natural resources and to ensure legislative action that will protect the environment.³⁹ Because the trust specifically sets out goals for the Commonwealth to accomplish, it is unequivocal that the proceeds from the sale of public property, which is the corpus of the trust, must be retained by the trust to further its purpose.⁴⁰ This means that the royalties generated by a well on public land, must be retained in trust, and may be used only to further conservation efforts.⁴¹ Under this interpretation, it is clear that the actions of the General Assembly, which transferred these funds into the General Fund, were unconstitutional.⁴² It would however, be possible to place the funds generated into the General Fund, as long as those moneys were earmarked and used only for the furtherance of conservation.⁴³ The only remaining issue is whether, under Pennsylvania of trust law at the time of the ERA’s enactment, lease funds are trust property or simply revenue.⁴⁴ This question will be answered on remand, consistent with the Pennsylvania Supreme Court’s interpretation.⁴⁵

³⁶ *Pa. Env'tl. Def. Found.*, 161 A.3d at 931-32

³⁷ *Id.* at 932

³⁸ *Id.*

³⁹ *Id.* at 933

⁴⁰ *Id.* at 934

⁴¹ *Id.* at 939

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 939

Justice Baer penned a dissenting opinion.⁴⁶ His objection to the majorities analysis lies within the language of the ERA. The text in the amendment only refers to the Commonwealth as trustee and fails to mention a trust corpus or a designated beneficiary. Rather, Justice Baer contends that the Commonwealth simply has a duty to consider environmental impacts, not to earmark funds and ensure that the funds are spent solely on conservation efforts.⁴⁷

Section II

The History of Article I, Section 27 of the Pennsylvania constitution is both controversial and short. The Pennsylvania courts have formed inconsistent interpretations of the language in this constitutional amendment, until the majority opinion was reached in 2017.

As mentioned previously, Article I, Section 27, or the Environmental Rights Amendment (ERA), provides the citizens of Pennsylvania with constitutional protection for their right to enjoy the scenic and historic lands that the Keystone state has to offer. This is of course in addition to their rights to clean air and water.

One of the earliest landmark case which explored the boundaries of the ERA was *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*⁴⁸ In this Commonwealth Court case, the Commonwealth sought to prevent the construction of a large observation tower which would provide an elevated view of the Civil War battlefield.⁴⁹ The Commonwealth argued that the park's esthetics and historic value would be compromised by constructing a modern looking

⁴⁶ *Pa. Env'tl. Def. Found.*, 161 A.3d at 947 (J. Baer dissent)

⁴⁷ *Id.* 948-49

⁴⁸ *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973)

⁴⁹ *Id.* at 888

tower in an area that otherwise looks as it did in July of 1863.⁵⁰ In order to use the ERA to prevent the towers construction, the commonwealth would have to show, among other things, that the ERA is self-executing and that the construction of the tower would result in such harm.⁵¹

The Court ultimately held that the Commonwealth did not proffer enough evidence to show that such harm would occur.⁵² The commonwealth court then went on to opine that the ERA was self-executing.⁵³ The court stated that to decide that the ERA would require legislative action to become effectual in any given situation would be comparable to requiring that the legislature act before a citizen could exercise their right to free speech.⁵⁴

The case was subsequently appealed to the Pennsylvania Supreme Court.⁵⁵ On appeal, a split panel held in a plurality opinion, that the ERA was not self-executing and required further legislative action.⁵⁶ The court opined that if the ERA were to be deemed self-executing, there would be a landslide of due-process and equal protection clause challenges to any action taken under the ERA.⁵⁷

The boundaries of the ERA's power were again tested in *Payne v. Kassab* along with the issue of self-execution, if only briefly.⁵⁸ In this case, the City of Wilkes-Barre sought to widen a city street by taking evenly from each side of the street or alternatively, taking from primarily the side of the street which was occupied by a city park.⁵⁹ The latter option was deemed to be the

⁵⁰ *National Gettysburg Battlefield Tower, Inc.*, 302 A.2d at 888

⁵¹ *Id.* at 892

⁵² *Id.* at 895

⁵³ *Id.* at 892

⁵⁴ *Id.*

⁵⁵ *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 589 (Pa. 1973)

⁵⁶ *Id.* at 594-95

⁵⁷ *Id.*

⁵⁸ *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976)

⁵⁹ *Id.* at 232

most practicable.⁶⁰ A group of citizens initiated this action claiming a constitutional violation under the ERA, as this park is historically significant dating back to the 1770's.⁶¹

When this case was tried in the commonwealth court a three-part test was fashioned to ensure the balancing of the various interests at stake; “(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?”⁶² Further, this court held the ERA to be self-executing with little deliberation on that matter.⁶³ With this test in mind, the court granted the defendants' motion to dismiss.⁶⁴

The Supreme Court of Pennsylvania heard the subsequent appeal.⁶⁵ The supreme court held that the matter of the ERA's self-execution was certain in the realm of publicly held land, as the call of the ERA to conserve public natural and historic was definite, unlike the regulation of private development at issue in *Gettysburg*.⁶⁶ The Pennsylvania Supreme Court found that all of the procedural requirements had been met and therefore, there was no violation of the ERA.⁶⁷ While not specifically adopting the three part test fashioned by the commonwealth court, the

⁶⁰ *Payne*, 361 A.2d at 232.

⁶¹ *Id.* at 229

⁶² *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973)

⁶³ *Id.* at 97

⁶⁴ *Id.*

⁶⁵ *Payne*, 361 A.2d at 263

⁶⁶ *Id.* at 245

⁶⁷ *Id.* at 246-47

reasoning used by the supreme court amounts to a de facto adoption of the three part *Payne* test which would stand as the test for ERA compliance for years.^{68 69}

In 2013 the Pennsylvania Supreme Court again explored the ERA in *Robinson Twp. v. Commonwealth*; this time to determine the constitutionality of portions of Act 13 of 2012.⁷⁰ Act 13 was an amendment to Pennsylvania's Oil and Gas Code.⁷¹ Specifically, Act 13 amended the handling of funds in the Oil and Gas Lease Fund, defined a statewide well permitting process, reduced local regulation of oil and gas operations through environmental regulation, and mandated statewide uniform municipal zoning ordinances with respect to oil and gas extraction.⁷² Numerous citizen groups and municipalities objected to Act 13 as a violation of the state and federal constitution.⁷³ The constitutional challenges included a claimed violation of the ERA.⁷⁴

The Pennsylvania Supreme Court began its analysis of the ERA by outlining the rights and duties created by its plain text.⁷⁵ In its discussion, the court established that the ERA creates a public trust and goes on to discuss the principals of the public trust.⁷⁶ These include the duty to conserve the publicly owned natural resources of Pennsylvania in a manner which facilitates the rights of all Pennsylvanians, including members of subsequent generations to enjoy the natural, ecstastic, and historic resources of Pennsylvania.⁷⁷ After reiterating the purpose of the ERA the

⁶⁸ *Payne*, 361 A.2d at 246-47

⁶⁹ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 966 (Pa. 2013)

⁷⁰ *Id.* at 913

⁷¹ *Id.* at 915

⁷² *Id.*

⁷³ *Id.* at 917-25

⁷⁴ *Id.* at 915-16

⁷⁵ *Id.* at 955

⁷⁶ *Id.* at 955-59

⁷⁷ *Id.*

court further examined previous case law.⁷⁸ The court discussed the fragmented nature of previous case law and the failure of the judiciary to add guidance to the ERA.⁷⁹ The court then criticized the *Payne* test for offering ineffective protection under the ERA.⁸⁰ After a lengthy analysis of the ERA's authority and an explanation of the public trust, a plurality of the justices opined that certain aspects of Act 13 were unconstitutional. Specifically, treating the commonwealth uniformly regardless of municipal zoning or local environmental concerns, would violate the ERA.⁸¹

Although this opinion was a more expansive interpretation of the ERA's power, it was a plurality decision with a concurrence penned by Justice Bear.⁸² In his concurrence, he opined that aspects of Act 13 were unconstitutional because they violated substantive due process, not because it violated the ERA specifically.⁸³ Thus, the *Payne* test continued to be the most common test used by the courts regarding ERA compliance until the *Environmental Defense Foundation* majority opinion in 2017.⁸⁴

Section III

Environmental folly has been an unfortunate corollary to the rich natural resources within the borders of Pennsylvania. Coal, iron, timber, and gas have all played an integral role in the development of the Commonwealth's infrastructure. Railways, roadways, and waterways were all created and improved to facilitate the transportation of these resources from remote areas to

⁷⁸ *Robinson Twp.*, 83 A.3d at 964-66

⁷⁹ *Id.* at 965

⁸⁰ *Id.* at 967

⁸¹ *Id.* at 979

⁸² *Robinson Twp.*, 83 A.3d at 1000 (J. Baer dissent)

⁸³ *Id.* at 1008-09

⁸⁴ *Pa. Env'tl. Def. Found.*, 161 A.3d at 916

urban hubs. Frequent booms of prosperity, fostered by the Commonwealth's bountiful resources, have provided Pennsylvania with a great deal of economic stability over the past century. The price paid for this stability came in the form of acidic water, unsustainable timber harvests, and wildlife populations that balanced on the verge of critical. This historic damage is still evident today, and cleanup costs have often fallen on the Commonwealth's tax payers.

Environmental Defense Foundation v. Commonwealth followed the natural progression of the ERA, from its enactment to its modern powerful interpretation. This case serves as a contemporary reflection of the Commonwealth's and the Nation's understanding that our actions will always have a reaction. Further, it is representative of the people's frustration with shortsighted environmental decisions with far reaching effects. Effects that travel far beyond the confines of a typical business transaction. Effects that reach well within the private domain of every Pennsylvanian. Effects on the water they drink, the food they eat, the sights they see, and the air they breathe. *Environmental Defense Foundation* established that the burden of environmental cleanup need not solely rest on the Commonwealth's tax payers, but rather it should rest on the shoulders of those who are using the Commonwealth's natural resources for their own benefit.

The most obvious advantage of this interpretation of the ERA is that the funds generated through the sale of publicly owned natural resources will be used to remedy the damage that such sales may cause.⁸⁵ The court however, stated that they were not properly positioned to adjudicate EDF's claim that *all revenue* generated would be added to the corpus of the trust, rather than only the royalties paid for extracted gas.⁸⁶ The Pennsylvania Supreme Court reserved themselves for the reason that the ERA must be interpreted through the understanding of trust law at the time

⁸⁵ *Pa. Env'tl. Def. Found.*, 161 A.3d at 935

⁸⁶ *Id.*

of the ERA's enactment. The court reasoned that at that time, rental incomes were typically paid directly as income to the beneficiaries of the trust and they were without proper advocacy to overcome that generality.⁸⁷ The court found that the question of other revenue streams would be more appropriate for decision on remand, after both parties have had an opportunity to research and argue their points in strict observance of Pennsylvania trust law.⁸⁸

That decision to remand came somewhat as a surprise, as the court had already defined the purpose of the trust created by the ERA. That purpose is to retain the fiscal benefits realized through the sale of trust property to conserve Pennsylvanian resources for the use of enjoyment of all. The purpose is not to provide financial support to citizens of the Commonwealth, it is specifically to facilitate their constitutional right to use and enjoy Pennsylvania's natural recourses.⁸⁹

The Court however, stopped short of fully facilitating this purpose when it hesitated to incorporate other revenue streams into the corpus of the trust. Citing two cases which involved the handling of rental proceeds derived from trust property, the Restatement Second of Trusts, and Pennsylvania Trust Code, the Court generalized that rental proceeds are paid to beneficiaries directly as income.⁹⁰

Neither of the cited cases however, questioned the principal that the settlor's intention will control how rental proceeds are managed by the trustee.^{91 92} Further, the Second Restatement of Trusts, Section 233 provides for a situation where the trust holds property for the purpose of

⁸⁷ *Pa. Env'tl. Def. Found.*, 161 A.3d at 935

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 936

⁹¹ *In re Estate of Rosenblum*, 328 A.2d 158 (PA 1974)

⁹² *Haak Estate*, 67 A.2d 449 (Pa. Super. Ct. 1949)

paying income to the beneficiaries.⁹³ This section is then explained in note A, “*Except as otherwise provided by the terms of the trust*, the trustee can properly make payments of income to the beneficiary *entitled to income*.”⁹⁴ Thus, the beneficiary must be entitled to income to receive it, and only when there is not a contrary intention in the trust indenture. Finally, Pennsylvania’s trust code explicitly allows the trust indenture to decide the allocation of trust income.⁹⁵

It should not have been doubted then by the supreme court that the intention of the settlor and the indenture itself are controlling on the ERA’s trust. Nor should it have been doubted that the trust itself must retain the other revenue streams generated by the trust corpus. The only purpose of the trust is to conserve and maintain the land in a manner that will promote the constitutional rights of Pennsylvania’s Citizens.⁹⁶ This very court made that determination earlier in this case. The only way to prevent the frustration of that purpose is to retain the income generated by the trust property, and reinvest it in accordance with the trust’s purpose; namely, conservation.

It was not necessary to remand a portion of this case to make such a determination. There exists only one use of the other streams of revenue generated through the sale of publically owned natural recourses that would not frustrate both the trust, and the Constitution of Pennsylvania.

⁹³ *Restat 2d of Trusts*, § 233 (2012)

⁹⁴ *Id.*

⁹⁵ 20 Pa. Cons. Stat. Ann. § 8103 (LexisNexis, Lexis Advance through 2017 Regular Session Acts 1-55; P.S. documents are current through 2017 Regular Session Acts 1-34)

⁹⁶ *Pa. Env'tl. Def. Found.* 161 A.3d at 935

Conclusion

Although the ERA has been highly controversial, it now has the support of a majority Pennsylvania Supreme Court opinion.⁹⁷ Stability is now within reach for the ERA. As case law develops across the Commonwealth, the framework developed by *Environmental Defense Foundation* will continue to be built upon, and a powerful environmental tool has been granted to the people of Pennsylvania.

⁹⁷ See, *Pa. Env'tl. Def. Found.* 161 A.3d 911