Weyerhaeuser Co. v. United States Fish and Wildlife Service: A New Direction for the Endangered Species Act

By Harrison Pierre Graydon

On November 27, 2018, the Supreme Court of the United States decided *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 139 S.Ct. 361 (2018). The unanimous opinion of the Court was delivered by Chief Justice Roberts. It addressed the interpretation of the Endangered Species Act and the issue of whether agency decisions under the ESA are reviewable by the courts.[1]

In *Weyerhaeuser*, the Court addressed two issues. The first is whether "critical habitat" under the Endangered Species Act must be actual habitat of an endangered species; the second is whether the economic impact of an agency's decision to include a certain tract of land in a critical habitat designation is reviewable by a federal court. [2]

Under the Endangered Species Act, the Secretary of the Interior is permitted to list species as endangered and designate the endangered species' critical habitat.[3] In *Weyerhaeuser*, a group of landowners in Louisiana challenged the designation of their property as critical habitat for an endangered species of frog.[4] The landowners' primary objection was that their land could not be *critical* habitat because it was not actually *habitat* for the species.[5] "Habitat," according to the Weyerhaeuser and the other landowning petitioners, refers only to those areas where the species could currently survive.[6]

[1] Weyerhaeuser Co. v. United States Fish and Wildlife Service, 139 S.Ct. 361 (2018).
[2] *Id.* at 368.
[3] *Id.* at 364.
[4] *Id.*
[5] *Id.*
[6] *Id.*

The District Court and Fifth Circuit Court of Appeals ruled that the ESA did not impose such a limitation on the definition of critical habitat.[7] Additionally, the ESA also allows the Secretary to "exclude an area that would otherwise be included as critical habitat, if the benefits of exclusion outweigh the benefits of designation."[8] The landowners' property was not excluded, and lower courts held that the Secretary's decision was not reviewable.[9] The Supreme Court granted certiorari to address both of these issues.[10]

The species at issue in the case was the dusky gopher frog, also known by its scientific name as *Rana sevosa*.[11] The frog only exists in a particularly limited type of habitat in upland longleaf pine forests with open canopies, which permits vegetation to coat the forest floor.[12] The vegetation that proliferates in open-canopy forests allows the frogs' eggs to attach, and provides habitat for insects that the frog feeds on.[13] Additionally, the frog requires "ephemeral ponds," which are naturally-occurring ponds that exist for only part of the year.[14] The ephemeral nature of the pools allows the frogs' tadpoles to be free from predation by fish.[15]

Ninety-eight percent of the open-canopy longleaf pine forests in Alabama, Louisiana, and Mississippi that formerly supported the frog's habitat have since been destroyed to make way for human development, timber harvest, and agriculture.[16] Much of the frog's range is covered with timber plantations, where trees are planted closely together, thus creating a closed canopy which

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 364-365.
[12] *Id.* at 365.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

prevents the frog's sensitive habitat from forming.[17] As a result of habitat destruction, the frog's population has significantly declined, and by 2001, only 100 individuals of the species were known to still survive at a pond in southern Mississippi.[18] The Fish and Wildlife Service, ("the Service"), which administers the ESA on behalf of the Secretary of the Interior, listed the frog as an endangered species in 2001.[19]

Under the ESA, when the Secretary of the Interior designates a species as endangered, he must also designate the critical habitat of the species.[20] The ESA defines "critical habitat" as

> "(i) the specific areas within the geographical area occupied by the species … on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species … upon a determination by the Secretary that such areas are essential for the conservation of the species."[21]

The statute also requires the Secretary to take economic impact and "other relevant impacts" of the critical habitat designation into consideration when making the designation.[22] If the Secretary determines that the benefits of exclusion of the area outweigh the benefits of designation, the Secretary may exclude the area from critical habitat designation, unless exclusion would result in the species' extinction.[23] When land is designated as "critical habitat," it does not directly limit private landowners' rights – instead, it regulates the ability of the federal government to physically change the designated area.[24] Under the ESA, federal agencies are

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*, *see also* 16 U.S.C. § 1522(a)(3)(A)(i).
[21] *Weyerhaeuser* at 365.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 365-366.

required to consult with the Secretary to "ensure that any action authorized, funded, or carried out by such agency" is not likely to have adverse effects on an endangered species' habitat.[25]

When the dusky gopher frog was listed as endangered in 2001, the Fish and Wildlife Service did not designate its critical habitat.[26] It was not until 2010, in response to a lawsuit brought by the Center for Biological Diversity that the Service published a proposed critical habitat designation.[27] The Service specified four locations as requiring special protection because each contained the three features that the Service considered essential to the conservation of the frog: "ephemeral ponds; upland open-canopy forest containing the holes and burrows in which the frog could live; and open canopy-forest connecting the two."[28] Despite this, the Service stipulated that designating only these four sites would not guarantee the frog's survival.[29] The existing populations were confined to two Gulf coast counties of Mississippi, and localized events or disasters could decimate the entire species.[30]

To insure against the risk of extinction, the Service proposed designating an unoccupied critical habitat consisting of 1,544 acres in St. Tammany Parish, Louisiana.[31] The site was dubbed "Unit 1" by the Service, and the area was the last known population of the frogs outside of Mississippi, but the frogs had not been seen in this area since 1965.[32] Petitioner Weyerhaeuser Co. (a timber company) owned most of the site, and leased the remainder of Unit 1 from private landowners.[33] The site was now almost completely occupied by closed-canopy timber

[25] *Id.*, *see also* 16 U.S.C. § 1536(a)(2).
[26] *Weyerhaeuser* at 366.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

plantations.[34] Although the forest was closed-canopy, the Service said that an open-canopy habitat could be restored, and that ephemeral ponds existed on the land, making it crucial to the survival of the frog.[35]

In its proposal, the Fish and Wildlife Service analyzed the probable economic impact of the designation of each area.[36] Unit 1 is within a quickly developing part of the outer New Orleans metropolitan area, and the landowners already had plans to profit from developing the land.[37]

The Service's report stated that anyone who wanted to develop the Unit 1 by filling in wetlands would have to obtain a Clean Water Act permit from the Army Corps of Engineers.[38] Under Section 7 of the ESA, the Corps (as a federal agency) would not be able to issue a permit without consulting the Service, because the area was designated as critical habitat.[39]

The report stated that the consultation could result in three possible outcomes: (1) the landowners could proceed with development if it was determined that Unit 1 wetlands did not require a Clean Water Act permit to fill in; (2) the Service could ask the Corps not to issue permits to fill wetlands on the side, thereby prohibiting development on 60% of Unit 1 at an estimated cost of $20.4 million to the landowners; or (3) the Service could ask the Corps to deny all permits and prevent development of Unit 1 at an estimated cost of $33.9 million.[40] The Service reached a conclusion that the potential costs of prohibiting development of Unit 1 were

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 367.
[38] *Id.*
[39] *Id.*
[40] *Id.*

not disproportionate to the conservation benefits to be reaped from designating the land as a critical habitat, so it declined to exclude Unit 1 in the critical habitat designation.[41]

Weyerhaeuser and the other landowners of Unit 1 sued in Federal District Court to vacate the critical habitat designation.[42] They argued that Unit 1 could not be critical habitat because it was not an "open-canopy longleaf pine forest," so the frog could not survive on the land.[43] The District Court upheld the designation because Unit 1 fit the statutory definition of "unoccupied critical habitat," which only requires that the Service deems the land essential for the conservation of the species.[44] Weyerhaeuser also challenged the Service's decision to include Unit 1 in the frog's critical habitat, arguing that the Service failed to weigh the benefits of designation against the economic costs, but the court declined to consider this challenge.[45]

The Fifth Circuit affirmed the District Court's decision and rejected Weyerhaeuser's argument that critical habitat has a habitability requirement.[46] It concluded that the Service's decision not to exclude Unit 1 was committed to agency discretion and was not judicially reviewable.[47] In a dissent, Judge Owen of the Fifth Circuit wrote that Unit 1 could not be essential to the survival of the species because it lacked the open-canopy environment deemed essential for the frog's survival by the Service.[48]

The Fifth Circuit denied rehearing *en banc*. A dissent from the denial reasoned that "critical habitat" must first be "habitat," so accordingly, Unit 1 was currently not habitat for the

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[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*, *see also* Markle Interests, LLC v. USFWS, 40 F.Supp.3d 744 (E.D.La.2014) (upholding designation of Unit 1 because the Service deemed the land essential for conservation of the species).
[45] *Weyerhaeuser* at 367.
[46] *Id.*
[47] *Id.*
[48] *Id.*

dusky gopher frog.[49] The dissent also said that the Service's decision was judicially reviewable for abuse of discretion.[50] Following the denial of rehearing *en banc,* the Supreme Court of the United States granted certiorari on the issues of the definition of critical habitat and whether the agency's decision not to exclude Unit 1 was reviewable by a federal court.[51]

Writing for the unanimous Court, Chief Justice Roberts began with the analysis of the term "critical habitat." The Court rejected the argument of the Center for Biological Diversity that "critical habitat" is a term complete in itself and that there was no need to separate the term "habitat."[52] The Court determined that because the term encompasses habitat, "critical" is merely an adjective and modifies the word habitat, so "critical habitat" must be habitat.[53] Additionally, the Court reviewed the statutory context of critical habitat and concluded that only habitat of the species can be designated as critical habitat.[54] "Critical habitat" is defined under the ESA in terms of what makes it *critical* and not what makes it *habitat*.[55] The Supreme Court's grammar lesson demonstrated unmistakably that "critical" is a modifier for "habitat" and not one self-contained term within the ESA.

The Court further reasoned that even though the Service can designate "unoccupied critical habitat" based on the Secretary's finding of the area being essential to the survival of the species, the statute does not permit the Secretary to designate the unoccupied area as critical habitat unless it is already habitat.[56] Additionally, according to the ESA, the critical habitat must

[49] *Id.*
[50] *Id.*
[51] *Id.* at 368.
[52] *Id.*
[53] *Id.*
[54] *Id.*, *see also* 16 U.S.C. § 1533(a)(3)(A)(i) (defining "critical habitat").
[55] *Id.*
[56] *Id.*

be "occupied by the species" on which there are "physical or biological features essential to the conservation of the species…"[57]

The Fish and Wildlife Service made no contention at the Supreme Court that "critical habitat" did not have to be habitat, although in the lower courts it did not concede this point.[58] Instead, the Service argued that habitat could encompass areas that only require a "small degree of modification" to support the species' survival.[59]

Weyerhaeuser countered the Service's contention by arguing that the term "habitat" could encompass areas where the species does not currently *live*, because the statute includes unoccupied areas with proper biological and physical features, but it cannot encompass areas where the species could not currently survive.[60] Here, the forest lacked the open-canopy which the Service had stated was crucial to the survival of the frog, so it could not be habitat.[61]

The Court addressed Weyerhaeuser's argument that even if Unit 1 were properly designated as critical habitat for the dusky gopher frog, the Secretary should have excluded Unit 1 because Section 4(b)(2) of the ESA requires the Secretary to take economic impact of critical habitat designation into consideration and exclude an area if the benefits of exclusion outweigh the benefits of designation as critical habitat.[62] The Fish and Wildlife Service's report concluded that the impact of designation was not disproportionate to the conservation benefits, so the Service declined to exclude it.[63] Weyerhaeuser contended that the Service improperly weighed the benefits of designating all of the proposed critical habitat against the costs of only

[57] *Id.* at 369.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

designating Unit 1 in particular.[64] Weyerhaeuser's contentions focused on the Service's alleged failure to take the full economic impact of designating Unit 1 into account, ignoring the costs of replacing trees, creating an open canopy, and the tax revenue losses to St. Tammany Parish from foregoing development.[65]

The Court addressed the tension between commitment of agency discretion prohibiting review and the ability of courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[66] The Administrative Procedure Act, or APA, allows for judicial review of federal agency decisions that have caused legal issues or wrongs.[67] There is an assumption of judicial review of agency actions, unless the relevant statute forbids judicial review outright or if the agency's discretion is committed to law.[68] The Court rejected the Fish and Wildlife Service's argument that Section 4(b)(2) of the ESA prohibits judicial review of agency decisions. In rejecting this argument, the Court framed the issue in this case as a routine dispute between a private party suffering an alleged wrong and a government agency.[69] According to the Court, in such "routine" cases, a private party is adversely affected by an agency action, and the private party opposes and objects that the agency did not properly justify its action under a standard set forth in a statute governing the agency's actions.[70] The Court thus concluded that the APA allows for judicial review of agency decisions in most circumstances and restricts the ability of agency decisions to be free from review only

[64] *Id.* at 369-370.
[65] *Id.* at 370.
[66] *Id.*
[67] *Id.*, (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967))
[68] *Weyerhaeuser Co.* at 370.
[69] *Id.*
[70] *Id.*

when "the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[71]

The Court cited its opinion in *Bennet v. Spear*, 520 U.S. 154 (1997), where it held that the Secretary's "ultimate decision" to designate or to exclude from designation is subject to judicial review.[72] When setting aside an agency decision under the APA, Courts assess whether the decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[73] Section 4(b)(2) of the ESA requires that the Secretary consider economic impact and weigh it against the relative benefits of designation before deciding whether to designate or exclude. According to the Court, the statute does not prevent a court from determining "a meaningful standard against which to judge the Secretary's exercise of his discretion."[74]

The Court held that the Fifth Circuit's determination that the Fish and Wildlife Service's decision was unreviewable did not consider whether the Service's assessment of the costs and benefits of the designation of critical habitat over Unit 1 was arbitrary, capricious, or an abuse of discretion.[75] Finding that the decision not to exclude Unit 1 from designation *is* judicially reviewable, the Court remanded the case to the Fifth Circuit Court of Appeals.

[71] *Id.*, (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)).
[72] *Id*. at 371; (citing Bennet v. Spear, 520 U.S. 154 (1997)).
[73] *Weyerhaeuser Co.* at 371; (quoting *Judulang v. Holder*, 565 U.S. 42, 54 (2011)).
[74] *Weyerhaeuser Co.* at 371; (quoting *Lincoln*, 508 U.S. at 191.)
[75] *Weyerhaeuser Co.* at 372.

History

The 1973 Endangered Species Act has a history of causing tension between environmentalists and those in favor of property rights and land development.[76] Around the time of its passage, this act was considered one of the most in-depth and comprehensive statutes for the preservation of threatened and endangered species ever passed.[77]

Prior to the Endangered Species Act, only limited forms of protection for endangered species existed in the form of predecessor statutes. A notable example was the Endangered Species Preservation Act of 1966, which authorized protection of species only via land purchases by the federal government.[78] In 1969, Congress enacted the Endangered Species Conservation Act, which continued the 1966 act but allowed for an increased role to be played by the federal government in preserving endangered species.[79] The 1969 act authorized the Secretary to list species "threatened with worldwide extinction" and forbade the importation of endangered species into the United States.[80]

Congress later realized that it had to take a broader approach to truly protect and preserve endangered species.[81] Congressional discussion of what would become the Endangered Species Act of 1973 was centered around the "overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources," and the threats of extinction loomed large in the minds of many members.[82] Congress concerned

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[76] Green*, The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329 (1998).
[77] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
[78] 16 U.S.C. § 668aa *et seq.* (repealed)
[79] 16 U.S.C. § 668aa *et seq. (*repealed)
[80] *Id.*
[81] *Id.*
[82] *Tennessee Valley Auth.*, 437 U.S. 174, citing Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N. D. L. REV. 315, 321 (1975).

itself with the loss of *any* species, and feared the unknown or unforeseeable impact that extinction of any species could have on the ecosystem or natural resources of the world.[83] When the bill was being discussed, scientists and ecologists warned Congress of the danger of destruction of natural habitats.[84] It was recommended that Congress require all land-managing agencies "to avoid damaging critical habitat for endangered species and to take positive steps to improve such habitat."[85]

Upon passage, the Endangered Species Act of 1973 was among the first measures designed containing provisions to prohibit both private actors and federal agencies from taking actions which would jeopardize the status of an endangered species.[86] The Endangered Species Act of 1973 has stated purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such … species …"[87]

The authority to enforce the provisions of the Act is given to the Secretary of the Interior, who has the power to create regulations to conserve and aid in the survival of both endangered and threatened species.[88] In particular, the Secretary has the authority to list a species as endangered.[89] Upon listing a species as endangered, the Secretary must designate the critical habitat of that species.[90] Critical habitat is defined as

> "the specific areas within the geographical area occupied by the species . . . which are . . . (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas

[83] *Tennessee Valley Auth.*, 437 U.S. 178-179 (1978).
[84] *Id.*
[85] *Id.* at 179.
[86] *Id.*
[87] 16 U.S.C. § 1531(b).
[88] *See id.* § 1533(d).
[89] *Id*.
[90] *Id.*

> outside the geographical area occupied by the species, . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."[91]

Once a species is listed as endangered, any "take" of the species is prohibited, which is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct.[92]

In the pursuance of the goal of conserving and protecting endangered species, Congress requires that "all Federal departments and agencies shall seek to conserve endangered species and threatened species."[93] Coupled with other provisions of the act, this means that the federal government and its agencies must, when possible, make efforts to conserve threatened and endangered species.

One provision of the Act, known as Section 7, imposes an affirmative duty upon federal agencies to ensure that any action taken does not jeopardize the survival of any endangered species or adversely affect the species' critical habitat.[94] This duty effectively requires all of the federal agencies to evaluate whether a proposed action will jeopardize or affect the survival of any species. The Secretary, in conjunction with affected States, will review the proposed actions and determine if the action is likely to jeopardize the survival of an endangered species.[95] If the action will jeopardize the survival of the species or have an adverse effect on the species' critical habitat, the Secretary will propose "reasonable and prudent alternatives" to the proposed agency

[91] *See id*. § 1532(5)(A).
[92] *See id*. § 1532(19), 1538(a).
[93] *See id*. Sec. 1531(c).
[94] *See id*. Sec 1536.
[95] *Id.*

action, which in some cases can amount to preventing the agency action altogether if there is no reasonable alternative.[96]

The Act also gives the Secretary the authority to grant exemptions to federal agencies, and the agencies may also go forward with the proposed action if it is determined by the Secretary that the action is unlikely to jeopardize an endangered species' survival or adversely affect its critical habitat. This has resulted in a requirement for all federal agencies to review their actions to ensure that they do not jeopardize endangered species' survival or adversely affect the species' critical habitat as designated by the Secretary of the Interior.

In 1978, the Act was amended to require that critical habitat determinations include an economic analysis.[97] Although a narrow reading of the text of the Act leaves all decision-making to the Secretary and the Fish and Wildlife Service, the revision sometimes leaves agencies to weigh economic consequences.[98] They often must do this in the face of political opposition and in attempt to avoid potential litigation.[99]

Section 4 of the act addresses listing of endangered species as well as designation of critical habitat.[100] In making critical habitat designations, the Secretary is required to consider the economic impact and "any other relevant impacts" of specifying any particular area as critical habitat.[101] If the Secretary determines that the consequences of designating an area as critical habitat outweigh the benefits of designation the Secretary can exclude the area from

[96] *Id.*
[97] *See id*. § 1533(b).
[98] *See id.* § 1533(b)(2)
[99] Ray Vaughan*, State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 584-90 (1995).
[100] 16 U.S.C. § 1533(b). (2019).
[101] *Id.*

designation.[102] However, if the Secretary determines "based on the best scientific and commercial data available" that failure to designate an area as critical habitat will result in extinction of the species, the Secretary can make the designation.[103]

This "weighing" provision of the Act has allowed for economic interests to influence how environmental policies are enforced. Over time, application of the Endangered Species Act has gradually involved incorporation of varying interests, sometimes favoring private property owners at the expense of conserving endangered species. The history of the Supreme Court's treatment of the ESA shows an initial favor towards strict application in favor of endangered species. In *Tennessee Valley Authority v. Hill*, the Supreme Court was tasked with interpreting the ESA for the first time.[104] In delivering its opinion, the Court, per Chief Justice Warren Burger, considered the Act to be "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[105]

The case dealt with the construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, a project initiated under the authority of the wholly federal government-owned Tennessee Valley Authority in 1967.[106] Congress appropriated the funding for the project and intended that the dam and reservoir would improve economic conditions in the area.[107] The project was nearly completed but was temporarily halted due to litigation involving the National Environmental Policy Act, another federal environmental statute.[108] During an injunction, a researcher from the University of Tennessee discovered a "previously unknown" species of fish

[102] *Id.*
[103] *Id.*
[104] *Tennessee Valley Authority*, 437 U.S. 153 (1978).
[105] *Id*. at 180.
[106] *Id.* at 157.
[107] *Id.*
[108] *Id* at 158.

in the river, known as the snail darter.[109] The species of fish was few in number and only lived in the Little Tennessee River.[110] The discovery of the fish became even more controversial following the passage of the ESA by Congress four months later.[111]

The respondents in *Hill* were several Tennessee biological scientists, local conservation groups, and an individual in the Tennessee Valley area.[112] They petitioned the Secretary of the Interior to list the snail darter as an endangered species, and on October 8, 1975, it was officially listed as an endangered species by the Secretary.[113] The fish's critical habitat was designated as the limited area of the Little Tennessee River where the dam was being constructed.[114] The Secretary further stated that the completion of the dam and reservoir would result in "total destruction of the snail darter's habitat" and the extinction of the species.[115]

Per section 7 of the ESA, the Secretary declared that "all Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area."[116] This was clearly directed at the TVA (as a federal actor) and meant that the dam was not to be completed or operated.[117] The TVA entered into negotiations with the Department of the Interior and the Fish and Wildlife Service to relocate the population of snail darters to another area, but ultimately the Secretary was not satisfied with the TVA's efforts.[118]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 162.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 163.

Citizen groups filed suit against the TVA to prevent the completion of the dam, pursuant to section 11(g) of the ESA that allows citizen suits.[119] The TVA argued that the ESA did not affect a project that was over 50% finished by the time that the ESA became effective and was 70-80% complete when the darter was listed as endangered.[120] The District Court found that completing the dam would result in adverse modification, "if not complete destruction" of the snail darter's critical habitat, but the project was far along and had begun long before the ESA was passed or the snail darter was discovered.[121] The court found it inequitable to apply the statute, and declined to apply the ESA.[122] The Court of Appeals agreed with the plaintiffs' arguments that the District Court abused its discretion by allowing a "blatant statutory violation" to occur.[123] The Court of Appeals rejected the TVA's argument that "actions" under section 7 of the Act was not intended by Congress to "encompass the terminal phases of ongoing projects."[124]

Congress continued to approve appropriations for the project.[125] It continued under a vote passed by both Houses of Congress despite the Court of Appeals' issuance of a permanent injunction.[126] The Supreme Court granted certiorari and addressed the fact that the dam would eradicate the snail darter.[127]

The Court found the language of the ESA to be plain in that it affirmatively commands federal agencies to "insure" that actions "authorized, funded, or carried out do not jeopardize the continued existence of an endangered species" or result in adverse modification or destruction of

[119] *Id.* at 164
[120] *Id.*
[121] *Id.* at 166.
[122] *Id.* at 167.
[123] *Id.* at 168.
[124] *Id.*
[125] *Id*. at 170.
[126] *Id.*
[127] *Id.* at 172.

its habitat.[128] It considered the legislative history of the Act and found that the ESA *requires* federal agencies to protect endangered species and their critical habitat.[129] The Court's interpretation of the ESA was strict in that it looked to the plain language of the act and found that Congress's intent was in favor of "affording endangered species the highest of priorities" with no exceptions for the continuing of the Tellico Dam project.[130] In a dissent, Justice Powell criticized the majority's holding that it allowed the ESA to waste $53 million in federal funds and prevent a mostly-completed project from being finished, and that the result of the strict application of the ESA here was one that no one had intended.[131]

Another major interpretation of the ESA by the Supreme Court would come in *Babbitt v. Sweet Home Chapter of Committees for a Great Oregon*, 515 U.S. 687 (1995). Here, the Court was primarily concerned with whether habitat modification fell under the definition of the word "harm" under Section 9 of the act, which describes "take" of endangered species.[132]

The ESA itself does not define "harm," but regulations issued by the Department of the Interior defined "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[133] The statute states that it protects the listed species from take anywhere within the United States or territorial sea of the United States – effectively meaning that it applies to private

[128] *Id.* at 173.
[129] *Id.* at 183.
[130] *Id.* at 194-195.
[131] *Id.* at 210-211.
[132] *Babbitt*, 515 U.S. 687, 690.
[133] *Id*. at 691.

and public property alike, as long as this property is within the territorial jurisdiction of the United States.[134]

Respondents in this case were private landowners in the Pacific Northwest and Southeast, bringing an action against the Secretary of the Interior and the Fish and Wildlife Service challenging the validity of the Secretary's regulation defining "harm."[135] In particular, the Respondents challenged the inclusion of "habitat modification" under the definition of "harm."[136] Respondents challenged the regulation and alleged that the application of "harm" to endangered species on their land had injured them economically.[137] Among their arguments, the Respondents argued that Congress intended the Act's express authorization for the federal government to buy private land to conserve habitat to be "an exclusive check against habitat modification on private property."[138] They also argued that the Senate deleted "habitat modification" from the final bill and that "harm" within the definition of "take" could not be expanded to encompass "habitat modification."[139]

The District Court rejected all of the arguments, and upheld the regulation by deferring to the agency's reasonable interpretation of the statute per *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, and dismissed the complaint.[140] The District of Columbia Court of Appeals found the word "harm" to be narrowly construed only to actions of force against the animal, based on a Ninth Circuit case that narrowly construed the word "harass" in the Marine Mammal Protection Act of 1972.[141] The court's view was "that Congress must not have intended

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[134] *Id.*
[135] *Id.* at 692.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 693.
[139] *Id.*
[140] *Id.* at 694; Chevron U.S.A v. N.R.D.C. Inc., 467 U.S. 837, 843 (1984).
[141] *Babbitt*, 515 U.S. 687 at 694.

the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted" and that the "take" prohibition did not reach habitat modification.[142] This decision was in conflict with another Ninth Circuit decision in *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (1988), that upheld the Secretary's definition of harm that encompassed habitat modification.[143]

The Supreme Court granted certiorari and found that based on the ESA's text, structure, legislative history, and its 1982 amendment, that the Court of Appeals' judgment should be reversed.[144] The Supreme Court, per Justice Stevens, stated that an ordinary understanding of the word "harm" in the context of the ESA naturally encompassed "habitat modification" resulting in death or injury to the endangered species.[145] The Court also cited to *TVA v. Hill* and stressed that Congress had plainly spoken on its intent to prioritize endangered species.[146] It also stated that the Court of Appeals' interpretation of "harm" requiring "direct application of force" was incorrect when viewed in context of the other terms that "harm" was near in the statutory text.[147] It also rejected the argument that the government's ability to purchase private land prevents it from regulating critical habitat on privately owned land, because Section 9 of the act allows the government to issue penalties for take of endangered wildlife, including habitat modification.[148] Additionally, the 1982 amendment to the ESA that allowed the Secretary to issue "incidental take permits" authorizing incidental take of species further counsels an interpretation that take (even on private land) is forbidden unless authorized by the Secretary in the form of a permit.[149]

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[142] *Babbitt*, 515 U.S. 687 at 694-695.
[143] *Id.* at 695.
[144] *Id.*
[145] *Id.* at 697.
[146] *Id*. at 699.
[147] *Id.* at 702.
[148] *Id.*, at 702.
[149] *Id.* at 707-708.

The majority effectively upheld a vigorous application of the ESA to private activities and private property.

In a vigorous dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, found it "unmistakably clear" that the ESA merely forbade the hunting and killing of endangered animals, and that it provided federal funds for the acquisition of private lands to preserve the habitat of endangered species.[150] Scalia rejected the majority's position that the ESA "incidentally preserves habitat on private lands" because it "imposes unfairness to the point of financial ruin."[151] The dissent rejects the broad interpretations of the Act's provisions and the broad interpretation of the word "harm."[152] Scalia's prescient dissent also channeled the future interpretation of the Act in *Weyerhaeuser Co.* when he criticized the majority's interpretation of "unoccupied critical habitat" in conjunction with "habitat modification" to mean that the ESA allows for regulation of unoccupied habitat in private hands if the Secretary finds that it *could* be habitat for an endangered species.[153] The majority strengthened the broad interpretation of the ESA as originally espoused in *TVA v. Hill*, but Scalia's narrow reading of the ESA and his pro-property rights dissent would be vindicated in 2018 in the *Weyerhaeuser Co.* decision that the agency decisions of the Department of the Interior under the ESA are reviewable.[154]

The Supreme Court would eventually address the economic impact component of the ESA and the reviewability of agency decisions under the ESA in *Bennett v. Spear*.[155] This case concerned a decision by the Bureau of Reclamation to maintain certain minimum water levels in

[150] *Id*. at 714.
[151] *Id.*
[152] *Id.* at 716-723.
[153] *Id.* at 725.
[154] *Weyerhaeuser Co.*, 139 S. Ct. 360, 371 (2018).
[155] Bennett v. Spear, 520 U.S. 154 (1997) (holding petitioners had standing to challenge critical habitat designation and that agency decisions under section 4(b) of the ESA were reviewable under abuse of discretion.)

lakes inhabited by two species of endangered fish after consulting with the U.S. Fish and Wildlife Service.[156] The Fish and Wildlife Service advised the Bureau to cease the project due to the threat it posed to the habitat of the endangered fish species.[157] The Fish and Wildlife Service issued a Biological Opinion that advised the Bureau of Reclamation to cease the irrigation project because of the effect it would have on the habitat of the fish, but it did not formally designate the affected lakes as critical habitat.[158] A group of Oregon ranchers receiving water from the irrigation project challenged the decision on the basis of an "implicit designation of critical habitat" that adversely affected their economic interests.[159] ~~W~~riting for the Court, Justice Scalia stated that Section 4(b) of the ESA describes the process for weighing the impact of a decision of designating an area as a critical habitat, and that Section 4(b) imposes a "categorical requirement" that the Secretary takes "economic and other impacts" into consideration before making a designation of critical habitat.[160] Here, such an "implicit" determination of critical habitat was determined to be reviewable.[161] *Bennett* also explained that the Secretary's decision on whether to designate or exclude an area from critical habitat designation is reviewable under the abuse of discretion standard.[162] The abuse of discretion standard is found in the Administrative Procedure Act ("APA").[163] The APA allows agency decisions to be reviewed by a court to determine if the agency actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," fail to follow procedure required by law, or otherwise contradictory to relevant law.[164] This would be relevant in *Weyerhaeuser*, where the petitioners

[156] *Id*. at 159.
[157] *Id*.
[158] *Id.* at 160.
[159] *Id.* at 159.
[160] *Bennett*, 520 U.S. at 172.
[161] *Id.* at 172.
[162] *Id*.
[163] 5 U.S.C. § 706 (2019).
[164] *Id.*

challenged the designation of critical habitat under the APA.[165] The Bennett case was relevant to the *Weyerhaeuser* Court's analysis and was relied on heavily by the *Weyerhaeuser* Court.[166]

Another case dealing with a critical habitat designation by the Fish and Wildlife Service under the ESA is *Arizona Cattle Growers' Association v. Salazar*. Here, in a somewhat similar vein to *Weyerhaeuser Co.*, a group of cattle ranchers challenged a critical habitat designation for the Mexican Spotted Owl. [167]They argued that the Fish and Wildlife Service unlawfully designated areas containing no owls as "occupied" habitat.[168]

The cattle ranchers also argued that the Fish and Wildlife Service's calculations of the economic impact of the designation were reached by use of an impermissible "baseline" approach.[169] After several conflicts over designation, in 2004 the Fish and Wildlife Service designated approximately 8.6 million acres as critical habitat for the Mexican Spotted Owl.[170] The 2004 decision by the Service determined that the owl occupied all of the designated habitat.[171] The ranchers moved to set aside the rule because the Service impermissibly treated areas as occupied under the ESA when no owls were present on the land, and the FWS's approach for determining impacts of the determination did not account for impacts of the designation of critical habitat that were also caused by listing of the species as endangered.[172]

The District Court denied the ranchers' motion for summary judgment and decided in favor of the Service.[173] On appeal, the Ninth Circuit addressed whether the Service properly

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[165] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).
[166] *Id*. at 371.
[167] Ariz. Cattle Growers Ass'n v. Salazar, 606 F.3d 1160, 1161 (2010).
[168] *Id.*
[169] *Id.*
[170] *Id*. at 1162.
[171] *Id*. at 1163.
[172] *Id*. at 1162.
[173] *Id.*

designated the areas as critical habitat, and differentiated between the statutory definitions of "occupied" and "unoccupied" habitat under the ESA.[174] The court acknowledged that the Service has to rely on "uncertainty" and "frequency" in its inquiry into designation of critical habitat.[175]

Addressing "uncertainty," the court found that the ESA does not require that the FWS act "only when it can justify its decision with absolute confidence."[176] Instead it must reach its determination of critical habitat based on "the best scientific data available."[177] As for the "frequency" component, the cattle ranchers argued that the word "occupied" in the ESA is unambiguous, meaning areas the species actually "resides in," similar to the argument that eventually would be accepted by the Supreme Court in *Weyerhaeuser Co.*[178]

Here, Ninth Circuit disagreed with the cattle ranchers, finding that "occupied" is not significantly clear, and that this term does not merely encompass where an owl resides but where it engages in "intermittent activities" as well as its home range.[179] The court leaves factual questions about where the owl lives to the Service's expertise and says that such agency decisions are entitled to deference.[180]

The cattle ranchers argued that "occupied critical habitat" has never been previously defined and that it is a self-serving definition.[181] The court found that "occupied critical habitat" does not require that the species is continuously present and that the cattle ranchers' proposed definition is too narrow.[182] The court said that critical habitat is "defined in relation to areas

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[174] *Id*. at 1163.
[175] *Id*.
[176] *Id.* at 1164.
[177] *Id*.
[178] *Id*.
[179] *Id.*
[180] *Id.* at 1165.
[181] *Id*.
[182] *Id*

necessary for the *conservation* of the species, not merely to ensure its survival."[183] The court also found that the actions of the Service were justified because it considered the best available scientific evidence in determining which areas to designate.[184]

Notably, the court *did* acknowledge that the Service could go too far. Here, the Service had determined that even though the owls did not occupy *all* of the land *all of the time*, the owls were still occupying the area within the meaning of the Service's definition.[185] The court explicitly rejected the idea that an area could be designated as critical habitat "merely because the area is suitable for future occupancy," almost verbatim predicting the holding of *Weyerhaeuser Co.*[186]

Addressing the economic impact analysis, the ranchers challenged the Service's "baseline" approach.[187] Using a baseline ignores the regulatory effect of a species being listed when determining the economic effects of designating critical habitat, which effectively ignores the impact on the land caused by listing a species as endangered.[188] The Arizona Cattle Growers cited a Tenth Circuit case, *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277, where the Tenth Circuit determined that this "baseline" approach was invalid.[189]

The Ninth Circuit rejected the Tenth Circuit's holding, finding that it relied on a faulty definition of "adverse modification" of habitat. It held that the Service's "baseline" approach was

[183] *Id*. at 1166.
[184] *Id.* at 1170.
[185] *Id*. at 1167.
[186] *Id*..
[187] *Id.* at 1172.
[188] *Id*.
[189] N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277 (2001).

still valid.[190] The court reached this conclusion by finding that the baseline approach is more logical than the co-extensive approach, because the species is still going to be listed as endangered regardless of whether the land in question is designated as critical habitat.[191] It affirmed the judgment of the District Court in favor of the Service, finding that the FWS did not treat unoccupied areas as occupied and that it applied a permissible approach in analyzing the economic impact of the critical habitat designation.[192]

While these are only a sampling of cases, the overall theme of ESA litigation has focused on the tension between agencies of government and tensions between private landowners and government regulators. The Court's first significant ESA decision in *TVA v. Hill* was a win for environmentalists and those favoring robust protection of endangered species.

Over time property owners' concerns have loomed larger as amendments to the ESA have been passed. Scalia's dissent in *Babbitt v. Sweet Home* forecasted the ruinous effect that the ESA could have on private landowners – something that the petitioner of *Weyerhaeuser Co.* complained of when the Service decided to designate the petitioner's land at a cost of almost $34 million.[193] Scalia's early view favoring private property concerns has largely been vindicated now by the Supreme Court's *Weyerhaeuser Co.* decision.

The appellants in *Arizona Cattle Growers* attempted to make arguments similar to those the petitioners would make in *Weyerhaeuser Co.* Ultimately they lost because the Service found that the owl actually occupied the designated area using a broad definition of the term

[190] *Ariz. Cattle Growers* at 1173.
[191] *Id.*
[192] *Id*. at 1174.
[193] *Weyerhaeuser Co.*, 139 S. Ct. at 367.

"occupied," unlike the land in *Weyerhaeuser Co*. which the Service acknowledged that the species did not occupy.[194]

Analysis

The Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.* is a victory for private landowners and individual rights at the cost of agency regulatory power to designate lands that may be important for continued conservation of species.

While the decision may at first to appear to strictly construe and limit the power of federal agencies, the decision keeps the Department of the Interior within its already-defined statutory and regulatory limits in enforcement of the Endangered Species Act. When a government agency can declare that a landowner's property is "unoccupied critical habitat," the government can essentially strip that landowner of any beneficial economic use of the land without even verifying that an endangered species lives on the land or if the land is the proper type of habitat for the species. The landowners in *Weyerhaeuser Co.* faced exactly this – losing their property rights inherent in land ownership because of a speculative possibility that the land *could* be transformed into "critical habitat" for the dusky gopher frog.[195] With no actual presence of the frogs on the land, the Service designated the petitioners' land as unoccupied critical habitat, even though it acknowledged that the land lacked *all* of the features necessary to constitute the dusky gopher frog's critical habitat without modification.[196] If this agency decision had gone unchecked, it would allow federal agencies such as the Department of the Interior to designate virtually any land as "unoccupied critical habitat" for endangered species, even if the

[194] *Id.* at 369.
[195] *Weyerhaeuser Co.* at 366.
[196] *Id.* at 369.

land in question requires modification to have the features necessary to regularly constitute "critical habitat" as defined by the ESA.

On the other hand, the decision will probably be viewed negatively by many environmentalists and endangered species activist groups. While the decision has vindicated private property owners' land interests over the government's ability to regulate land use for conservation purposes, it limited the government's ability to regulate land that *could* be beneficial for an endangered species. Many species have been put in danger of extinction due to the eradication of their habitat. The hope for many endangered species' survival is re-establishment of their habitat. Such re-establishment may require the government to find that private property (with some modification) would be a species' best hope at continued survival. This decision clearly limits the ability of the federal government to make efforts on behalf of endangered species lacking adequate existing habitats. This could have the potential of setting back conservation efforts further. Despite this, narrowing of the act will allow for proper designation of land, and will ensure that the critical habitat that has the best possible chance of supporting survival is used.

Despite this, otherwise correctly decided "occupied critical habitat" designations will be left undisturbed by this decision.[197] In seeking conservation for endangered species, the cooperation of the public and private sphere will likely be necessary, and balances have to be struck between the interests of private owners and the federal government's interest in conservation of species.

Following this decision, the Trump administration changed rules relating to Endangered Species Act enforcement to allow for more flexibility, including elimination for "threatened

[197] *Id.*

species" under the act.[198] Many are critical of this move and perceive it as benefiting the economy and certain industries at the expense of the environment.[199] Following this, 18 state attorneys general filed a lawsuit against the federal government to enjoin the Trump administration from relaxing ESA enforcement rules.[200]

Finally, the decision is a victory for individual rights against the power of the administrative state. The *Weyerhaeuser Co.* Court ultimately determined that the actions of the Fish and Wildlife Service were judicially reviewable, essentially allowing individuals who have suffered wrongs from this particular type of agency action to seek redress in the courts.[201] Allowing agency decisions made by unelected bureaucrats to go unchecked could result in grave abuses of power, such as when agency has the power to deprive a private landowner of beneficial use of his or her land without the ability to challenge the decision in court.

Overall, while the decision may at first appear to cut against important conservation interests, it has reined in the possibility for abuse by the Fish and Wildlife Service of its power to designate critical habitat without first verifying whether the critical habitat is actually habitat for the species. The rights of the individual against the runaway administrative state have been vindicated. Other mechanisms exist for the Department of the Interior to continue conserving and protecting endangered species, and private-public cooperation will always be necessary in furtherance of the goal of protecting natural resources.

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[198] Ben Lefebvre, *Trump administration eases endangered species rules.* Politico. (Aug. 12, 2019), https://www.politico.com/story/2019/08/12/trump-administration-eases-endangered-species-rules-1655594
[199] *Id.*
[200] Martha Golar, *Another Voice: New York's federal lawmakers must protect the Endangered Species Act.* The Buffalo News. (Nov. 12, 2019), https://buffalonews.com/2019/11/12/another-voice-new-yorks-federal-lawmakers-must-protect-the-endangered-species-act/
[201] *Weyerhaeuser Co.* at 372.

A CLEAN FUTURE FOR ENERGY IN PENNSYLVANIA: A Case Note on EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010 (Pa. 2019).

By Nina Victoria

I. NEW RULE MAKES IT EASIER TO REJECT CONDITIONAL LAND USE APPLICATIONS IN PENNSYLVANIA

Facts of the Case

In September 2015, EQT and their affiliate, ET Blue Grass Clearing LLC, filed a conditional use[202] application to construct, operate, and maintain a 126-acre tract of land in the Borough of Jefferson Hills ("the Borough") as a natural gas production complex.[203] The proposed site was located in a Business District that overlays with an Oil and Gas Developing District.[204] The Bickerton Well Site ("Bickerton Site"), as the property came to be known, would include a 29.7-acre area with up to sixteen "unconventional" gas wells.[205] The Bickerton Site would be the first unconventional gas well site in the Borough.[206] These wells are unconventional because EQT planned to drill 6,000 to 7,000 feet vertically, then once reaching that depth, drill 10,000 feet horizontally[207] to employ the hydraulic fracturing production process ("fracking") to withdraw natural gas from a reservoir.[208] The proposed well site would also

[202] A use that is permitted in a certain zoning district when it is shown that the use "complies with the standards and criteria for the location or operation of the use as contained in the zoning ordinance." PA. TRANSACTION GUIDE – LEGAL FORMS § 200.43 (Matthew Bender & Co., Inc. release no. 89 current through September 2019).
[203] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1011-1012 (Pa. 2019).
[204] *Id*. at 1012.
[205] *Id*. at 1011-1012.
[206] *Id*. at 1012
[207] Traditional wells do not employ drilling at such great depths, horizontal drilling, or hydraulic fracturing to withdraw the natural gas from the earth. *Conventional Wells*, PA. GRADE CRUDE OIL COAL., http://www.pagcoc.org/conventional-wells/ (last visited October 23, 2019).

[208] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1012 (Pa. 2019).

contain an impoundment pond that could hold up to 3.4 million gallons of freshwater, along with holding tanks for wastewater returned from the well during fracking.[209] The water remains in these holding tanks, which are exposed to open air, for up to a week, during which time much of the water evaporates.[210] The water that remains in the holding tank is reused in the fracking process.[211]

Both the Business District and the Oil and Gas District allow for fracking as a conditional use; as noted above, EQT applied for the conditional use in September of 2015.[212] The Borough Planning Commission provisionally recommended that their conditional use application be approved on October 26, 2015, subject to EQT amending their application to include details regarding EQT's past citations for violations issued by the Pennsylvania Department of Environmental Protection; the height of structures to be used in the construction of and use of the wells; descriptions and maps of the routes that materials, such as equipment, water, and chemicals to be used in the fracking process, would take to the well site; the routes that service vehicles would take through the Borough to service the well site; and plans for signage and a fence.[213] The Borough Council ("the Council") conducted a public hearing on EQT's application on November 10, 2015, as required by the Municipalities Planning Code ("MPC"). [214]

Eight objectors testified at the meeting against granting the conditional use application. Four of those objectors lived within 1000 feet of the Bickerton Well Site, and three were from Union Township, Washington County, which borders the Borough.[215] The objectors from Union

[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id*. at 1011-1012.
[213] *Id*. at 1012.
[214] *Id.*
[215] *Id* at 1012-1013.

Township lived near another unconventional well site, the Trax Farm Well Site.[216] One objector at the hearing previously lived near the Trax Farm Well Site, but recently moved into the Borough.[217] The Trax Farm Well Site was built and has been in operation since 2007, and the objectors that lived near it felt that EQT's activities negatively impacted their health, quality of life, and their community's environment.[218]

The residents of Union Township ("residents"), including the gentleman who recently moved into the Borough, testified about the "gag agreements" offered to people who lived next to the site, in addition to loud noises emanating from the site, intense vibrations in their homes, concerns about water quality, and air pollution – all of which had detrimental effects on the residents' health and quality of life.[219]

The residents placed one of the actual gag agreements into the evidentiary record.[220] The gag agreements provided the signees with $50,000 cash in exchange for an easement and right-of-way to EQT over their property for "noise, dust, light, smoke, odors, fumes, soot or other pollution, and vibrations . . . and other adverse impacts or other conditions or nuisance which may emanate or be caused by EQT's operations."[221] The residents testified that the agreements were offered after individuals complained that EQT's activities at the Trax Farm Site were a nuisance that interfered with the use and enjoyment of their property.[222]

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[216] *Id*. at 1013.
[217] *Id*.
[218] *Id*.
[219] *Id.* at 1013-1017.
[220] *Id*. at 1013.
[221] *Id*.
[222] *Id.*

The residents also testified to very high levels of noise that made living conditions in their homes intolerable.[223] They noted that a sound monitor that was placed in the master bedroom of one of the residents' homes measured the sound from the site to be 82 decibels, which is approximately as loud as a diesel train 100 feet away.[224] One resident told the Council that there was a constant low-frequency humming sound that emanated from the well-site and interrupted his sleep.[225] The residents claimed that when sound studies were conducted to assess the noise generated by the wells, drilling activity – the source of the noise – and the disruptions diminished suspiciously.[226]

The residents testified that, while the well was in operation, there was a continuous stream of at least sixteen to seventeen diesel trucks traveling throughout the Township, generating noticeable air pollution.[227] They further noted that the tanks situated on the Trax Farm Well Site, of which there were at least twelve, also produced air pollution, and that similar tanks would likely be erected at the Bickerton Well Site.[228] The residents stated that they would often smell strong diesel fuel and sulfur.[229] These frequent, intense diesel fumes were the reason the resident from Jefferson Hills resident moved away from the Trax Farm Well Site.[230]

One resident claimed that, while walking his dog, he saw a thick, white fog that smelled very strongly of sulfur encroaching on his backyard after enveloping the well site.[231] That resident testified that a non-profit public health organization in southwestern Pennsylvania

[223] *Id*. at 1014.
[224] *Id*.
[225] *Id*. at 1016.
[226] *Id*.
[227] *Id.* at 1013.
[228] *Id*. at 1013-1014.
[229] *Id*. at 1014.
[230] *Id*. at 1016-1017.
[231] *Id*. at 1014.

became aware of the problem and had a meeting with the residents of the community.[232] They recommended not allowing children to play outside without a respirator, not mowing their lawns without a respirator, and abstaining from planting gardens while fracking was occurring because of dangerous chemicals present on the grass.[233] The resident stated that the non-profit organization provided the residents with air-quality monitors and told them that if the monitor read over 200 or above for an hour or more, they were to evacuate their homes.[234] Once, the resident testified, the monitor read over 260 and they were forced to evacuate.[235] The resident recounted other instances when he was forced to evacuate his home, including when he and his family were forced to stay in a hotel for two months. The resident noted that evacuation had been forced "countless times."[236]

Two residents testified to serious illnesses caused by air pollution from the well site. One testified to developing a serious respiratory illness that required him to spend five days in the hospital on a ventilator and be given oxygen.[237] Another claimed he suffered severe respiratory problems, which felt like great pressure in his chest, after he went to get the mail and saw a thick-white cloud that smelled intensely of chlorine.[238] He struggled to get back into his home, and when he did, the resident collapsed against the wall and struggled for air.[239]

The resident informed the Council that he was reasonably worried that there had been an accident at the well site and that there could be seriously injured or potentially dead workers on

[232] *Id*.
[233] *Id*. at 1014-1015.
[234] *Id*. at 1015.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] *Id*.

the site, and, because of his fear, he called a supervisor of the well site.[240] The supervisor was dismissive of the resident's concern, but told him he would call the site to see if there were any reports. The resident stated he did not hear back from him or any EQT representative.[241] Once he hung up the phone, the resident testified that he noticed that his hands, face, and body were covered in red spots that resembled measles.[242]

The residents testified to other problems that were created by the well site. At the hearing, they claimed to experience intense periods of vibrations inside of their homes since the well became operational.[243] The residents stated that these vibrations could be felt through their entire bodies, and often would shake water glasses and even the water in the toilets.[244] They took pictures and videos as evidence.[245] One resident testified that EQT erected lights, which were only moved at his request, that made it bright enough outside at night to read the newspaper.[246] The residents also encouraged council members to look into the accidents occurring in Washington County relating to EQT's drilling activities, including mud blowback from drilling that flowed into the Monongahela River and Mingo Creek, encrusting the bottom of both water sources.[247]

One resident testified that he sought relief from the nuisance caused by the well site and contacted the PA Department of Environmental Protection and the Federal Environmental Protection Agency, but both were understaffed and could not help.[248] Instead, the resident

[240] *Id*. at 1015-1016.
[241] *Id*. at 1016.
[242] *Id*.
[243] *Id*. at 1014.
[244] *Id*.
[245] *Id*.
[246] *Id*. at 1016.
[247] *Id*. at 1013.
[248] *Id*. at 1015.

recounted he then tried to sell his house, though he knew he would take a loss because of the Trax Farm Well Site.[249] However, he found that a realtor would not represent him if he entered into one of the gag agreements that EQT offered the residents.[250]

EQT offered no rebuttal to this testimony, but presented evidence from a safety coordinator, a sound engineer, and the project coordinator.[251] EQT representatives testified that the plans met the Zoning Ordinance's requirements, described EQT's Safety and Environmental Plan, and produced/proposed a sound study to develop a Noise Management Plan for the Bickerton Well Site.[252]

Procedural History

The Council applied the following law to decide if EQT met its burden of proof for their application to be approved:

> An applicant is entitled to a conditional use as a matter of right, unless the governing body determines that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use. The applicant bears the initial burden of showing that the proposed conditional use satisfies the objective standards set forth in the zoning ordinance, and a proposed use that does so is presumptively deemed to be consistent with the health, safety and welfare of the community. Once the applicant satisfies these specific standards, the burden shifts to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land use that are set forth in the zoning ordinance, *i.e.*, that the proposed use would be injurious to the public health, safety and welfare.[253]

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[249] *Id.*
[250] *Id.*
[251] Id. at 1017; EQT Prod. Co. v. Borough of Jefferson Hills, No. SA 16-000025, 2016 Pa. Dist. & Cnty. Dec. LEXIS 4435, at *2 (Ct. of Common Pleas of Allegheny Cnty. June 28, 2016).
[252] EQT Prod. Co. v. Borough of Jefferson Hills, No. SA 16-000025, 2016 Pa. Dist. & Cnty. Dec. LEXIS 4435, at *2 (Ct. of Common Pleas of Allegheny Cnty. June 28, 2016).
[253] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1017 (Pa. 2019) (citing In re Drumore Crossing, L.P., 984 A.2d 589, 595 (Pa. Commw. Ct. 2009)).

The Council found EQT's application met all of the general standards for the grant of a conditional use in the Borough's Zoning Ordinance, and also met the specific requirements of the Borough's Zoning Code for a natural gas facility to operate in a Business Park district and an Oil and Gas Development Overlay zoning district.[254]

However, the Council found the testimony from Union Township residents to be "credible and persuasive," so they considered it with "significant weight."[255] The Council found the evidence showed the proposed conditional use application would not protect the health, safety, and welfare of the Borough's residents as required by the Zoning Ordinance; therefore, EQT did not meet its burden of proof.[256] Under the Council's approach, EQT would only have met their burden if they proved that their conditional use application would not affect the health, safety, and welfare of the community. Since EQT did not meet its burden, the burden did not shift to the objectors to prove that the impact of the conditional use would violate general requirements for land use outlined in the Zoning Ordinance.[257] On December 14, 2015, the Council voted unanimously to deny EQT's conditional use application.[258]

EQT then appealed the Council's decision to the Court of Common Pleas of Allegheny County, where Senior Judge Joseph M. James presided.[259] The Court of Common Pleas delivered their opinion on June 28, 2016.[260] Judge James did not take any additional evidence, so the standard of review was limited to whether the Council committed an error of law, abused its

[254] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1017 (Pa. 2019).
[255] *Id*.
[256] *Id*. at 1017-1018.
[257] *Id*.
[258] *Id*. at 1017.
[259] *Id*. at 1018.
[260] EQT Prod. Co. v. Borough of Jefferson Hills, No. SA 16-000025, 2016 Pa. Dist. & Cnty. Dec. LEXIS 4435 (Ct. of Common Pleas of Allegheny Cnty. June 28, 2016).

discretion, or made findings not supported by substantial evidence.[261] The Court of Common Pleas stated that the relevant legal standard was:

> the developer has the initial burden of proving by a preponderance of the evidence that its proposed use is the nature and type of conditional use described in the zoning code, and, also, that the proposed use complies with the specific requirements of the zoning ordinance. . . . [O]nce the developer makes these showings, the burden then shifts to those objecting to the use to prove the proposed land use will have an adverse effect on the general public, *i.e.*, demonstrate with a "high degree of probability" that the proposed use will pose a substantial threat to the health, safety, and welfare of the public.[262]

The Court of Common Pleas found that EQT met all of the requirements that the Borough's Zoning Ordinance set forth for the grant of the conditional use application for oil and gas drilling activities, and that the burden had shifted to the objectors.[263] The Court of Common Pleas held that the objectors failed to show that the proposed use would have adverse effects on the general public and their testimony was "'speculative regarding general oil and gas development' and rais[ed] only 'theoretical concerns about air pollution and odors.[264]'" The testimony would not have been speculative if the objectors presented evidence that related specifically to the Bickerton Well Site. Therefore, the Court of Common Pleas reversed the Council's decision.

The Borough then appealed to the Commonwealth Court.[265]

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[261] EQT Prod. Co. v. Borough of Jefferson Hills, No. SA 16-000025, 2016 Pa. Dist. & Cnty. Dec. LEXIS 4435, at *3 (Ct. of Common Pleas of Allegheny Cnty. June 28, 2016).
[262] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1018 (Pa. 2019) (citing Bray v. Zoning Bd. of Adjustment, 410 A.2d 909, 914 (Pa. Commw. Ct. 1980)).
[263] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1018 (Pa. 2019).
[264] *Id*.
[265] *Id*. ("The Commonwealth Court has exclusive jurisdiction over appeals from final orders of the Court of Common Pleas in . . . [a]ll actions or proceedings arising under any municipality, institution district, public school, planning or zoning code . . . ." 42 PA. CONS. STAT. § 762(a)(4) (West, Westlaw current through 2019 Regular Session Act 75)).

The Commonwealth Court delivered their opinion on May 18, 2017, and began by stating:

> a conditional use is not an exception to a municipality's zoning ordinance, but, rather, is a use to which an applicant is entitled as a matter of right, unless the municipal legislative body determines "that the use does not satisfy the specific, objective requirement in the zoning ordinance for that conditional use." . . . [T]he applicant seeking conditional use approval has the burden of persuasion to establish that its proposed use satisfies the objective requirements enumerated by the relevant zoning ordinance governing conditional uses. Once an applicant reaches its *prima facie* burden, then it "is entitled to approval, unless objectors in the proceeding offer credible and sufficient evidence that the proposed use would have a detrimental impact on public health, safety, and welfare.[266]

The Commonwealth Court stated that the objectors' must prove with a high degree of probability that "the conditional use will create a substantial risk of harm to the community – *i.e.*, that it 'will impose detrimental impacts exceeding those ordinarily to be expected from the use at issue.'"[267]

The Commonwealth Court found that EQT had met its burden of proving that their conditional use met the requirements of the Zoning Ordinance and that the objectors had to prove that the conditional use would be detrimental to the health, safety, or general welfare of the residents of the community.[268] After reviewing the testimony presented at the Council meeting, the Commonwealth Court concluded that the objectors did not sufficiently prove a detrimental impact.[269] The Commonwealth Court agreed with the Court of Common Pleas that the testimony was "speculative" and affirmed the decision.[270] According to the Commonwealth Court, the

[266] *Id*. at 1018-1019. (citing In re Drumore Crossing, L.P. at 595)).
[267] *Id*. at 1019.
[268] *Id*.
[269] *Id*.
[270] *Id*. at 1018.

objectors' evidence would have needed to show that the Bickerton Well Site would have created greater harm to the residents' health, safety, and general welfare than other conventional well sites for the Council to have objected their application.

Judge Patricia A. McCullough dissented from the majority.[271] Judge McCullough stated, as a general proposition, that it is very difficult for objectors, who have no first-hand experience with a particular use, to demonstrate that the use will have a negative impact on the health, safety, and welfare without the use of speculation.[272] However, she disagreed that the testimony of the objectors was speculative; instead, she stated the testimony was "specific and concrete."[273] Judge McCullough found the evidence established the Trax Farm site, which was similar to the site proposed, had detrimental effects on the residents of the surrounding community.[274]

Judge McCullough relied on *Visionquest National Limited v. Board of Supervisors of Honey Brook Township*, 569 A.2d 915 (Pa. 1990) for support.[275] In *Visionquest*, the Commonwealth Court held that while objectors' bald assertions, personal opinions, and speculation would not be enough to prove a detrimental impact on a community, testimony by individuals with specific past experiences with the proposed use can be sufficient to prove detrimental impact.[276] Even though *Visionquest* did not address the question of whether its rule can be extended to cases where the objectors' testimony relates to a different, but similar, facility in a different municipality, Judge McCullough proposed that it should.[277] She reasoned that allowing objectors to bring evidence related only to the proposed site is "unduly restrictive and

[271] *Id*. at 1019.
[272] *Id*.
[273] *Id*. at 1019-1020.
[274] *Id*. at 1020.
[275] *Id*.
[276] *Id*.
[277] *Id*.

impracticable," and results in the "imposition of a nearly insurmountable burden on them of proving detrimental harm."[278] Judge McCullough concluded by stating that it was within the Council's abilities as fact-finder to infer that the consequences that occurred in the neighboring municipality would likely occur in their own.[279]

The Borough filed a petition for the allowance of appeal to the Supreme Court of Pennsylvania, and the Supreme Court granted certiorari on January 22, 2018 to decide:

> whether the Commonwealth Court erred as a matter of law by imposing a standard upon the admissibility of objectors' evidence that effectively eliminates the ability to raise any objection to a land use application based on firsthand experience with a similar use when the proposed use does not already appear within municipal borders?[280]

Arguments of the Parties

The Borough argued that the standard the Commonwealth Court placed upon municipalities in considering objectors' evidence when deciding whether to grant a conditional use application was "draconian."[281] They argued that the evidence presented by the residents of Union Township was highly relevant and not "speculative" in determining if EQT's conditional use would detrimentally effect health, safety, and welfare; especially because there was no unconventional drilling activity within the Borough.[282] They argued that when the conditional use does not already exist within the municipality, requiring objectors' testimony to connect to the proposed conditional use while prohibiting first-hand experiences with a similar use outside of the municipality is "both unjustified and unworkable."[283]

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[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*. at 1020.
[282] *Id*. at 1020-1021.
[283] *Id*. at 1021.

The Borough also contended that the restrictions the Commonwealth Court placed on the testimony they are allowed to consider intrudes on the local governmental body's duty to operate as the finder of fact in considering a conditional use application because "it interferes with its duty to evaluate and assess the credibility of all relevant evidence in order to guard against unwarranted approval of a land use that will negatively affect the health, safety, and welfare of its citizens."[284]

The Borough further argued that the Department of Environmental Protection is "required to consider evidence of driller's past conduct and to deny the application if the driller remains in violation of the law."[285] This demonstrated that evidence of past conduct of a driller is highly probative in considering their conditional use application; and, excluding evidence of past conduct "grants applicants a 'free pass' simply because they are proposing a land use for the first time in a community."[286] They also contended that the Commonwealth Court's rejection of first-hand evidence is contrary to caselaw that considers that evidence favorably.[287]

Finally, the Borough argued that the Supreme Court should adopt Judge McCullough's dissent and rule that the evidence was not speculative and that it was entitled to considerable weight.[288]

EQT agreed with the decision of the Commonwealth Court that "the objectors were required to demonstrate with a high degree of probability that the use in question will generate adverse impacts exceeding that normally generated by this type of use and that these impacts

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[284] *Id*.
[285] *Id*.
[286] *Id*. at 1021-1022.
[287] *Id*. at 1022 (quoting Pennsy Supply . Zoning Hearing Bd. of Dorrance Twp., 987 A.2d 1243, 1250 (Pa. Commw. Ct. 2009).
[288] *Id*.

pose a substantial threat to the health, safety, and welfare of the community."[289] They argued that the objectors were required to present evidence regarding only the Bickerton Well Site and that the evidence must have shown that the Bickerton Well Site would somehow do more harm to health, safety, and welfare than other well sites.[290]

To address the problem of not being able to present evidence regarding a site that does not yet exist, EQT contended that the objectors could have presented expert testimony that would highlight "unique characteristics of the site that would have made it unsuitable for unconventional drilling, or . . . that showed that such drilling would likely cause detrimental health and safety effects on nearby resident . . . ."[291] They argued that personal experiences with a use are only relevant when they occurred at the site in question.[292]

Finally, EQT stated that Borough already considered the environmental impact of unconventional well pads and found that they met the standards required by the MPC when it approved it as a conditional use, and denying EQT's application was "an improper effort to rewrite [the municipality's] ordinance without following the mandatory procedures for doing so set forth in the MPC."[293]

Holding and Rational of the Supreme Court of Pennsylvania

The Pennsylvania Supreme Court filed its decision on May 31, 2019.[294] The Supreme Court held that the testimony of the objectors at the Council meeting was both relevant and probative as to whether the Bickerton Well Site would harm the health, safety, and general

[289] *Id*. at 1023.
[290] *Id*. at 1023-1024.
[291] *Id*. at 1024.
[292] *Id*.
[293] *Id*.
[294] *Id*. at 1010.

welfare of the Jefferson Borough[295] and that the Council properly received and considered the evidence in making its decision to reject the conditional use proposal.[296]

The Supreme Court began their discussion by stating that the standard for review for municipality decisions regarding conditional use applications is "limited to determining whether the municipality abused its discretion, or committed an error of law in denying the application."[297] The Supreme Court is not bound by the legal conclusions of the courts below.[298] An abuse of discretion occurs when the municipality's decision is not supported by substantial evidence, which the Court defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[299] The Supreme Court further stated that local agencies may consider "all relevant evidence of reasonably probative value[,]" and they "are not bound by technical rules of evidence when conducting hearings."[300]

To determine if the evidence the protesters presented at the hearing was relevant, the Supreme Court turned to the most basic rule of evidence: evidence is relevant when it "logically tends to establish a material fact in the case, tends to make a fact more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact."[301]

If an applicant is applying for a new license to conduct future business activities that are the same as business activities they have conducted in the past, the Supreme Court stated that it has established that an appellant's past conduct is both probative and relevant in determining

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[295] *Id*. at 1028.
[296] *Id*.
[297] *Id*. at 1024.
[298] *Id*. at 1025.
[299] *Id*. at 1024-1025 (quoting Gorsline v. Board of Supervisors of Fairfield Township, 186 A.3d 375, 385 (Pa. 2018)).
[300] *Id*. at 1025.
[301] *Id*. (quoting Commonwealth v. Johnson, 160 A.3d 127, 146 (Pa 2017); Commonwealth v. DeJesus, 880 A.2d 608, 615 (Pa. 2005)).

whether they meet conditions for licensure.[302] Therefore, if EQT had already had an unconventional well site within the Borough, their conduct at that well site would be relevant and probative in deciding if EQT should be granted a conditional use for a second unconventional well site.

The Supreme Court agreed with Judge McCullough of the Commonwealth Court that *Visionquest* should be controlling.[303] In *Visionquest*, the applicant was seeking the approval of a conditional use application to run a rehabilitative facility for youth with behavioral issues.[304] The rehabilitative center was running without licensure before applying for a conditional use, and their pre-application conduct left a bad impression on the municipality's residents.[305] At the hearing, the residents presented evidence about the activities at the rehabilitative center, including loud, disruptive noises in the morning and youths escaping from the center.[306] They also presented evidence of property damage that resulted from the escapees in another county, which were at a rehabilitative center with the same owners.[307] The municipality denied their conditional use application because it did not meet the objective criteria of the zoning ordinance, but, even if it did, the municipality still would have denied the application because their proposed use would have "a detrimental effect on the welfare of the community."[308] *Visionquest* was appealed to the Supreme Court, where it was held that

> firsthand experiences with a particular type of land use by people living near it are relevant and probative evidence for a local government to consider in evaluating

[302] *Id*. at 1025.
[303] *Id*. at 1027.
[304] *Id*. at 1026.
[305] *Id*.
[306] *Id*.
[307] *Id*.
[308] *Id*.

> whether a similar land use activity conducted by the same entity, in a similar manner, and in a similar type of location will pose a detriment to its community.[309]

The similarity that is required between the two sites of the conditional use is a similarity in essential circumstances.[310]

Here, the Supreme Court found that the unrebutted evidence that the objectors from Union Township presented about EQT's conduct at the Trax Farm Well Site established that EQT's activities at the Bickerton Well Site would be similar.[311] If the Bickerton Well Site's application were to be approved, both sites would have multiple unconventional well pads operated for the same reasons and would be in equal proximity to residents.[312] Therefore, the testimony presented by the objectors regarding the loud noises, smells, and pollution that occurred in and around their homes was relevant and probative in determining how the health and welfare of the residents living near the Bickerton Well Site would be affected.[313] The Supreme Court ultimately held that the Borough correctly considered this evidence in determining whether to grant the conditional use application to EQT, and it reversed the decision of the Commonwealth Court.[314]

Justice Mundy Dissent

Justice Mundy filed a dissent in this case.[315] She agreed with the Commonwealth Court that conditional uses are not exceptions to the zoning ordinance; instead, "they are uses permitted as a right as long as the zoning ordinances are met."[316] She also agreed that once the

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[309] *Id.* at 1027.
[310] *Id.* at 1028 (quoting David P. Leonard, THE NEW WIGMORE. A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 14.3 (2018)).
[311] *Id*. at 1027.
[312] *Id*.
[313] *Id*. at 1028.
[314] *Id*.
[315] *Id*. at 1029.
[316] *Id*.

applicant meets the burden of proving that the intended conditional use meets the standards, the objectors must show evidence to establish that the conditional use will cause a "substantial threat to the community" with a "high degree of probability".[317] Justice Mundy found that EQT met their burden but the objectors did not because their testimony was speculative and *Visionquest* should not be extended to the present case.[318]

The decision was not appealed by EQT and the decision of the Pennsylvania Supreme Court is final.[319]

II. HISTORY AND ENVIRONMENTAL IMPACTS OF FRACKING

The first Marcellus Shale well was drilled in Pennsylvania in October 2004, and by 2018 there were 7,788 unconventional gas wells in the state.[320] As of March 2020, there are 12,450.[321] EQT and other similar companies use hydraulic fracturing to extract natural gas from underground deposits; a process where developers drill deep into the earth, then direct a high-pressure mixture of water, minerals, and chemicals into the rock where the natural gas is held.[322] This causes the rock to fracture, hence the shorthand term for hydraulic fracturing is "fracking." The fracturing of the rock allows the natural gas to flow out and be collected.[323] With the rapid

[317] *Id*.
[318] *Id*. at 1030-1031.
[319] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010 (Pa. 2019).

[320] Candy Woodall, *The rise and fall -- and rise? -- of Pa.'s oil and gas industry*, PENNLIVE (Updated January 5, 2019), https://www.pennlive.com/news/2016/03/the_rise_and_fall_and_rise_of.html; JoAnn Wypijewski, *What Happened When Fracking Came to Town*, THE NEW YORK TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/books/review/eliza-griswold-amity-and-prosperity.html.

[321] *Pennsylvania Shale Viewer*, FRACTRAKER ALLIANCE (Last visited April 10, 2020), https://www.fractracker.org/map/us/pennsylvania/pa-shale-viewer/.
[322] *What is Fracking and Why is it Controversial?*, BBC (October 15, 2018), https://www.bbc.com/news/uk-

[323] *Id*.

growth of wells in the state came population growth and economic boom for Pennsylvania, but it also brought environmental and health problems for residents.[324]

Fracking poses significant danger to air and water quality. Each well requires four million gallons of water to be contaminated with chemicals so that the natural gas can be extracted.[325] While, according to FracFocus, fracking fluid is 98-99.2 percent water, the remaining percentage of fracking fluid is chemicals like hydrochloric acid, quandary ammonium chloride, citric acid, petroleum distillate, methanol, and more.[326] Chemicals have different uses in fracking: acid is used to crack rock and dissolve minerals; biocides eliminate bacteria in the water; and, other chemicals are used for friction reduction, clay and shale stabilization, and protection from corrosion during the process.[327]

After extraction, the wastewater is even more contaminated. During the fracking process, bacteria forms in the water and toxic metals – like barium – are released from water-rock chemical reactions.[328] Some of this water stays underground as groundwater and mixes with methane, which is the primary component of natural gas and is 105 times as powerful as carbon dioxide as a greenhouse pollutant.[329] The contaminated groundwater then makes its way to our streams, rivers, aquifers, and private wells.[330] Once the water leaves the ground and warms above

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[324] Woodall, *supra*; Wypijewski, *supra*.

[325] Wypijewski, *supra*.

[326] *Chemical Use in Hydraulic Fracking*, FRACFOCUS: CHEMICAL DISCLOSURE REGISTRY, https://fracfocus.org/water-protection/drilling-usage (last visited Dec. 8, 2019).

[327] *Id.*

[328] *Id*.; *Fracking Plays Active Role in Generating Toxic metal Wastewater, Study Finds*, SCIENCEDAILY (Dec. 15, 2015), https://www.sciencedaily.com/releases/2015/12/151215134653.htm.

[329] Wypijewski, *supra*; Jesse Coleman, *Colorado Fracking Companies Admit to Major Air Pollution Problem, Emissions Rules Proposed*, GREENPEACE (Nov. 19, 2013), https://www.greenpeace.org/usa/colorado-fracking-companies-admit-to-major-air-pollution-problem-emissions-rules-proposed/.

[330] Wypijewski, *supra*.

58 degrees, methane is released into the air, which makes air pollution another significant risk posed by the industry.[331] Scientists theorize that methane emissions from fracking wells make natural gas worse for the environment than coal.[332] The trucks and equipment needed for fracking also give off air pollution, as do the wells themselves.[333]

While many brush off concerns of radioactivity, some samples of the brine[334] extracted during the fracking process have been shown to contain more than 8,500 picocuries per liter of radium.[335] The National Regulatory Commission requires discharges of radium to remain below 60 picocuries per liter.[336] This brine touches the tanks, filters, pipes, hoses, and trucks involved in the natural gas extraction process essentially rendering them all radioactive, meanwhile if that much radium was spilled in a lab, the entire lab would be shut down.[337] Since brine is a major part of wastewater, radioactive elements are also released into water systems and the air via groundwater.

The National Resource Defense Council scientists found that adverse health impacts from fracking pollution include respiratory problems, birth defects, blood disorders, cancer, and

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[331] Bryan Swistock, *Methane Gas and Its Removal from Water Wells*, PENN STATE EXTENSION: COLLEGE OF AGRICULTURAL SCIENCES (Sept. 23, 2013), https://extension.psu.edu/methane-gas-and-its-removal-from-water-wells;

The Costs of Fracking, ENVIRONMENT AMERICA, https://environmentamerica.org/sites/environment/files/exp/reports/costs_of_fracking.html (last visited November 11, 2019).

[332] Coleman, *supra*.

[333] *The Costs of Fracking*, *supra.*

[334] Brines make up the majority of fracking wastewater. It is extracted along with natural gas. Brines contain salts, heavy metals, and naturally occurring radioactive elements. Duke University, *Fracking Wastewater is Mostly Brines, Not Manmade Fracking Fluids*, SCIENCEDAILY (October 17, 2016) https://www.sciencedaily.com/releases/2016/10/161017150835.htm.

[335] Justin Nobel, *America's Radioactive Secret*, RollingStone (January 21, 2020) https://www.rollingstone.com/politics/politics-features/oil-gas-fracking-radioactive-investigation-937389/.

[336] *Id*.

[337] *Id*.

nervous system impacts.[338] Not only are the communities with wells in them effected, but entire regions with high levels of oil and gas drilling are at risk of health problems.[339] Nitrogen oxides and volatile organic substances that are produced during fracking create a low-level ozone, which can cause respiratory and cardiovascular effects ranging from coughs and shortness of breath to heart attacks, strokes, and decreased lung function.[340] Those living close to well sites can be exposed to carcinogens and other toxins which can lead to "eye, nose and throat irritation, brain and nervous system problems including headaches, lightheadedness and disorientation, blood and bone marrow damage leading to anemia and immunological problems, reproductive system effects, birth defects and harm to the developing fetus, and cancer."[341]

Fracking does not only have negative repercussions for the residents but also on infrastructure and the environment. Air pollution derived from fracking is contributing to the hole in the ozone.[342] There has also been great deforestation in Pennsylvania and other states to build unconventional gas wells, which destroys habitats for native animals.[343] Clearance for well pads is significantly greater for unconventional gas drilling than conventional oil drilling.[344] Each unconventional well pad requires five acres of clearance for well operations and roads to connect each pad.[345] In Pennsylvania, 1,700 acres of state forests have been affected by

[338] *Five Major Health Threats from Fracking-Related Air Pollution*, NRDC (Dec. 16, 2014) https://www.nrdc.org/media/2014/141216.

[339] *Id*.
[340] *Id*.
[341] *Id*.
[342] *The Costs of Fracking*, *supra*.
[343] *Id*.
[344] Jorge Daniel Taillant, Megan Glaub and Suzanna Buck, *Human Rights and the Business of Fracking* (THE CENTER FOR HUMAN RIGHTS AND ENVIRONMENT, September 29, 2015).
[345] *Id*.

fracking.[346] Finally, the amount of trucks needed to operate an unconventional well creates so much damage to Pennsylvania roads that $265 million will be needed to repair them.[347]

III. PROCEDURE FOR APPROVAL OF A CONDITIONAL LAND USE

In Pennsylvania, "a property owner who wishes to avoid the restrictive effect of a zoning ordinance may seek amendment of the zoning ordinance by action of the legislative body of the municipality, or may seek relief from the restriction by way of a variance or exception."[348] A special exception is a conditionally permitted use that is allowed by the legislature if specifically listed needs are met.[349] A conditional use is a special exception that can *only* be resolved by the municipal legislative body, not the zoning hearing board.[350]

The process for approving or denying a conditional use is defined in each municipality's code. For example, in the Borough of Jefferson Hills, the applicant for a conditional use approval must first submit a written application to the Zoning Officer at least thirty days before the monthly meeting of the planning commission and pay all application fees.[351] The written application must include a plan, which is

> [a] survey of a lot upon which is shown the location of existing and/or proposed structures, existing contours, proposed grading, location and dimensions of yards, feasibility of proposals for the disposition of stormwater and sanitary waste, indications of zoning compliance, name and applicant of the landowner, area location map, dates of preparation and revisions, and evidence of preparation by an architect, landscape architect, or engineer.[352]

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[346] Marie Cusick, *As Gas Boom Cuts into Forest, Scientists Study How to Put it Back Together*, STATEIMPACT: PENNSYLVANIA https://stateimpact.npr.org/pennsylvania/2015/05/12/as-gas-boom-cuts-into-forests-scientists-study-how-to-put-it-back-together/ (last visited Dec. 8, 2019).

[347] *The Costs of Fracking*, *supra*.
[348] 35 PA. LEGAL ENCYCLOPEDIA § 453 (2019).
[349] *Id*.
[350] *Id*.
[351] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2(a)-(b) (2000).
[352] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §102.2 (2000).

The application must also indicate which section of the Borough's Ordinance under which conditional use approval is being sought and "shall state the grounds upon which it is requested."[353]

At least thirty days after the initial Planning Commission Meeting where the application was first considered complete and properly filed, or after receiving a written recommendation of the planning meeting, a public hearing is held by the Borough Council.[354] The hearing must begin within sixty days of the applicants' request for a hearing and must be completed within one-hundred days after the completion of the applicant's case-in-chief.[355] The hearing can extend past the one-hundred days if the applicant agrees in writing or on the record to an extension of time, or for good cause upon application to the Court of Common Pleas.[356]

Forty-five days after the last hearing before the Borough Council is held, a written decision is rendered.[357] If the Borough does not come to a decision, they will supply written findings regarding the conditional use application.[358] If the application is contested or denied, the written decision will include a finding of facts; reasons for contest or denial, which includes a reference to the regulation or provision of the Ordinance that was relied upon; and an explanation of why the finding of fact allowed for the conclusion.[359]

The Borough may attach appropriate conditions and safeguards that conform with the "spirit and intent" of the ordinance to the approval of a conditional use application and may

[353] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2(a) (2000).
[354] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2(c)-(d) (2000).
[355] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2(d) (2000).
[356] *Id*.
[357] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2(e) (2000).
[358] *Id*.
[359] *Id*.

establish time limits in their sole discretion.[360] A violation of any condition or safeguard attached to the application is considered a violation of the ordinance.[361] When the Borough Council determines that the conditional use application meets all of the requirements and receives assurances that the conditions and safeguards attached will be fulfilled, the application will be referred to the Zoning Officer to issue zoning approval.[362]

Evidentiary Standards

At the public hearing, objectors may present evidence to prevent the approval of the conditional use application, and there is an abundance of precedent in Pennsylvania to determine what types of evidence are proper to do so. In *Archbishop O'Hara's Appeal*, 131 A.2d 587 (Pa. 1957), the Supreme Court of Pennsylvania had to decide whether the objectors' evidence regarding increased traffic[363], destruction of residential character, expenses to the taxpayers[364], and diminution in property values due to the conditional use would be sufficient to prove that the conditional use would harm the health, safety, and general welfare of the residents.[365] The Supreme Court also considered evidence concerning the inadequate size of the proposed tract[366]

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[360] BOROUGH OF JEFFERSON HILLS CODIFIED ZONING ORDINANCE §1206.2 (2000).
[361] *Id*.
[362] *Id*.
[363] Archbishop John O'Hara planned to build a diocesan high school on an eighteen-acre plot of land he owned. The school would serve approximately 1,200 Catholic students in the fourteen parishes near the school. The school would sit on Royal Avenue, a public road in Cheltenham Township. This road, and other roads around it, are only wide enough to handle residential traffic. The students would not have access to school transportation to get to and from school, so there will be a significant increase in traffic on roads surrounding the school. O'Hara's Appeal at 589-591.
[364] To resolve the increased traffic, Royal Avenue would need to be widened and sidewalks, lighting, and traffic controls would need to be installed. There was also a possibility that a sewage pump would need to be installed because the current eight-inch sewage drain would be inadequate to carry the burden of a school. O'Hara's Appeal at 591-592.
[365] O'Hara's Appeal at 596.
[366] The Department of Public Instruction of the Commonwealth of Pennsylvania recommends that high schools have a minimum of ten acres and one additional acre for every one-hundred students. By this calculation, the proposed high school should be sitting on at least twenty-six acres of land. O'Hara's Appeal at 592.

and whether objectors' argument that another site owned by the appellant was better suited to the conditional use was sufficient evidence to support the denial of the conditional use application.[367]

The Court established that the evidence must show with a high degree of probability that the proposed use will affect the health, safety, and welfare of the community; and, until sufficient evidence of adverse effects is presented "no court should act in such a way as to deprive a landowner of the otherwise legitimate use of his land."[368] The Court also reiterated that aesthetic reasons, conservation of property values, and the stabilization of economic values do not promote the health, safety, or welfare of residents; and, therefore, evidence as to these concerns would not be sufficient to show harm.[369]

The Court found the evidence that the objectors presented against the conditional use regarding cost to taxpayers, availability of another site, and inadequacy of the current site bore no relationship to the health, safety, or welfare of the residents of the community.[370] They found that evidence regarding the diminution of property values and change in the residential character of the area insufficient as well.[371] Finally, the Court held that evidence of the increased traffic did not show with a high degree of probability that the traffic would harm the residents.[372] The Supreme Court reversed the decision of the Commonwealth Court and granted the use.[373]

Applying the evidentiary standard established in *Archbishop O'Hara's Appeal* to the facts of *EQT Prod. Co. v. Borough of Jefferson Hills*, as long as the fact-finder found that the evidence presented by the objectors against EQT's conditional use application made it highly

[367] O'Hara's Appeal at 596.
[368] *Id*.
[369] *Id*. at 597 (quoting Medinger Appeal, 104 A.2d 118 (Pa. 1954)).
[370] *Id*. at 598.
[371] *Id*.
[372] *Id*.
[373] *Id*. at 599.

probable that significant harm would be caused to the residents' health, safety, or welfare, the municipality would be justified to deny the conditional use application.

The next decision which clarified the quality of evidence required by objectors was *Commonwealth v. Pittsburgh*, 532 A.2d 12 (Pa. 1987). On appeal, the Supreme Court again considered the issue of whether the evidence presented by objectors was sufficient to demonstrate that the proposed use[374] would have a detrimental effect on the community.[375] The court held that evidence that is not "substantiated by facts [and is] no more than . . . bald assertions, personal opinions, and perceptions" is not adequate to prove that the proposed use would be of harm to the citizen's health, safety, and general welfare.[376]

The residents in *Commonwealth v. Pittsburgh* made statements about the high crime rate and numerous bars in the area. They also were concerned about the many female and elderly residents that lived in the area and the effect that the pre-release center would have on property values. However, the objectors presented no studies, police records, or any evidence that would substantiate their fears and would "lead a reasonable mind to conclude that the facility would be detrimental to the community's general welfare."[377] The Court affirmed the decision below and granted the conditional use application.[378]

According to the rule in *Commonwealth v. Pittsburgh*, the evidence presented must show with a high probability the detrimental harm will occur without speculation. Therefore, as long as the Borough found that with a high degree of probability there would be substantial harm to the

[374] The appellant filed a conditional use application to relocate a pre-release center for state prisoners from a location on Ridge Avenue to a location on Miltenberger Avenue. The prior location operated without incident since 1969. Commonwealth v. Pittsburgh at 13.
[375] Commonwealth v. Pittsburgh at 13.
[376] *Id*. at 14.
[377] *Id*.
[378] *Id*. at 15.

community and that the evidence demonstrated proof of that harm without the use speculation than the conditional use application could be rightfully denied. The Supreme Court did not define what constitutes speculation, ruling only on the evidence submitted in the case before it.

In *Visionquest*, discussed above, the Supreme Court held that first-hand experiences with a specific entity do not constitute speculation and are probative in determining if a conditional use will detriment the residents' health, safety, or general welfare.[379] Applying the *Visionquest* approach to *EQT Prod. Co. v. Borough of Jefferson Hills*, the evidence that residents from Union Township presented would have been more than sufficient to deny EQT an additional conditional use application within Union Township, however, the *Visionquest* holding left open the issue of whether evidence of first-hand accounts from a different, but similarly situated municipality could be submitted in opposition to EQT's conditional use application in the Borough of Jefferson Hills.

The court in *EQT Prod. Co. v. Borough of Jefferson Hills* expanded the *Visionquest* holding to find that evidence of first-hand accounts taken from outside the municipality are relevant in considering an conditional land use application, where the essential factors of the evidence arose from a conditional use that was similar to the one proposed in the application at issue. Such essential factors included the owners, the activities to be conducted, and the location of the conditional use.[380]

IV. THE OBJECTORS SUCCEED

Under all the approaches discussed above, the Union Township objectors' testimony would have been properly considered and admitted. Under the *O'Hara's Appeal* approach, the

[379] Visionquest Nat'l Ltd. v. Bd. of Supervisors of Honey Brook Twp., 569 A.2d 915 (Pa. 1990).
[380] EQT Prod. Co. v. Borough of Jefferson Hills, 208 A.3d 1010, 1027. (Pa. 2019).

evidence would have been properly considered because it demonstrates with a high degree of probability that the residents' health, safety, and general welfare would be harmed detrimentally.[381] The testimony of the two men who were exposed to gas from the unconventional well alone would have been enough to show a high probability of detriment to the residents' health.

Under the approach in *Commonwealth v. Pittsburgh*, the objectors had to present evidence that was substantiated by fact as opposed to "bald assertions, personal opinions, and perceptions,"[382] a standard met by the objectors in *EQT Prod. Co. v. Borough of Jefferson Hills*. The Union Township objectors testified to intense periods of vibrations and presented pictures and videos of the vibrations shaking glasses of water as evidence. They did not testify to opinions or perceptions, instead, they presented evidence of their firsthand experiences.

Finally, the objectors' evidence would have prevailed under the *Visionquest*, as long as the evidence came from within the Borough.[383] Therefore, the Supreme Court of Pennsylvania in the present case properly expanded the ruling in *Visionquest* to apply to first-hand experiences from outside a municipality when nothing similar to the conditional use application exists with the municipality already. This is proper because if such evidence is not admissible, there would be no way to prevent such a conditional use application since the testimony from outside the municipality would be speculative, which is violative of the holding in *Commonwealth v. Pittsburgh*.

[381] O'Hara's Appeal at 596.
[382] Commonwealth v. Pittsburgh at 14.
[383] Visionquest at 113-114.

The ruling in *EQT Prod. Co. v. Borough of Jefferson Hills* gives future opposition to unconventional gas wells hope they will be able to prevent fracking in their community; and, will likely force natural gas companies to improve their practices. With this ruling and the current practices of natural gas companies, Pennsylvanians may see more rejected conditional use applications for unconventional gas wells given the undeniable negative effects that they have on health, safety, and public welfare of communities. Natural gas companies, like EQT, will need to change their habits or risk the disappearance of the industry, which may lead Pennsylvania to a future in clean and renewable energy.

V. THE FUTURE FOR ENERGY

To survive, natural gas companies must begin employing practices that do not harm the health, safety, or general welfare of the communities their wells are in. On November 22, 2019, Governor Tom Wolf, of Pennsylvania, committed $3 million on a pair of research studies to determine if there is a link between fracking and childhood cancers.[384] Natural gas companies can use research studies like these to make their practices safer.

There are already known ways that fracking can be improved, but these practices have not yet been employed by natural gas companies. For example, better construction of the wells themselves would prevent the methane leaks that are associated with well sites; and, testing the groundwater before fracking begins and for at least a year after it has commenced will allow for contamination problems to be fixed before they become too big of a problem.[385]

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[384] Michael Rubinkam, *Pennsylvania to Fund Research into Fracking Health Dangers*, APNEWS (November 22, 2019), https://apnews.com/e7859cfd44f145f18463568a5891e6b6.

[385] Russell Gold, *How to Make Fracking Safer*, THE WALL STREET JOURNAL (April 4, 2014), https://www.wsj.com/articles/how-to-make-fracking-safer-1396549574?ns=prod/accounts-wsj.

If natural gas operations do not become safer, opposition to new wells will continue to grow. If opposition grows, rejection rates of conditional use applications for fracking will grow. If conditional use applications for fracking are not being approved, the state will need to find new energy sources, like solar or wind, once the existing wells dry up. Either way, Pennsylvanians will be better off.

However, citizens must know how to block conditional use applications for fracking from being approved if the potential positive outcomes of this case are to come to fruition. The naivety of citizens will continue to allow fracking to thrive in Pennsylvania without change and people to be harmed.

In conclusion, the Supreme Court of Pennsylvania properly expanded the ruling in *Visionquest* to apply to the present case and cases like it. However, this ruling will not benefit the public if they do not know about it. When the public is aware, they can slow the approval of conditional use applications for fracking and lead the state to clean and renewable energy.

The Limits Placed on Pennsylvania's Constitutional Right to Clean Water and Air: An Analysis of Funk v. Wolf

By: Kirstin Kennedy

Pennsylvania is among few states across the country to provide in its Constitution a right of citizens to enjoy clean water and clean air.[386] However, Pennsylvania courts have held that this right has significant limitations. The concept of a right to clean water and air has numerous times since the right came to fruition in 1971. For example, the Commonwealth Court of Pennsylvania, in Funk v. Wolf,[387], addressed the permissible scope of government action under the Pennsylvania Environmental Rights Amendment. Specifically, the court analyzed the affirmative duties, if any, of government agencies to exercise environmental consciousness for the benefit of the public. The case of Funk v. Wolf was heard and decided by Hon. Judge Renee Cohn Jubelier in June 2016. Petitioner Ashely Funk was joined by six minor children and their respective guardians.[388] Collectively called "the Petitioners," the minor children included Otis Harrison, Lilian McIntyre, Rekha Dhillon-Richardson, Austin, Fortino, Darius Abrams, and Kaia Luna Elinich.[389] In their Second Amended Petition for Review Seeking Declaratory and Mandamus Relief, the Petitioners named Governor Tom Wolf and six governmental agencies as Respondents.[390] Agency Respondents included the Pennsylvania Department of Environmental Protection ("DEP"), the Pennsylvania Environmental Quality Board ("EQB"), the Pennsylvania Public Utility Commission ("PUC"), the Pennsylvania Department of Conservation and Natural Resources ("DCNR"), the

[386] Pa. Const.art 1, §27.
[387] Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016), aff'd, 638 Pa. 726, 158 A.3d 624 (2017).
[388] Id.
[389] Id.
[390] Id.

Pennsylvania Department of Transportation ("PennDOT"), the Pennsylvania Department of Agriculture ("DOA"), as well as the respective heads of each individual department.[391]

The Petition, filed in Dauphin County, implored the Commonwealth Court to mandate that the pertinent governmental agencies adopt regulatory practices to address emissions of carbon dioxide and greenhouse gases in compliance with the duties of the executive branch and various agencies "under Article 1, Section 27 of the Pennsylvania Constitution," known as the Environmental Rights Amendment ("ERA").[392] The Petitioners argued that, because the government had not established such a plan in light of evidence regarding climate change, the Respondents failed to comply with the Constitutional requirement "to not infringe upon the rights of the people" and were derelict in fulfilling their obligations as "trustees of the Commonwealth's public natural resources."[393] Further, the Petitioners argued that the atmosphere should be considered as such a natural resource.[394] In response, Gov. Wolf and the listed agencies filed twelve Preliminary Objections, followed by seven additional objections separately filed by the PUC.[395] The court considered preliminary objections related to inadequate jurisdiction, a lack of standing, failure to state a claim for mandamus, and declaratory relief, raised by each respondent.[396]

The court began its analysis of the Petition and respective Preliminary Objections by dissecting the language of the ERA, which states:

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[391] Id. John Quigley, Secretary of the Pennsylvania Department of Environmental Protection and Chairperson of the Environmental Quality Board, Gladys M. Brown, Chairperson of the Public Utility Commission, Cindy Adams Dunn, Secretary of the Pennsylvania Department of Conservation and Natural Resources, Leslie S. Richards, Secretary of the Pennsylvania Department of Transportation, and Russell C. Redding, Secretary of the Department of Agriculture.
[392] Id. (*citing* Pa. Const.art 1, §27).
[393] Id. at 232.
[394] Id.
[395] Id.
[396] Id. at 241-251.

> 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.[397]

The court explained that the first provision of the ERA establishes the "endow[ment]" of the rights to natural resources to the citizens of Pennsylvania.[398] As a result, the ERA prevents state officials and administrative agencies from interfering with the outlined rights, including the right to clean air and water.[399] The second provision explicitly creates a trust wherein the government is assigned the role of trustee for the citizens, who are established as the beneficiaries of the rights outlined in the Amendment.[400] According to the court, because of this fiduciary relationship, the ERA "imposes a duty on the Commonwealth" to protect environmental rights for the citizen-beneficiaries.[401]

However, courts have held that the reach of the ERA is not absolute, particularly when it comes to issues related to economic development.[402] Specifically, the court analogized the ERA to "a thumb on the scale" when environmental issues are "juxtaposed" with economic development, providing slightly greater weight to the concerns of environmental impact.[403] The court went on to explain that while the Commonwealth, as trustee, owes a duty to "conserve and maintain public natural resources for the benefit of all the people," there must be a balance with the many other duties owed by the government to the people. [404] This balance, according to the

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[397] Pa. Const.art 1, §27.
[398] Funk v. Wolf, 144 A.3d 228 at 233. (*citing* Cmty. Coll. Of Delaware Cnty v. Fox, 20 Pa.Cmwlth. 335, 342 A.2d 468, 473 (1975)).
[399] Id. (*citing* Com. by Shapp v. Nat'l Gettysburg Battlefield Tower, Inc., 454 Pa 193, 311 A.2d 588, 592 (1973)).
[400] Id. (*citing* Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 167 (Pa.Cmwlth.2015)).
[401] Id.
[402] Id. (*citing* Payne v. Kassab, 468 Pa. 266, 361 A.2d 263, 237 (1976); Robinson Twp. Washington Cnty v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 958 (2013) (plurality)).
[403] Id. (*citing* Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140 at 170).
[404] Id. at 235 (*citing* Payne v. Kassab, 468 Pa. 266, 362 A.2d 237 at 272-73).

court, is typically addressed by the Pennsylvania General Assembly.[405] As a result, the court held that, when addressing issues related to the ERA, courts must be aware of "the balance the General Assembly has already struck" in weighing environmental issues with other regulatory concerns.[406]

After establishing a general framework of the ERA, the court looked to the Petitioner's allegations regarding the environmental impact of global warming.[407] The Petitioners pointed to several apparent issues throughout Pennsylvania's environmental ecosystem which show the already existing impact of climate change, including rising air temperatures, increased instances of heavy rain, decreased snow coverage and "summer runoff," lower moisture levels in soil, and increased "soil moisture droughts."[408] Petitioners also explained several prospective issues that could occur absent regulatory measures, including disruption to the Delaware River and Estuary as a result of rising water levels, damage to parks and wetlands, diminished forest area, damage to wildlife, and decreased biodiversity.[409] Further, Petitioners point to health issues stemming from unchecked climate change, including increased "heart-related deaths," issues with "asthma, respiratory infections" and allergies.[410] The Petitioners concluded by stating that Pennsylvania "substantially contributes to climate change" so much so that if the Commonwealth were a country "it would be the 26th largest emitter of [greenhouse gases] in the world."[411]

The court then considered the demands stated in the Petition, including the notion that the Respondents owe a fiduciary duty as trustee to "conserve and maintain clean air and safe levels of [carbon dioxide emissions and greenhouse gases] in accordance with current climate science" for

[405] Id. (*see* Nat'l Solid Wastes Mgmt. Ass'n v. Casey, 134 Pa.Cmwlth., 577, 600 A.2d 260, 265 (1991), aff'd, 533 Pa. 97, 619 A.2d 1063 (1993).
[406] Id.
[407] Id.
[408] Id. at 236.
[409] Id.
[410] Id.
[411] Id. (Petitioner citing the United States Energy Information Agency).

the benefit of the public.[412] Petitioners argued that because comprehensive steps had not been taken to regulate such emissions, Respondents have shirked their duty, resulting in sustaining damages to Petitioners.[413] Petitioners then requested that the court require the Respondents to "determine which steps are necessary" for the preservation of natural resources, including the atmosphere, in light of the mounting evidence of climate change resulting from the lack of regulation pertaining to emissions of carbon dioxide and greenhouse gases.[414]

As stated, the court considered four of the Respondent's Preliminary Objections: jurisdiction, a lack of standing, failure to state a claim for mandamus, and declaratory relief.[415] It examined the issue of jurisdiction initially, as challenges to jurisdiction must be considered prior to other issues.[416] In the objection, Respondents argued that Petitioners should have filed the action with the Environmental Quality Board ("EQB"), an agency which Respondents argued had original jurisdiction over the matter.[417] According to Respondents, the Commonwealth Court possessed only appellate jurisdiction over the claim.[418] In response, the Petitioners asserted that mandamus relief is within the jurisdiction of the Commonwealth Court, as it spans the authority of the EQB.[419] Ultimately, the court agreed with Petitioners and overruled the preliminary objection, holding that Petitioners did not seek "the enactment of a specific regulation," but rather asked the court to order the EQB to comply with the regulatory standards addressed in the

[412] Id. at 237.
[413] Id.
[414] Id. at 239.
[415] Id. at 241-251.
[416] Id. at 241. (*citing* Borough of Olyphant v. Pa Pub. Util. Comm'n, 861 A.2d 377, 382 n. 10 (Pa.Cmwlth. 2004)).
[417] Id. at 242.
[418] Id.
[419] Id.

Petition.[420] In a matter of first impression, the court held that it had subject matter jurisdiction over the case because no lower agency was able to evaluate the stated claim.[421]

Next, the court considered the preliminary objection that the Respondents lacked standing.[422] Respondents objected on the basis of inadequate standing, alleging that Petitioners "merely assert[ed] generalized injuries and claims based upon remote and speculative allegations of harm."[423] Standing, according to the court, generally requires that a claimant be "adversely affected" by the matter that is asserted and absence of such adversity is demonstrative of a lack of standing.[424] A claimant has established that he or she is "sufficiently aggrieved" if it can be shown that he or she has "a substantial, direct[,] and immediate interest in the outcome of the litigation."[425] The court broke down each of the elements in order to assess whether the Petitioners had adequately established standing.[426]

In order to show that a claimant has a substantial interest in the outcome of litigation, he or she must demonstrate an interest in the issue which "surpasses that of all citizens in procuring obedience to the law." [427] While the claimant must have a distinct interest, he or she is not precluded from the action just because the issue at hand, like that of environmental concerns, impacts the public at large.[428] While the connection must be substantial, it need not relate to monetary relief.[429] A direct interest relates to a "causal connection" between the claims made and

[420] Id. at 243.
[421] Id.
[422] Id.
[423] Id.
[424] Id. (*citing* Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 287 n. 32 (1975)).
[425] Id. at 243-44. (*citing* Fumo v. City of Philadelphia, 601 Pa. 322, 972 A.2d 487, 496 (2009)).
[426] Id. at 244.
[427] Id.
[428] Id. (*citing* Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)).
[429] Id.

the damages asserted.[430] Finally, an immediate interest is established when the "causal connection" is not distant or "speculative."[431]

In order to show that the individually named Petitioners would be substantially, directly, and immediately impacted by a lack of governmental regulation of carbon dioxide and greenhouse gases, the court examined statements made by ten-year-old Petitioner Lilian McIntyre, a resident of Philadelphia who alleged that she suffered from asthma and an allergy to pollen.[432] Miss McIntyre alleged that climate change worsened her asthma, limited her ability to enjoy skiing in state parks, and "threatened to inundate her hometown of Philadelphia with floodwaters."[433] Miss McIntyre, along with the other juvenile Petitioners, further alleged that global warming and climate change has impacted and would continue to impact their quality of life and access to environmental stability, in a multitude of different ways, throughout the rest of their lives.[434]

In applying these claims to the elements of standing, the court found that Miss McIntyre adequately established a substantial interest in the outcome of the litigation.[435] Individually, the minor distinguished herself from the general public by illustrating the impact that climate change had on her present and future life.[436] As a result, the court held that Miss McIntyre's interest in the second provision of the ERA was substantial.[437] The court held that Miss McIntyre established "a causal connection" between her alleged harm and the alleged inaction of Respondents by showing that the breach of a duty to uphold the ERA was the cause of her heightened asthma and reduced

[430] Id. (*citing* Fumo v. City of Philadelphia, 601 Pa. 322, 972 A.2d 487 at 496.
[431] Id.
[432] Id. at 246.
[433] Id.
[434] Id.
[435] Id. at 247.
[436] Id. (*citing* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc. 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).
[437] Id. (*citing* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc. 528 U.S. 167, 183; Robinson Twp. Washington Cnty v. Commonwealth, 623 Pa. 564, 83).

enjoyment of natural resources.[438] Finally, the court also concluded that Petitioners established an immediate interest in the outcome of the litigation.[439] Miss McIntyre alleged "both present and likely future harms." Previous courts examining the issue of standing have held that "an immediate interest is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question."[440] The court found that the protections of the ERA were within the zone of interest for both citizens of Pennsylvania and the generations to come.[441] As a result, Respondent's Preliminary Objection on the basis of lack of standing was overruled.[442]

After dismissing the first two of Respondent's Preliminary Objections, the court looked to the issue of mandamus, explaining that it is a remedy used to "compel the performance of a ministerial act or mandatory duty."[443] The elements necessary to implore a court to issue a writ of mandamus include a showing of a "clear legal right to enforce the performance" on the part of a claimant, a "corresponding duty" on the part of the respondent, and no other available option for the claimant to seek a remedy.[444] The Petitioners alleged that "the ERA imposes certain mandatory duties" including the protection of natural resources.[445] The court acknowledged the duties imposed by the Amendment, but ruled that the Petitioner's demand did not illustrate the actual issue at hand.[446] The real question for determination, the court explained, was whether the Act gave the Petitioners a "clear right to the performance of the specific acts" requested in the demand

[438] Id.
[439] Id. at 248
[440] Id. (*citing* Unified Sportsmen of Pa. ex rel, Their Members v. Pa. Game Comm'n, 903 A.2d 117, 123 (Pa.Cmwlth. 2006); George v. Pa. Pub. Util. Comm'n, 735 A.2d 1282, 1286 (Pa.Cmwlth. 1999)).
[441] Id.
[442] Id.
[443] Id. (*citing* Unified Sportsmen of Pa. ex rel, Their Members v. Pa. Game Comm'n, 903 A.2d at 125).
[444] Id. at 249.
[445] Id.
[446] Id.

and if "performance" of such was mandatory.[447] In answering these questions, the court looked to a balancing test wherein the "environmental and societal concerns" are weighed against other legislative action which has already taken into account the mandates of the ERA.[448] Additionally, the laws impose a duty on Respondents to "promulgate and implement rules and regulations to reduce" emissions of greenhouse gases and carbon dioxide.[449] However, as argued by Respondents, the law states no requirement that the executive officials :combat climate change through the steps" asserted by the Petitioners.[450]

The court looked to Pennsylvania legislation which "directly and indirectly" relates to global climate change, including the Pennsylvania Climate Change Act ("CCA") and the Air Pollution Control Act ("APCA").[451] Both laws require the Respondents to "examine the potential impacts of climate change" and to submit a report to the Governor every three years.[452]

Indeed, the court found no legislative action which would bind the Respondents to the specific demands alleged by the Petitioners.[453] The task of asserting those responsibilities, according to the court, is reserved for the General Assembly, as the Amendment itself cannot expand the powers given to the Respondents.[454] Additionally, the court held that the language of the ERA simply does not grant Petitioners "a clear right" to demand that Respondents comply with the elements established in the action.[455] Failure to meet this necessary element resulted in the

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[447] Id.
[448] Id. at 250. (*citing* Natl. Solid Wastes Mgt. Ass'n v. Casey, 600 A.2d 260, 265 (Pa. Cmmw. 1991), aff'd, 619 A.2d 1063 (Pa. 1993).
[449] Id. at 250.
[450] Id.
[451] Id.
[452] Id.
[453] Id.
[454] Id.
[455] Id. at 251.

court's decision to sustain the objection.[456] The issue of mandamus, as a result, was overruled.[457] Because of this finding, the court reasoned that declaratory relief, the basis of a fourth Preliminary Objection, "would serve no practical purpose."[458] The court held that granting declaratory relief would require an advisory opinion, which is improper for such relief.[459] The court further ruled that a third amendment to the Petition "would be futile."[460] The Petition was, as a result, dismissed with prejudice."[461]

History

The opinion rendered in Funk v. Wolf was the product of years' worth of work for lead Plaintiff Ashley Funk, 20, who had long petitioned both the court system and the Environmental Quality Board ("EQB") to address her specific climate change concerns.[462] A college student and Westmoreland County resident, Funk's efforts to reduce greenhouse gas and carbon dioxide emissions began in 2012 when she first made a plea to the EQB, a twenty-member board which reviews Pennsylvania environmental regulations.[463] The Pennsylvania Department of Environmental Protection ("DEP") recommended that the EQB ignore the demand, arguing that the fractional reduction of greenhouse gas emissions in Pennsylvania would have little to no impact on global climate change at large.[464] The DEP went on the stress that several "strategies" were already in place for the reduction of such emissions.[465] Ultimately, the EQB did reject the petition,

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[456] Id.
[457] Id.
[458] Id. at 252.
[459] Id. at 251. (*citing* Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist., 526 Pa/ 483, 587 A.2d 699, 701(1991)).
[460] Id.
[461] Id.
[462] Laura Legere, "The kids don't have a clear right: Court dismisses Pennsylvania youths' climate case" (online, August 2, 2016) https://www.post-gazette.com/business/powersource/2016/08/02/Court-dismisses-Pennsylvania-youth-s-climate-case/stories/201608020008.
[463] Laura Legere, "State weighs petition seeking new emission rules" (online, August 12, 2014) https://www.post-gazette.com/business/powersource/2014/08/12/state-to-consider-petition-seeking-new-emissions-rules/stories/201408120007.
[464] Id.
[465] Id.

which led Funk and some six minors to appeal directly to the Pennsylvania Commonwealth Court.[466]

The Environmental Rights Amendment ("ERA") was adopted into the Constitution of Pennsylvania on May 18, 1971.[467] The Amendment grants the citizens of Pennsylvania a Constitutional right to specific natural elements necessary to sustain human life, including "clean air" and "pure water."[468] Further, the Amendment establishes a vow for the "preservation" of the environment for the purpose of "the natural, scenic, historic and esthetic values."[469] The ERA was established after centuries of economic development across Pennsylvania in an effort to counteract the harsh results of industrialization.[470] According to the analysis of the Commonwealth Court in Community College of Delaware County v. Fox, decided shortly after the enactment of the ERA, this first provision of the Amendment establishes the specific rights granted to the public by the Commonwealth.[471] In its second provision, the ERA goes on to state that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."[472] Further, the Amendment establishes the Commonwealth government as the "trustee of these resources."[473] The provision concludes in establishing that the government "shall conserve and maintain" the aforementioned rights "for the benefit of all the people."[474] This last provision,

[466] Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016), aff'd, 638 Pa. 726, 158 A.3d 624 (2017).
[467] James W. Pfeifer, John W. Carroll, Breathing New Life into Pennsylvania's Environmental Rights Amendment, 36 Pa. Law. 28 (March/April 2014).

[468] Pa. Const.art 1, §27.
[469] Id.
[470] Franklin Kury, "Pennsylvania's Environmental Rights Amendment" (online) https://conservationadvocate.org/pennsylvanias-environmental-rights-amendment/.
[471] Community College of Delaware County v. Fox, 342 A.2d 468, 473 (Pa. Cmmw. 1975).

[472] Pa. Const.art 1, §27.
[473] Id.
[474] Id.

according to the court in Community College of Delaware County v. Fox, establishes the trustee-beneficiary relationship where the government acts as trustee for the citizen-beneficiaries.[475]

The scope of the ERA was first examined by the Pennsylvania Supreme Court in the 1973 decision of Com. by Shapp v. Natl. Gettysburg Battlefield Tower, Inc.[476] The case was originally brought in Commonwealth Court in July 1971 against National Gettysburg Battlefield Tower, Inc. and Thomas R Ottenstein.[477] The two defendants had come to an agreement with the National Parks Service regarding "the construction of a 307-foot observation tower near the Gettysburg Battlefield."[478] Although the National Parks Service agreed to the deal, the Commonwealth did not and subsequently filed the action seeking an injunction.[479] The Commonwealth went on to argue that construction of the tower was a "despoliation of the natural and historic environment."[480] The Commonwealth Court ruled that the Plaintiff, the government, "failed to carry its burden of proof" to establish that the tower would harm the environment.[481]

On appeal to the Supreme Court of Pennsylvania, the government used the ERA to argue that the tower would disrupt the historic value of the land in Gettysburg.[482] In its analysis, the court recognized that the ERA expanded the government's responsibility beyond merely preserving clear water and air to requiring the preservation of historic and aesthetic values of state land.[483] However, the court went on to hold that the ERA is not "self-executing" and requires further guidance from the state legislature.[484] The court found that the ERA "merely" established the "the

[475] Community College of Delaware County v. Fox, 342 A.2d 468, 473 (Pa. Cmmw. 1975).
[476] Com. by Shapp v. Natl. Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 589 (Pa. 1973).
[477] Id.
[478] Id.
[479] Id.
[480] Id. at 590.
[481] Id.
[482] Id. at 591.
[483] Id. at 592.
[484] Id. at 593-93.

general principal" that the government is the "trustee of Pennsylvania's public natural resources."[485] To be made applicable without additional legislation, the ERA would require a definition of "the values which the amendment seeks to protect" as the Amendment itself does not create a legal obligation.[486] The court, as a result, affirmed the conclusion of the lower court, holding that the government failed to establish a showing of the requisite damage the tower would cause to the historic value of the land, leaving the threshold to be determined by the state legislature.[487] This case serves as an example of the high bar set for petitioners alleging violations of the ERA, the same high standard which the court applied in its analysis of Funk.

The application of the ERA was taken up again by the Supreme Court of Pennsylvania in the 1975 decision of Payne v. Kassab.[488] In this case, several residents of the City of Wilkes-Barre, along with several college students, sought to enjoin the Pennsylvania Department of Transportation ("PennDOT") from commencing a street-widening project.[489] Plaintiffs turned to the ERA because they feared the road project would negatively impact the aesthetic and historic value of the River Common, an area located near the bank of the Susquehanna River.[490] The Plaintiffs argued that the ERA provided "standing as beneficiaries of the public trust."[491] The Commonwealth Court, serving as the trial court, ruled that, while he ERA was self-executing, it was not violated by the PennDOT project.[492] Plaintiffs then appealed directly to the Supreme Court, which agreed that the amendment "creates a public trust" for the purpose of the preservation

[485] Id. at 595.
[486] Id.
[487] Id.
[488] Payne v. Kassab, 361 A.2d 263 (Pa. 1976).
[489] Id. at 264.
[490] Id.
[491] Id. at 272.
[492] Id.

of natural resources.[493] As a result, according to the Supreme Court of Pennsylvania "[n]o implementing legislation is needed to enunciate these broad purposes."[494] However, the Supreme Court of Pennsylvania held that the ERA does not establish an "automatic" or "absolute" right.[495] While the Commonwealth is bound to abide by the provisions of the ERA, it is also required to "perform other duties" including "the maintenance of an adequate public highway system."[496] Both of these rights are for the benefit of the public, according to the court.[497] Through this analysis, the Pennsylvania Supreme Court established a balancing test to be used in evaluating the degree of importance of the environmental rights created by the ERA and a conflicting right granted to the public.[498] As a result, the court held that the road project did not violate the governmental duties established in the ERA. The balancing test, a now-established precedent, is used in many courts' analyses of the application of the ERA, including the court in Funk.

Several years later, in 1991, the Pennsylvania Commonwealth Court addressed the ERA in relation to an Executive Order issued by then-Governor Robert P. Casey concerning the temporary cessation of permits issued for the creation of municipal waste fields.[499] The National Solid Wastes Management Association filed a petition against Governor Casey and sought to dismantle the Executive Order.[500] The Association argued that Pennsylvania Act 97 established "extensive and detailed requirements for the operation of municipal waste landfills and the process by which municipal waste landfills are permitted in Pennsylvania."[501] The Governor, on the other hand,

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[493] Id.
[494] Id.
[495] Id.at 273.
[496] Id.
[497] Id. (*see* Sections 11 and 13(a) of Act 120, 71 P.S. 511, 513(a)).
[498] Id. at 274.
[499] Natl. Solid Wastes Mgt. Ass'n v. Casey, 600 A.2d 260, 261 (Pa. Cmmw. 1991), aff'd, 619 A.2d 1063 (Pa. 1993).

[500] Id.
[501] Id. at 262.

relied on the ERA in defense of the order.[502] In addressing the ERA's application in this case, the court determined that the amendment makes no specific protection for executive orders.[503] Further, the court held that the "balancing of environmental and societal concerns" was resolved through the enactment of Act 97, as well as Act 101, which provided for the adequate planning of waste locations.[504] The Governor, according to the court, did not have "the authority to disturb that legislative scheme."[505] As a result, the executive order was stricken.[506] After an appeal was made directly to the Pennsylvania Supreme Court, the Commonwealth Court determination was affirmed in 1993, which offered no further details on the matter.[507] The same legal principal was applied in Funk in the court's use of a balancing test to determine whether the CCA and the APCA asserted specific responsibilities to the executive branch concerning climate change.

Most recently, The Supreme Court of Pennsylvania addressed the ERA in the context of oil and gas drilling in a suit filed by numerous municipalities across the Commonwealth in Robinson Tp., Washington County v. Com.[508] In addition to the individual municipalities, the Plaintiffs included elected officials, a non-profit organization, and a physician.[509] In its introduction to the case, the Supreme Court of Pennsylvania acknowledged that the matter included "multiple issues of constitutional import" which resulted from the Petitioner's challenges to Act 13 of 2012.[510] The Act specifically permitted "the exploitation and recovery of natural gas" in the Marcellus Shale, a "geological formation" which spans the geographical boundaries of the

[502] Id.
[503] Id. at 265.
[504] Id.
[505] Id.
[506] Id.
[507] Natl. Solid Wastes Mgt. Ass'n v. Casey, 619 A.2d 1063 (Pa. 1993).
[508] Robinson Tp., Washington County v. Com., 83 A.3d 901, 913 (Pa. 2013).
[509] Id. at 913.
[510] Id.

Commonwealth.[511] According to the Supreme Court of Pennsylvania, the Marcellus Shale Formation is a "known natural gas reserve" located "[p]articularily in northeastern Pennsylvania."[512] As a result of the accessibility to the natural gas reserves, the drilling industry uses "hydraulic fracturing" or "fracking: and "horizontal drilling" to access the natural gas in the Shale.[513]

The citizen Petitioners, in March 2012, filed a "fourteen-count petition for review" asking for Act 13 to be declared unconstitutional.[514] Petitioners further requested a "permanent injunction prohibiting" use of Act 13.[515] Among several constitutional arguments, Petitioners pointed to the Environmental Rights Amendment for support in their attempt to have Act 13 declared unconstitutional.[516] In response, similar to the government respondents in Funk, the Commonwealth filed preliminary objections for relief.[517] Further, the government Respondents similarly argued that Petitioners lacked standing to bring the claim under the concept of justiciability.[518] They further argued the claim lacked ripeness and amounted to a political question.[519]

The court took up these justiciability issues in determining the Petitioners' ability to state a claim against the oil and gas company. [520] Through the court's ruling in this case, the determinative test addressing the adequacy of standing in relation to the ERA was established, namely that a petitioner must be sufficiently aggrieved and directly, immediately, or substantially

[511] Id.
[512] Id. at 914.
[513] Id at 914-915.
[514] Id. at 15.
[515] Id.
[516] Id. at 16.
[517] Id.
[518] Id.
[519] Id. at 17.
[520] Id. at 917.

interested in the outcome of the litigation.[521] This same test for standing was applied in Funk v. Wolf and served as the standard for determining petitioner's standing.[522] It will conceivable be used in future cases as courts continue to address these justiciability issues related to the Environmental Rights Amendment. Ultimately, the court in Robinson Twp., used this test to determine whether the individual Petitioners were "sufficiently aggrieved" by the matter.[523] Here, several petitioners were found to have standing as a result as their status as landowners in relation to the concept of natural gas drilling.[524] This concept can be juxtaposed to Petitioners in Funk, who were able to establish a significant interest even as non-landowning minors.

Analysis

The Supreme Court's decision in Funk was considered a "blow" to those favoring "a plain reading" of the ERA, like the Petitioners, while simultaneously serving as "a relief" to those who sought better guidance of how the "environmental demands" acknowledged by the ERA impact Pennsylvania.[525] The division between the two parties is clear. Indeed, the court definitively concurs with other recent cases that there is a "high bar" in alleging a violation of the ERA.[526] This juxtaposition of environmental rights and economic interests and the resulting "high bar" speaks to the issue that the Commonwealth faces as both an environmentally progressive and historically industrial state. Pennsylvania joins few other states in providing a Constitutional right to clear water and air to its citizens. Notably, the Commonwealth also welcomes innovative industry,

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[521] Id.
[522] Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016), aff'd, 638 Pa. 726, 158 A.3d 624 (2017).
[523] Robinson Tp., Washington County v. Com., 83 A.3d at 917.

[524] Id.
[525] Laura Legere, "The kids don't have a clear right: Court dismisses Pennsylvania youths' climate case" (online, August 2, 2016) https://www.post-gazette.com/business/powersource/2016/08/02/Court-dismisses-Pennsylvania-youth-s-climate-case/stories/201608020008.
[526] Alan M. Seltzer and John F. Povilaitis, "Payne Avoids Falling Into A Funk In PA" (online, August 3, 2016) https://www.law360.com/articles/824231.

including hydraulic fracturing, nuclear development, and mining, all which require the state to balance the conflicting needs of industry with its stated goal of protecting environmental rights of citizens.

The Petitioners, led by Ashley Funk, entered the case with the goal to reduce statewide greenhouse gas and carbon dioxide emissions by six percent over the course of approximately one decade. They used the ERA to support their conviction that administrative agencies must be held accountable for reaching this lofty goal. In essence, a plain reading of the Amendment supports the exact goal of reducing the emissions by 6% or more broadly asserts their position that elected officials should be responsible for ensuring citizens' right to a clean environment. asserted by the Petitioners. With mounting evidence showing the already present impacts of global climate change, including increased flooding, growing deaths related to respiratory issues, mounting agricultural hardship, the intention of the ERA cannot be fulfilled without a change to policy in Pennsylvania of placing the goals of economic growth from environmental damaging industries before the public right to a clean environment.[527] Afterall, without natural resources to enjoy the ERA is moot. According to the Pennsylvania Department of Environmental Protection, statewide temperatures increased by 1.8 degrees over the course of the past century, and, over the course of the next forty years, it is expected to continue to increase by 5.4 degrees.[528] Accordingly, this has led to worsening air quality samples across the state.[529] Further, precipitation increased in the northeastern portion of the United States over the course of the century by an average of 10%, in some areas reaching up to 20%.[530]

[527] https://www.depgis.state.pa.us/ClimateChange/index.html
[528] Id.
[529] Id.
[530] Id.

Alternatively, the Commonwealth has objective goals in terms of economics, health initiatives, and development that, in many ways, conflict with stricter guidelines related to emissions. Business, such as the Shell cracker plant built in Potter Township, Beaver County, could be stunted as a result of more stringent restrictions. Some have argued that the same business boost that comes with industry, such as Shell's cracker plant – such as jobs and increased economic growth – could be equally achieved with the implementation green industry, such as solar arrays or wind farms.[531] Such projects could, arguably, similarly boost industry while eliminating the concern of emissions. Further, as the Respondents, argued, the benefit of environmental protection, which could be slight, may not outweigh the economic burden. Further, as the court explained, a board interpretation of the ERA is not practical in the fulfillment of all of Pennsylvania's goals for the wellness and liberty of its citizens. An amendment alone cannot usurp the role of the state Legislature. This result, however, does not seem to strike a fair balance between the economic needs of the Commonwealth and the very existence of the ERA.

It challenges the conscience to choose between the health and happiness of a child and the prospect of business development. At just ten years old, Petitioner Lilian McIntyre surely has a right to play outside without the threat of conditions aggravating to asthma. This is the express rule of the ERA, which provides that the Commonwealth has a duty to maintain clean air. However, the court is very clear in its analysis of the requested relief. The ERA, without supportive legislation, does not create specific goal for the executive branch and its administrative agencies. As the court established a high bar in both Funk and Robinson Twp., it likely will maintain such standards.

[531] https://breatheproject.org/patrolling-our-air/

By act of the General Assembly, a compromise could surely be reached. Lofty goals such as those asserted by Funk and her fellow Petitioners may be unrealistic, but appropriate legislative action could put Pennsylvania on a path to reasonable reductions in emissions. Further, enacted laws would surely apply to the environmental agencies of the state government. Legislation, like court action, seems unlikely. Despite this, Funk has petitioned the court, the EQB, and the General Assembly for the better part of a decade, even going so far as to point to asthmatic children in desperate need of a vow of clean air. Perhaps with the continued work of such activists, the ERA can be utilized in a more effective way so as to both permit industrial development while still serving its ultimate purpose: to ensure Pennsylvanians clean water and air.