

The Application of Article I, § 27 of the Pennsylvania Constitution, the Environmental Rights Amendment, to Modern Cases and State Land Management

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The Environmental Rights Amendment, Article 1, § 27, in the Pennsylvania Constitution, was passed in 1971. Pennsylvania was one of the first states to enact an Amendment of its kind into the state's Constitution. States that have Environmental or Green Amendments in their state Constitutions include Montana, Illinois, Massachusetts, Hawaii, and Rhode Island.² In November 2021, New York passed its own Environmental Rights Amendment called the Green Amendment after it was approved by a public vote of nearly 70% of voters.³ The United States Constitution does not have an environmental provision.

This paper will discuss the history of the Pennsylvania Environmental Rights Amendment by reviewing noteworthy cases that have affected its interpretation in the judicial system. Next, this paper will discuss the rights created by the language of the Environmental Rights Amendment. Following, this paper will discuss the application of the Environmental Rights Amendment in 2021. Finally, this paper will end with a proposal of a generalized Pennsylvania Planning Rule that mandates land management plans and ensures that state agencies are acting as trustees of the state's natural resources at all times.

I. Historical Overview of the Environmental Rights Amendment

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² Rockefeller Inst. of Gov't, *The Precedents and Potential of State Green Amendments*, <https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf> (last visited November 22, 2021).

³ *New York Proposal 2, Environmental Rights Amendment*, BallotPedia [https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_\(2021\)](https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021)) (last visited November 22, 2021).

The Environmental Rights Amendment states, “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”⁴

This section will discuss the most noteworthy cases that have determined the application of the Environmental Rights Amendment in the judicial system since 1971. For several decades after the Environmental Rights Amendment was passed, it became increasingly difficult for plaintiffs to utilize it in furtherance of claims to benefit the environment.

A. *Commonwealth v. Gettysburg Battlefield National Tower* (1973)

In 1973, the Pennsylvania Supreme Court heard the case of *Commonwealth v. Gettysburg Battlefield National Tower*, which involved an agreement negotiated by the National Gettysburg Battlefield Tower, Inc. with the U.S. government to construct an observation tower near Gettysburg’s battlefield.⁵ The Commonwealth filed suit to enjoin the construction of the tower in the proposed location because it would obstruct the skyline and would take away from “the historic, scenic, and aesthetic environment of Gettysburg.”⁶ The Commonwealth relied on Article I, § 27, the Environmental Rights Amendment, to authorize the suit.⁷ The issue presented in this case was whether the constitutional provision was self-executing, meaning that it can be enforced without legislative involvement.⁸ The Court found that the Environmental Rights Amendment was not self-executing and stated that the Amendment needed to be paired with additional legislation

⁴ Pa. Const. art. I, § 27.

⁵ *Com. by Shapp v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 589 (Pa. 1973).

⁶ *Id.* at 590.

⁷ *Id.*

⁸ *Id.* at 591.

in order for it to be enforced.⁹ The Court expressed concerns that if the Amendment were self-executing, other constitutional issues may arise.¹⁰ In particular, the Court was concerned that a self-executing provision would give rise to Equal Protection and Due Process issues arising under the Fourteenth Amendment of the U.S. Constitution, and would affect the ability of people to enjoy the use of their private property without being challenged under the Environmental Rights Amendment.¹¹

B. *Payne v. Kassab* (1973)

In *Payne v. Kassab* (hereinafter “*Payne*”), the Commonwealth Court of Pennsylvania announced the first test associated with the Environmental Rights Amendment. In *Payne*, the plaintiffs, concerned citizens of the Wilkes-Barre area, invoked the Environmental Rights Amendment in opposition to a street widening project that would cut away a portion of a local park.¹² The plaintiffs asked the court to apply the Environmental Rights Amendment in hopes of enjoining the project to save the park.¹³

A three-part test regarding the Environmental Rights Amendment was derived from the case. The test read:

“1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? 2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? 3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?”¹⁴

⁹ *Id.* at 594-595.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Payne v. Kassab*, 312 A.2d 86, 88 (Pa. Cmwlth. 1973).

¹³ *Id.* at 93.

¹⁴ *Id.* at 94.

The court utilized the aforementioned test to balance environmental and social concerns in a realistic way rather than simply relying on a legal standard.¹⁵ The court found that the public benefit of the widened street outweighed any impact that the project would have on the environment.¹⁶ This three-part test made it difficult for anyone challenging the Environmental Rights Amendment to succeed, essentially giving the provision no teeth for several decades.

C. *Robinson Township v. Commonwealth* (2013)

The Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth* (hereinafter "*Robinson Township*") departed from the three-part test articulated in *Payne* and changed the way the courts interpreted the Environmental Rights Amendment. In *Robinson Township*, municipalities and individuals challenged provisions of Act 13 as unconstitutional under the Environmental Rights Amendment.¹⁷ Act 13 is a statute that regulates companies and people seeking to extract Pennsylvania's oil and gas, specifically Marcellus Shale, with "sweeping legislation."¹⁸ The Court found several of the provisions in Act 13 to be unconstitutional, affirming two that the Commonwealth Court had found to be unconstitutional and finding Section 3303 of Act 13 unconstitutional.¹⁹

In addressing the three-part test derived from *Payne*, the plurality reasoned that the test narrowed the Commonwealth's duties as a trustee in a way that conflicted with the Amendment.²⁰ The plurality discussed the self-executing nature of the Environmental Rights Amendment and found the three-part test unnecessarily assumed the need for legislative action in order for there to

¹⁵ *Id.*

¹⁶ *Id.* at 96.

¹⁷ *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 915 (Pa. 2013).

¹⁸ *Id.* at 913.

¹⁹ *Id.* at 978.

²⁰ *Id.* at 967.

be judicial relief for a claim.²¹ Without legislative action, the plurality found that the duties of trustees were being minimized by the judiciary.²² The plurality opinion revitalized the constitutional teeth given to the Environmental Rights Amendment that was limited by the *Payne* test for several decades.

The multi-part majority opinion is the largest facet of the *Robinson Township* case.²³ The plurality opinion, specifically Parts III and VI(C) for reference, are the portions that most heavily involve the Environmental Rights Amendment and discussion of the constitutionality of Article 13 under the Amendment.²⁴ Chief Justice Ronald Castille, who wrote the lead opinion, was joined by two other justices in the plurality opinion.²⁵ Justice Baer joined the plurality in all but the sections discussing the Environmental Rights Amendment and grounded his concurrence in substantive due process.²⁶

The plurality opinion began its interpretation with the plain language of the Amendment, noting the two separate rights it establishes.²⁷ The opinion noted that the Environmental Rights Amendment garners its meaning from the historical context behind the need for the Amendment in the degradation of state natural resources and the legislative history in its passing.²⁸ It noted that the Amendment received, “unanimous assent of both chambers during both the 1969-1970 and

²¹ *Id.*

²² *Id.*

²³ *Id.* at 913.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1001.

²⁷ *Id.* at 950.

²⁸ *Id.* at 959-960.

1971-1972 legislative sessions.”²⁹ The plurality also noted that voters in Pennsylvania ratified the Environmental Rights Amendment on a 4-1 margin with over 1 million votes in its favor.³⁰

D. *Pennsylvania Environmental Defense Fund v. Commonwealth* (2017)

In *Pennsylvania Environmental Defense Fund v. Commonwealth* (hereinafter “*PEDF II*”), the Pennsylvania Supreme Court adopted the plurality’s interpretation of the Environmental Rights Amendment in *Robinson Township*.³¹ *PEDF II* involved an issue of royalties under the Oil and Gas Lease Fund that accumulated from oil and gas leases in Pennsylvania State Forests and where that money was funneled.³² The money was redirected into the Commonwealth’s General Fund rather than towards conservation and natural resources, in turn, allowing the Commonwealth to determine what that money would be spent on.³³ In *PEDF II*, the Court largely adopted the same interpretation as constructed by the plurality in *Robinson Township*, focusing on the Environmental Rights Amendment as granting two separate rights: individual rights and the public trust.³⁴

The Court found that the Commonwealth, as a trustee of the Commonwealth’s natural resources, was obligated to structure oil and gas leases in a manner by which the royalties ultimately end up in a way consistent with the Environmental Rights Amendment.³⁵ The majority in *PEDF II* held that the sections of the lease pertaining to royalties had violated the Commonwealth’s fiduciary duty under the Environmental Rights Amendment, but noted that redirecting funds was not a violation of the Amendment.³⁶ However, funneling oil and gas royalties

²⁹ *Id.* at 961.

³⁰ *Id.* at 962.

³¹ *Pennsylvania Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017).

³² *Id.* at 919.

³³ *Id.*

³⁴ *Id.* at 931.

³⁵ *Id.* at 936.

³⁶ *Id.* at 938-939.

into something inherently non-trust related *does* violate the Amendment as it effectively impinges on the Commonwealth’s duties as a trustee.³⁷ Because the majority adopted the interpretation set forth in *Robinson Township*, a new precedent was set for interpreting the Environmental Rights Amendment.

E. *Pennsylvania Environmental Defense Fund v. Commonwealth* (2021)

In *PEDF v. Commonwealth* (hereinafter “*PEDF IV*”), the Pennsylvania Supreme Court returned to its decision in the *PEDF II*.³⁸ *PEDF IV* involved the diversion of royalties from oil and gas leases on state-owned public land into the Commonwealth’s General Fund rather than being used for conservation purposes.³⁹ This case reaffirmed *PEDF II* and further held that the money filtered into the Oil and Gas Lease Fund must not be put into the state’s general fund for uninhibited use.⁴⁰ The Court determined that the Commonwealth is entitled to generate income from assets derived from the trust, Pennsylvania’s natural resources, but that does not mean that the people of Pennsylvania are entitled to that money as distributed through the General Fund.⁴¹ Instead, the money must be used for “conservation and maintenance of the public resources.”⁴²

In the previous Commonwealth Court decision of this case, *PEDF III*, the Court decided that the royalties could be distributed through the General Fund to the beneficiaries of the trust: the current citizens of Pennsylvania as life tenants and the future citizens of Pennsylvania as remaindermen.⁴³ In *PEDF IV*, like in *PEDF II*, the Court relied on the principles that the trust

³⁷ *Id.*

³⁸ *Pennsylvania Env't Def. Found. v. Commonwealth*, 255 A.3d 289, 292 (Pa. 2021).

³⁹ *Id.*

⁴⁰ *Id.* at 314.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 293.

established by the Environmental Rights Amendment was subject to private trust law.⁴⁴ Private trust law would preclude the Commonwealth's unrestricted use of the royalties through the General Fund.⁴⁵ The Court in *PEDF IV* stated, "[a] remand is unnecessary... as the record is now sufficiently developed and based upon that record we hold that the incomes generated under these oil and gas leases must be returned to the corpus."⁴⁶ According to the Court, the decision seems to have a degree of finality.

II. The Rights Created by the Environmental Rights Amendment

Robinson Township, *PEDF II*, and *PEDF IV* discussed the rights assured by the Environmental Rights Amendment. This section will discuss the sets of rights the Environmental Rights Amendment assures, the involvement of trust law, and the cross-generational aspect of the Environmental Rights Amendment discussed in *PEDF IV*.

For the first time since the 1970s, Chief Justice Ronald Castille's lead opinion in *Robinson Township* invigorated the Environmental Rights Amendment by establishing that it granted two sets of rights.⁴⁷ *Robinson Township*, as was affirmed in *PEDF II* and *PEDF IV*, clarified that the Environmental Rights Amendment would prevent the Commonwealth from acting in a way that contravened the Amendment and moreover that the Amendment established a framework for Pennsylvania to develop and enforce environmental rights.⁴⁸ The plurality in *Robinson Township* highlighted the placement of the Environmental Rights Amendment in Article I of the

⁴⁴ *Id.* at 297.

⁴⁵ *Id.* at 313.

⁴⁶ *Id.* at 293.

⁴⁷ *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 941 (Pa. 2013).

⁴⁸ *Id.* at 950.

Pennsylvania Constitution, the Constitution's Declaration of Rights, which emphasizes the rights of the people of the state.⁴⁹

The first set of rights, contained within the first sentence of the Amendment, are the individual environmental rights of clean air, water, and various values placed on the environmental integrity of Pennsylvania.⁵⁰ The constitutional provision places limitations on the state to act in ways or condone actions that are in opposition to preserving its environmental integrity, as well as some historic and esthetic values.⁵¹ If another law were to “unreasonably impair” the individual rights granted by the Environmental Rights Amendment, then that law would be unconstitutional.⁵² The plurality in *Robinson Township* also stated that the failure to consider the environmental effect of something does not excuse the obligation the constitutional provision creates.⁵³ The first set of rights does not deal with the trust principles that the second and third sentences of the provision do.

The next two sentences of Amendment are the sections that deal, and sometimes struggle, with trust law.⁵⁴ The second sentence establishes the, “common ownership of the people, including future generations, of Pennsylvania's natural resources.”⁵⁵ The third sentence establishes the duties of Pennsylvania to the trust, the natural resources of the state.⁵⁶ The Commonwealth is the overarching trustee.⁵⁷ Not every branch of government in the Commonwealth is a trustee, but “the intent of the provision is to permit checks and balances of government to operate for the benefit of

⁴⁹ *Id.* at 948.

⁵⁰ *Id.* at 951.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 952.

⁵⁴ *Id.*

⁵⁵ *Id.* at 954.

⁵⁶ *Id.* at 956.

⁵⁷ *Id.* at 956-957.

the people in order to accomplish the purposes of the trust.”⁵⁸ This would include a local government.⁵⁹ As the trustee, the Commonwealth is obligated to comply with the corpus or standards provided by the trust.⁶⁰ In *Robinson Township*, this fiduciary duty includes the duty to act with “prudence, loyalty, and impartiality,” with regard to any actions taken which relate to the public natural resources trust.⁶¹ The duty to act with prudence encompasses the trustee’s duty to use the ordinary skill and care of a reasonably, prudent person.⁶² The duty to act with loyalty includes acting with unbiased loyalty to the corpus of the trust and to the benefit of the beneficiary.⁶³ The duty to act with impartiality includes the duty to act equally and with absolute fairness in the execution of any duties.⁶⁴ As the trustee, the Commonwealth is responsible for upholding its duties to the beneficiary of the trust, the people.⁶⁵

PEDF II adopted *Robinson Township’s* interpretation of the Environmental Rights Amendment, including the private trust fiduciary duty component.⁶⁶ The use of private trust language prompted now Chief Justice Baer to concur-in-part and dissent from the primary holding of the case on the basis that the royalties derived from the oil and gas leases were not part of the “trust corpus” because the Amendment should not include private trust principles.⁶⁷ Chief Justice Baer’s analysis of the trust language reflected back upon the original drafting of the Environmental Rights Amendment by Representative Franklin Kury, Duquesne University Professor Robert Broughton, and its legislative history that indicated the second and third sentences to be of public

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 957.

⁶¹ *Id.*

⁶² Restatement (Second) of Trusts § 174 (1959).

⁶³ Restatement (Second) of Trusts § 170 (1959).

⁶⁴ Restatement (Second) of Trusts § 232 (1959).

⁶⁵ *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 957 (Pa. 2013).

⁶⁶ *Pennsylvania Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017).

⁶⁷ *Id.* at 940.

trust nature.⁶⁸ Chief Justice Baer explained that while it is easy to rely on the familiarity of private trust, according to Professor Broughton, when the provision was invoked that it was intended to be a public trust with a “fiduciary-like construct.”⁶⁹ Public trust language would require the trustee to retain many of the same duties under the trust, but it would give the trustee more leniency to act in the interest of the beneficiary.⁷⁰ According to Chief Justice Baer, public trust language does not preclude the Commonwealth from leasing trust property or using royalties to benefit the beneficiaries as it sees fit.⁷¹

PEDF IV re-affirmed and expanded the Environmental Rights Amendment interpretation adopted in *PEDF II* including the private-trust-like interpretation. The Court noted that the text of the Environmental Rights Amendment does not limit which generation the provision is intended to benefit and thus should include current and future generations.⁷² The Court used the language “cross-generational dimension” that requires the Environmental Rights Amendment to be considered so that “current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA.”⁷³ This lengthens the amount of time that trustees must consider when taking an action that may negatively affect the environment. The Court indicated that the trustees “cannot prioritize the needs of the living over those yet to be born.”⁷⁴

Chief Justice Baer dissented in *PEDF IV* regarding the private trust language, which he also discussed in *PEDF II*. While agreeing with the basic premise of the decision, he reflected

⁶⁸ *Id.* at 943.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Pennsylvania Env't Def. Found. v. Commonwealth*, 255 A.3d 289, 309 (Pa. 2021).

⁷³ *Id.* at 310.

⁷⁴ *Id.*

upon the Court’s use of private trust language over public trust language once again.⁷⁵ Chief Justice Baer also noted in his dissent that, “[t]he Court properly...deemed [the Environmental Rights Amendment] self-executing.”⁷⁶ The self-executing nature of the Environmental Rights Amendment is consistently agreed upon in *Robinson Township, PEDF II*, and *PEDF IV*.

III. How will the Environmental Rights Amendment be Applied Going Forward?

Following *PEDF IV*, the Environmental Rights Amendment has been invoked in Commonwealth Court cases. These cases give an impression as to how the Environmental Rights Amendment will be applied going forward. Section A will introduce state agencies that are trustees under the Environment Rights Amendment. Sections B and C will discuss two cases that have proceeded through Pennsylvania’s Commonwealth Court since *PEDF IV*. Both *Pennsylvania Environmental Defense Fund v. Department of Conservation and Natural Resources* (hereinafter “*PEDF v. DCNR*”) and *Delaware Riverkeeper Network v. Department of Environmental Protection* (hereinafter “*Delaware Riverkeeper*”) are cases in which environmental organizations tried to hold Pennsylvania environmental agencies accountable under the Environmental Rights Amendment. Finally, section D will summarize the application of the Environmental Rights Amendment from these two cases and other issues that seem to arise.

A. Who are the Trustees of the Environmental Rights Amendment in Pennsylvania?

The Environmental Rights Amendment states that the Commonwealth is the trustee of the rights derived from the Amendment.⁷⁷ These trustees include the state agencies that manage the public land and natural resources in Pennsylvania, including the Department of Conservation and

⁷⁵ *Id.* at 317.

⁷⁶ *Id.*

⁷⁷ Pa. Const. art. I, § 27.

Natural Resources (hereinafter “DCNR”) and the Pennsylvania Game Commission (hereinafter “PGC”). The Department of Environment Protection (hereinafter “DEP”) is an environmental state agency in Pennsylvania that is responsible for enforcing environmental laws and regulation pertaining to the quality of the environment.

The DCNR was established in 1995 and the agency maintains 121 State Parks and 2.2 million acres of state forest land in Pennsylvania.⁷⁸ Act 18, the Conservation and Natural Resources Act, split what originally was the Department of Environmental Resources into the DCNR and the DEP.⁷⁹ The DEP retained the rulemaking powers of the Environmental Quality Board and the DCNR retained management of the State’s forests and parks.⁸⁰ Within the first chapter of Act 18, it states that it implements the DCNR’s duty within Article 1, Section 27, the Environmental Rights Amendment.⁸¹ The Act also includes DCNR’s mission statement,

“The primary mission of the Department of Conservation and Natural Resources will be to maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania’s ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.”⁸²

The PGC was established in 1895 after Pennsylvania resident, John Phillips, lobbied the state legislature for five years to better protect the state’s wildlife out of concern that the game to hunt was quickly disappearing and the public natural resources were being turned to agricultural

⁷⁸ Dep’t of Conservation & Nat. Res., *About DCNR*, <https://www.dcnr.pa.gov/about/Pages/default.aspx> (last visited November 19, 2021).

⁷⁹ 71 Pa. Stat. Ann. § 1340.101 (West).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

land.⁸³ The PGC manages and owns approximately 1.5 million acres of state game land or public land in Pennsylvania.⁸⁴ Title 34, the Game and Wildlife Code, highlights the establishment and qualifications behind the PGC along with relevant amendments.⁸⁵ Title 34 does not mention Article I, § 27, the Environmental Rights Amendment. However, within the most recent Board of Commissioners Policy Manual for the PGC, the board holds the PGC accountable under the Environmental Rights Amendment.⁸⁶ Title 58 regulates game and management of state game lands under PGC's control.⁸⁷ The current mission and vision on the PGC's website are:

Mission: "Manage and protect wildlife and their habitats while promoting hunting and trapping for current and future generations. Our mission summarizes the reason we exist as an agency and guides decisions we make."

Vision: "Recognized and respected as the leader in innovative and proactive stewardship of wildlife and their habitats. Our vision is what we hope to be. We are passionate about being a voice for Pennsylvania wildlife and inspired by the natural world in which we live."⁸⁸

The DEP was also established in 1995 and it retains rulemaking authority to promulgate, adopt, and enforce regulations pertaining to environmental quality in the state of Pennsylvania.⁸⁹ Like the DCNR, the DEP was created by Act 18 in Chapter 5.⁹⁰ Originally, Act 275 of 1970 created the Department of Environmental Resources, and the DEP retained some of the responsibilities

⁸³ J.T. Fleegle, *History of the Whitetail: Selective Memory*, Pa. Game Comm'n, <https://www.pgc.pa.gov/Wildlife/WildlifeSpecies/White-tailedDeer/LifeTimesoftheWhitetail/Pages/HistoryoftheWhitetail.aspx#:~:text=Phillips%20lobbied%20the%20legislature%20for,there%20would%20be%20more%20game> (last visited November 19, 2021).

⁸⁴ Pa. Game Comm'n, *Pennsylvania State Game Lands*, <https://www.pgc.pa.gov/HuntTrap/StateGameLands/Pages/default.aspx> (last visited November 19, 2021).

⁸⁵ 34 Pa. Stat. and Cons. Stat. Ann. § 101 (West).

⁸⁶ Pa. Game Comm'n, *Board of Commissioners Policy Manual*, <https://www.pgc.pa.gov/InformationResources/AboutUs/Commissioners/Documents/PGC%20Commissioners%20Policy%20Manual.pdf> (last visited November 19, 2021).

⁸⁷ Pa. Code § 131.1.

⁸⁸ Pa. Game Comm'n, *About Us*, <https://www.pgc.pa.gov/InformationResources/AboutUs/Pages/default.aspx> (last visited November 19, 2021).

⁸⁹ 71 Pa. Stat. Ann. § 1340.101 (West).

⁹⁰ *Id.*

that were not given to the DCNR when Act 18 split the agencies. The DEP’s mission is, “to protect Pennsylvania’s air, land, and water from pollution and to provide for the health and safety of its citizens through a cleaner environment. We will work as partners with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources.”⁹¹

Each of these agencies acknowledges, either in the agency’s founding documents or in the agency’s policy manuals, that it is bound under the Environmental Rights Amendment in the actions it takes. There is no other explicit legal authority that expressly states that the DCNR, the PGC, or the DEP are the trustees under the Environmental Rights Amendment. The only trustee that the Amendment names is the Commonwealth itself. However, the state acts through its agencies. Thus, when the Environmental Rights Amendment names the Commonwealth as the trustee, the Commonwealth is obligated to fulfill that duty through its agencies.

Pennsylvania has approximately 17 million acres of woods, 70% of which is owned by private landowners and the other 30% is public land owned by federal, state, or local governments or agencies.⁹² The federal government owns approximately 616,000 acres of public land in Pennsylvania between the United States National Park Service, the United States Forest Service, the United States Fish and Wildlife Service, and the United States Department of Defense.⁹³ The Federal Government is not a trustee under the Environmental Rights Amendment and has its own set of regulations in which it manages its public land. The largest managers of public land and natural resources in Pennsylvania are the DCNR and the PGC, who collectively own over 3.7

⁹¹ Dep’t Env’t Prot., *Mission Statement*, <https://www.dep.pa.gov/About/Pages/default.aspx> (last visited November 19, 2021).

⁹² Dep’t of Conservation & Nat. Res., *Forests and Trees*, <https://www.dcnr.pa.gov/Conservation/ForestsAndTrees/Pages/default.aspx> (last visited November 19, 2021).

⁹³ *Federal Land Policy in Pennsylvania*, BallotPedia, https://ballotpedia.org/Federal_land_policy_in_Pennsylvania (last visited November 19, 2021).

million acres of public land and a significant portion of the 30% of public land in the state. That makes both agencies accountability under the Environmental Rights Amendment important because what they decide to do with the land will affect generations to come. This section highlights that there is some legal authority that state agencies such as the PGC, the DEP, and the DCNR are trustees of the Environmental Rights Amendment, and each agency is obligated to fulfill any duties that arise in connection with the Amendment.

B. *PEDF v. Department of Conservation and Natural Resources* (2021)

One of the first cases following *PEDF IV* is *PEDF v. DCNR*. This case gives an impression of how the Commonwealth Court may enforce the Environmental Rights Amendment going forward. This case involved one of the agency trustees, the DCNR. In Pennsylvania's Commonwealth Court, PEDF challenged the DCNR's 2016 State Forest Resource Management Plan (hereinafter "SFRMP").⁹⁴ PEDF claimed that from some of the statements written in the 2016 SFRMP, the DCNR violated the Environmental Rights Amendment and their duty as a trustee.⁹⁵ According to PEDF, the DCNR violated the Environmental Rights Amendment by allowing the sale of public resources and the economic use surrounding resources derived from Pennsylvania's state forests, namely having to do with oil and gas leasing among other things.⁹⁶ In challenging the SFRMP and the DCNR, PEDF hoped the court would find that the certain statements within the document and actions taken by the agency violated the Environmental Rights Amendment and as

⁹⁴ *PEDF v. Dep't of Conservation & Nat. Res.*, No. 609 M.D. 2019, 2021 WL 3439573, at *7 (Pa. Commw. Ct. Aug. 6, 2021).

⁹⁵ *Id.* at *7.

⁹⁶ *Id.* at *5.

a trustee of public natural resources, the DCNR would be forced to comply with its duties under the Environmental Rights Amendment.⁹⁷

The DCNR has been completing SFRMPs for some time and it conveys the DCNR's management goals and decisions to the public, but the court highlights that it is not a "prescriptive manual."⁹⁸ There is not a regulation that requires the DCNR to adopt a resource management plan like SFRMP and there is not binding regulation that requires DCNR to follow what is written in the SFRMPs.⁹⁹ To this effect, the court held that the SFRMP is not a binding, regulatory document that the DCNR must follow and while it outlines the agency's intention, it is only policy.¹⁰⁰ The court also concluded that the decision was not ripe for review unless the PEDF challenges a particular action that violates the Environmental Rights Amendment under the SFRMP, rather than the statements made within the SFRMP.¹⁰¹ Finally, the court concluded that the PEDF does not have a right to mandamus relief, if that is what the PEDF sought, because the DCNR is not required by any regulation or legislation to put forth the SFRMP in the first place.¹⁰² What the case's result seems to convey is that the Environmental Rights Amendment is not implicated when a trustee is performing a discretionary duty rather than a mandatory one.

C. *Delaware Riverkeeper Network v. Department of Environmental Protection* (2021)

Another case that quickly followed the *PEDF IV* decision was *Delaware Riverkeeper*. This case involved another agency trustee, the DEP. This petition for review also took place in

⁹⁷ *Id.*

⁹⁸ *Id.* at *2.

⁹⁹ *Id.* at *13.

¹⁰⁰ *Id.* at *13.

¹⁰¹ *Id.* at *15-16.

¹⁰² *Id.* at *17.

Pennsylvania's Commonwealth Court.¹⁰³ The Delaware Riverkeeper Network sought injunctive and declaratory relief against the DEP for its neglect in cleaning up the Bishop Tube Hazardous Waste Site, violating laws such as the Clean Streams Law, the Hazardous Sites Cleanup Act (HSCA), and the Environmental Rights Amendment.¹⁰⁴ The site was leaching hazardous substances including trichloroethylene, volatile organic compounds, heavy metals, and other similar substances into the watershed, which affected surface and ground water, and it flows downstream into the greater Delaware River Basin which has a very high bar of protection because it is an exceptional value stream.¹⁰⁵

After the first discovery of the contamination in the 1970-1980s by the DEP's predecessor, the Department of Environmental Resources, the DEP tried to resolve the issue at Bishop Tube Hazardous Waste Site by conducting studies on the contaminants and installing water treatment systems, putting a fence around the area to keep people out, and plugging leaking pipes.¹⁰⁶ Delaware Riverkeeper Network challenged that the efforts by the DEP were insufficient and that the continued pollution put the surrounding community at a significant public health and environmental risk.¹⁰⁷ The DEP contended that it had been putting forth efforts towards the site, albeit slowly, and by doing so it had fulfilled its duties under environmental laws including the duty to act with prudence under the Environmental Rights Amendment.¹⁰⁸ The final sentence of the opinion before the conclusion includes, "the resolution of whether DEP has violated these environmental laws must wait until after a trial on the merits of Riverkeeper's Petition and a

¹⁰³ *Delaware Riverkeeper Network v. Pennsylvania Dep't of Env't Prot.*, No. 525 M.D. 2017, 2021 WL 3354898, *1 (Pa. Commw. Ct. Aug. 3, 2021).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *3.

¹⁰⁸ *Id.* at *5.

consideration of what mandatory, rather than discretionary, duties those laws impose on DEP.”¹⁰⁹ Again, note the emphasis on mandatory duties, rather than discretionary duties, in instances where the court will find that the Environmental Rights Amendment has been implicated.

In both cases, the court consistently held that in order for the Environmental Rights Amendment to be implicated, the duty must be a mandatory duty rather than discretionary one in order to hold trustees accountable for their actions.

D. A Summary of the Current Application of the Environmental Rights Amendment and Lasting Questions Regarding How the Amendment will be Applied Going Forward

The claim in *PEDF v. DCNR* was not ripe for review without challenging a particular action or statement made by the SFRMP. The holding in *PEDF v. DCNR* highlights a common theme in the application of the Environmental Rights Amendment. The court thus far has required there to be a mandatory legislative authority present, like a regulation, in order to deem something violative of the Environmental Rights Amendment. In *PEDF v. DCNR*, there was no regulation requiring the DCNR to make SFRMPs or to follow what the SFRMPs said, and therefore the Court did not think it had the authority to decide on whether these statements conflicted with the DCNR’s duties under the Environmental Rights Amendment. Both of these 2021 Commonwealth Court decisions seem to state that the Environmental Rights Amendment does not apply when there is a discretionary, nonbinding action or statement. This may only be an issue in a fraction of Environmental Rights Amendment cases since the Amendment may still be enforced without a statute when there is a cause of action. However, when a stage agency is responsible for managing

¹⁰⁹ *Id.* at *7.

something like the state forests, one would hope that they should be held responsible to perform both discretionary and mandatory duties.

If *PEDF IV* reaffirmed *PEDF II* and expanded upon the application of the Environmental Rights Amendment, accentuating that it was a self-executing constitutional provision that ensured a cross-generational application, then it would seem that there is a broader authority to apply the provision to agency actions. Black's Law Dictionary defines self-executing as, "effective immediately without the need of any type of implementing action."¹¹⁰ If the Environmental Rights Amendment is a self-executing authority, then why does there need to be some sort of mandatory or regulatory requirement for the court to enforce the constitutional provision? To only challenge a cause of action, like an ill-advised timber harvest, seems like a step too late. If an agency has put a plan that would seem to otherwise violate their duties under the Environmental Rights Amendment into a discretionary document, perhaps that plan should be able to be challenged before its implemented. Creating an extra step, like some sort of regulatory or legislative authority, only delays the ability to hold the agency accountable.

Administrative agencies are often given broad authority to decide what actions they need to take in order to accomplish their goals. Agencies are given this broad authority because they are often filled with individuals with the necessary expertise to accomplish the goals of the agency. With such broad authority, there is also the likelihood that an agency may be involved in something unfavorable. For example, if an agency in Pennsylvania has a plan to lease an abundance of their land for oil and gas, what authority is there to stop the agency if this plan is listed in a discretionary document? One would think that this is exactly the type of situation that the Environmental Rights

¹¹⁰ SELF-EXECUTING, Black's Law Dictionary (11th ed. 2019).

Amendment was intended to control. However, if the two Commonwealth Court cases from 2021 are any indication, there must be some kind of specific authority to stop them other than the Environmental Rights Amendment.

Something else that is notable in the application of the Environmental Rights Amendment may be the court in which the decisions were made. Both 2021 cases, *PEDF v. DCNR* and *Delaware Riverkeeper*, were decided in Pennsylvania's Commonwealth Court. Pennsylvania's Commonwealth Court is the same court that established the three-part test in *Payne* that limited the Environmental Right Amendment for decades. *PEDF III* was also decided in the Commonwealth Court. The holding in *PEDF III*, that was ultimately kicked back up to Pennsylvania's Supreme Court, was that the redirection of funds from the Lease Fund to the state's General Fund was not unconstitutional and obligated the funds to be used toward the corpus of the trust under the Environmental Rights Amendment.¹¹¹

There seems to be a general disconnect between Pennsylvania's Commonwealth Court decisions and the Pennsylvania Supreme Court's decisions. The Commonwealth Court has consistently limited the Environmental Rights Amendment's application, while the Supreme Court has produced some of the most landmark decisions in favor of environmental law in the state. The Commonwealth Court tends to give less authority to the Amendment and while it may acknowledge the constitutional provision, it does not see it as an explicit authority giving rise to a right-to-relief without another legislative authority present. The Pennsylvania Supreme Court tends to interpret the Environmental Rights Amendment broadly, giving it more authority to be self-executing without any kind of express regulation. If the two Commonwealth Court decisions

¹¹¹ *Pennsylvania Env't Def. Found. v. Commonwealth*, 214 A.3d 748, 774 (Pa. Commw. Ct. 2019), rev'd, 255 A.3d 289 (Pa. 2021).

from 2021 are appealed to the Supreme Court of Pennsylvania, it would be interesting to see if the Supreme Court would give the Environmental Rights Amendment more force.

There is also the cross-generational aspect of the Environmental Rights Amendment that is raised in *PEDF IV*. This creates an obligation by environmental state agencies in Pennsylvania to consider the effect of their management on a more long-term scale. For example, in *Delaware Riverkeeper*, the DEP seemed to slowly, but steadily, work on mitigating the hazardous substances that were leaching from the site. However, that slow effort exacerbated the problem as those hazardous substances ran downstream into even larger waterways, creating an even larger problem to clean up. If the intent behind the Environmental Rights Amendment is to prevent long-term detriment to the environment, by allowing an issue to go that long and progress into a larger issue, the likelihood of detriment to more of the state and more of the beneficiaries of the trust increases. A similar problem would occur if the DEP were to have approached the issue with a more short-term cure, without fixing the actual problem. For example, say the DEP had found a way to temporarily contain the substances at the hazardous waste site in *Delaware Riverkeeper* in order for them to not leach into the waterways. However, if the DEP left the actual cause of the hazardous substances there, without any solution on how to remove them, what implication does that have on future generations?

There are plenty of similar examples that already exist in Pennsylvania's waterways today. A significant portion of Pennsylvania's waterways are affected by acid mine drainage (hereinafter "AMD") leftover from the coal mining industry. When the coal industry disintegrated, mines were abandoned, causing the impacts of AMD and the orange water seen across Pennsylvania today. One of the ways to mitigate AMD is with active or passive treatment systems. It is fairly easy for some of these systems to break down. What if there is a treatment system, introduced by a state

agency, that breaks down located within or near the Pennsylvania Wilds, a relatively undisturbed forested region in northern Pennsylvania, left unchecked or forgotten? Any short-term positive impact that treatment system had would not benefit future generations unless it is continuously checked and maintained. This example would not adequately address the cross-generational need prescribed by the Environmental Rights Amendment.

By applying the cross-generational aspect of the Environmental Rights Amendment to something like a mitigation plan, it seems like that would magnify the importance for a quick and efficient response to environmental hazards. The cross-generational aspect creates a larger scope for each trustee to consider before taking an action and it makes a trustee's plan to address something like an environmental hazard much more complicated. The analysis and environmental consideration would need to be far looking and include more scientific data for the best practices possible. This likely requires each trustee to give more time and money to any mitigation project. The Environmental Rights Amendment lacks any specific thresholds. Without something like a scientific basis for best management practices, it is difficult to require an agency implementing a project to stay within specific confines that do not violate the Environmental Rights Amendment.

The provision gives any trustee the broad discretion to decide what that threshold may look like, and it gives the court the authority to decide what a reasonable expectation may be. Besides the numerous existing state environmental statutes and regulations, the Commonwealth Court is correct in that there is no mandatory legislation or regulation that provides any kind of background or standard in which to hold a trustee accountable. Any plan that a state agency would provide to address a problem like an AMD system, unless mandated, would likely not be enforced by the court. Consequently, the issue remains of how to go about requiring a trustee, like an

environmental agency, to provide a cross-generational approach to environmental management, including a means for the court to enforce that duty without a mandate.

IV. Proposal of a Pennsylvania Planning Rule Mandating Land Management Plans

While only addressing a fraction of what the Environmental Rights Amendment concerns, by requiring environmental state agencies in Pennsylvania to provide some sort of land or natural resource management plan would provide some threshold for the courts to refer to when making decisions regarding each agency's duty as a trustee. This proposed management plan would address only the land and natural resource management and not the wide breadth of other Environmental Rights Amendment related duties. This section discusses the 2012 Planning Rule, which is implemented pursuant to the National Forest Management Act of 1976 (hereinafter "NFMA"), and how something with a similar framework to the 2012 Planning Rule could be used to construct a Pennsylvania Planning Rule that mandates land management plans on state-owned public land.

Admittedly, it would be difficult to provide any kind of quantitative threshold as to what action a trustee takes that would violate the Environmental Rights Amendment. By providing a legislative enactment that requires trustees that manage state public land to provide a management plan, some of their duties under the Environmental Rights Amendment could be satisfied. A management plan that thoughtfully considers cross-generational environmental aspects of management on public land would satisfy the need to conserve the natural resources in the state on a more long-term scale.

The NFMA is a federal law governing the United States Forest Service's (hereinafter "USFS") management of national forests, including an interdisciplinary approach to conservation

and resource management that aids in both conservation and in utilizing the resources that are available on the land.¹¹² The NFMA provides the regulatory requirements that federal agencies must follow in order to comply with proper management plans.¹¹³ Throughout the executive administration turnover, different plans for the management of federal forest lands have been published. Currently, the USFS is managing their land under the 2012 Planning Rule.¹¹⁴ The 2012 Planning Rule provides a management and development plan for forests and guides the management plan based on the type of use, including harvesting, preservation, or recreational use.¹¹⁵ The plans are holistic in the sense that they include plans for multiple-use and include sections in the plan for not only the resources, but the wildlife and specific issues that the particular forest may be exposed to.¹¹⁶ The plans are reworked every 15 years to adapt to any foreseeable changes in management in order to conserve the forests in longevity.¹¹⁷

The 2012 Planning Rule was authorized under the Obama Administration after a rather tumultuous history of prior forest plans and forest plan amendments that were struck down in the court system.¹¹⁸ The Planning Rule was collaborative.¹¹⁹ Many stakeholders came together to refine this version of the Planning Rule in order to accommodate environmentalist groups, individuals, those who profited and relied on resource harvesting, scientists, etc.¹²⁰ A 21-member

¹¹² 16 U.S.C.A. § 1601 (West).

¹¹³ Susan Jane M. Brown and Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, https://www.cfc.umt.edu/bolle/files/Brown_Nie_NR_E_2019.pdf (last visited November 22, 2021).

¹¹⁴ 36 C.F.R. § 219.1.

¹¹⁵ *The 2012 Planning Rule*, United States Forest Service, <https://storymaps.arcgis.com/stories/dce6a7782db042689016f5bdd32c565a> (last visited 12/15/2021).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Susan Jane M. Brown and Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, https://www.cfc.umt.edu/bolle/files/Brown_Nie_NR_E_2019.pdf (last visited November 22, 2021).

¹¹⁹ *Id.*

¹²⁰ *Id.*

Federal Advisory Committee was formed in order to represent varying interests in how the forest is used.¹²¹ The Trump Administration ended the Federal Advisory Committee.¹²² Another highlight of the 2012 Planning Rule was the continuance of multiple-use standards, sustainability, and the use of best available scientific information.¹²³ The planning framework under the 2012 Planning Rule includes continual assessment of the forest areas, the process to amend or revise plans, and the continual monitoring of the forest areas.¹²⁴ The 2012 Planning Rule was a win-win for a multitude of user groups that relied on the forests for research, economic value, or recreation.

To comply with the Environmental Rights Amendment's obligation of natural resource conservation, perhaps a similar planning mechanism could be established in Pennsylvania. In an effort to conserve clean air, water, and other natural values of the environment cross-generationally, Pennsylvania needs a regulatory plan similar to that of the 2012 Planning Rule to govern land management and conservation. As stated in *PEDF v. DCNR*, the DCNR has been creating SFRMPs for decades, but there is no state regulation that requires the DCNR to write the SFRMPs or to follow the management plans laid out in the SFRMPs.¹²⁵ For the courts to hold trustees of the Environmental Rights Amendment, like the DCNR and the PGC, accountable for how their public land is used, perhaps Pennsylvania needs to create a regulatory document like the 2012 Planning Rule to guide such agencies on how state forests and state game lands are to be managed. A Pennsylvania Planning Rule would require the agencies to continually assess and monitor the lands and have a plan for how the lands can be used. The plan, like the 2012 Planning

¹²¹ *Id.*

¹²² *Id.*

¹²³ Susan Jane M. Brown and Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, https://www.cfc.umt.edu/bolle/files/Brown_Nie_NR_E_2019.pdf (last visited November 22, 2021).

¹²⁴ 36 C.F.R. § 219.5.

¹²⁵ *PEDF v. Dep't of Conservation & Nat. Res.*, No. 609 M.D. 2019, 2021 WL 3439573, at *7 (Pa. Commw. Ct. Aug. 6, 2021).

Rule, would not preclude a multiple-use scheme, and would allow resource extraction, like timber harvesting, to remain. The Pennsylvania Planning Rule would include aspects of sustainability and the best science available to distinguish limitations on extraction and best management practices for the particular land.

Unlike the federal forest lands addressed by the 2012 Planning Rule, Pennsylvania has more diverse natural resources. Therefore, the science behind the management of each resource would be different. However, the key element of a Pennsylvania Planning Rule is the requirement of a management plan for the particular land or resource in question. For example, the PGC often manages state game lands for specific game. A Pennsylvania Planning Rule would require the PGC to submit a management plan for the state game land that includes conservation goals, management for any resources or biodiversity that could be affected by a management plan for that specific area, what the intended uses of the land are, and any foreseeable issues with the land in the agency's pursuit to conserve its natural integrity. The plan would have a natural timeline, similar to that of the 2012 Planning Rule, of a decade or so which would give the agency time to monitor and assess any changes in the land and submit any necessary amendments. Like in *PEDF v. DCNR*, if there is nothing requiring the DCNR to manage their land, then it is easy to leave their duties as a trustee under the Environmental Rights Amendment ambiguous and discretionary. By requiring a management plan for Pennsylvania's natural resources, a trustee's need to think cross-generationally in their management practices under the Environmental Rights Amendment would be better addressed.

An interdisciplinary approach to land management would be equally as beneficial as it was in establishing the 2012 Planning Rule. The 2012 Planning Rule was received well by user groups and interested parties alike, but much like most proposed regulations, it was subject to challenges.

There are many different user groups in Pennsylvania that maintain a specific interest in how state public land is used. For example, there are people in Pennsylvania who make their livelihoods off of timber harvesting. There are also environmental groups, institutions that use public land in the state for research, and outdoor recreators. There are also groups that hope to modernize the use of Pennsylvania public lands by allowing ATV's or other off-road vehicles in state parks and on state game lands. By combining the diversity of user groups in Pennsylvania, a similar Advisory Committee could be formed to create a comprehensive land management regulatory scheme. This Advisory Committee could come together to share individualized knowledge and information and set limitations on things like the extraction of natural resources or to set parameters on for where off-road vehicles can be used.

Much like the executive turnovers that affected the federal Planning Rule, a Pennsylvania Planning Rule would likely experience changes during an administrative changeover, like a gubernatorial turnover. The details of the Planning Rule still matter, but the ultimate goal of the Rule would be to require trustees of the state's public resources to have a management plan in order to satisfy their duties under the Environmental Rights Amendment. If an administrative changeover affected said requirement, then the Commonwealth would likely be subject to a constitutional challenge in the judicial system. The courts could use key elements derived from the Pennsylvania Planning Rule as a barometer to fulfill the requirements of the Environmental Rights Amendment. Like the NFMA, the management plan would need to satisfy federal laws, such as the Endangered Species Act. While it may seem that a Pennsylvania Planning Rule would be an enormous effort requiring a lot of money, time, and resources, the DCNR and the PGC already provide many of their own land management plans, like the SFRMPs or specific game management plans. As long as these existing plans include multiple-use land management

principles and the best science available, they are likely already in compliance. Like the 2012 Planning Rule, the Pennsylvania Planning Rule would also provide the framework for an amendment if an agency would need to alter a plan to adapt to things like climate change. Again, something like the Pennsylvania Planning Rule would only aid one small facet of issues falling under the Environmental Rights Amendment.

V. Conclusion

How the Environmental Rights Amendment is applied in the Pennsylvania Commonwealth Court remains a challenge. While the Supreme Court of Pennsylvania has held that the Environmental Rights Amendment is self-executing in *PEDF II* and *PEDF IV*, the Commonwealth Court seems to seek a more definitive mandatory and regulatory scheme in order to enforce discretionary tasks under the Amendment on to trustees. A Pennsylvania Planning Rule requiring state agencies that are trustees under the Environmental Rights Amendment to maintain a land management plan would fulfill a greater need for agency transparency in their plans to maintain state public land like state forests, state parks, and state game lands with cross-generation conservation in mind. A Pennsylvania Planning Rule would create clearer boundaries in which state environmental agencies can operate in order to satisfy their duties under the Environmental Rights Amendment.