

Can the Environmental Rights Amendment Protect Pennsylvanians From EPA Cuts?

By **Caleb J. Holmes** | March 8, 2018

President Donald J. Trump and his administration have focused on the EPA during his time in office, particularly in regards to its funding, and its regulations. The president has taken several high-profile steps in addressing climate change, including pulling the United States out of the Paris climate accord and proposing the repeal of the Clean Power Plan. The Trump administration also reversed the decision on the Dakota Access Pipeline, allowing it to move forward. And last month, the Trump administration released its proposed budget for 2019, which includes significant cuts to EPA's budget, and makes significant cuts to state grants.

These cuts and regulatory rollbacks are of particular importance to Pennsylvanians. The EPA's National Center for Environmental Assessment recently released a study finding disproportionate exposure to air pollutants for those in poverty, as well as for minority populations. These populations may now be at greater risk. A review of proposed cuts highlights the question of whether Article I, Section 27 of the Pennsylvania Constitution—the “Environmental Rights Amendment”—can help protect Pennsylvanians, especially at-risk communities, from the environmental impacts of a shrinking EPA and federal regulatory rollbacks.

Based on the Trump administration's proposed budget, the EPA moving forward will be smaller and more focused on Superfund. President Trump transmitted a 2019 proposed budget to Congress on Feb. 12, which proposed a 26 percent reduction for EPA. Notably, a last-minute addendum allotted an additional \$327 million to the Superfund program. This is of concern because the resources that will now be allocated to the Superfund program comes at the expense of many programs that either by intent or by effect would protect at-risk communities from disparate impact.

EPA Administrator Scott Pruitt has made it clear that his focus will be the Superfund program, promising to get hands-on. As part of that focus, Administrator Pruitt created the Superfund Task Force, which made 42 recommendations and led to the creation of a top priority list of Superfund sites in which Administrator Pruitt will have direct involvement. Pruitt's goals are expediting cleanup and remediation, re-invigorating responsible party cleanup and reuse, encouraging

private investment, promoting redevelopment and community revitalization, and engaging partners and stakeholders.

Administrator Pruitt's focus on cleaning up Superfund sites more expeditiously and returning them to productive use is encouraging, as the benefits of more sites being cleaned up can be felt by all communities, not just those parties investing in their reuse. However, some hurdles still remain. For one, despite the focus on the Superfund program, the EPA has a shrinking staff and a shrinking budget. But even assuming that the EPA has sufficient resources to carry out its Superfund goals, accelerating cleanups may mean cutting corners when it comes to human health and the environment. For sites with remedies exceeding \$50 million, Administrator Pruitt intends to take a hands-on approach to remedy selection. Focusing on speedy cleanups may mean human health and the environment—and in turn at-risk communities—will suffer.

For Pennsylvanians, the Trump administration's budget will have direct consequences for the commonwealth's environmental programs and initiatives. The budget cuts impact state and tribal assistant grants (STAGs) significantly, and makes cuts to grants for air quality management, pollution control, wetlands program development and many more.

So if Pennsylvanians are facing impacts to their environmental resources, how can the Environmental Rights Amendment help? If you are reading about the Environmental Rights Amendment for the first time, it was adopted in 1971 and provides:

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

A 1973 decision, *Payne v. Kassab*, 11 Pa. Comwlth. 14, 313 A.3d 86 (1973), created the test to determine the constitutionality of commonwealth action. That test was found to be inadequate, first by a plurality of the Pennsylvania Supreme Court, see *Robinson Township v. Public Utilities Commission*, 83 A.3d 901 (Pa. 2013) then by a majority in *Pennsylvania Environmental Defense Foundation v. Wolf*, 161 A.3d 911 (Pa. 2017) (*PEDF*). Those decisions have reinvigorated the Environmental Rights Amendment, or at least reinvigorated debate as to what the Environmental Rights Amendment means. *PEDF* explained that Section 27 grants two rights. Under the first sentence, the government may not “unreasonably impair” citizens' rights to the listed resources.

Under the second sentence, a trust is created for all public natural resources. The commonwealth is the trustee on behalf of “all the people,” including future generations.

Jurisprudence concerning the Environmental Rights Amendment has followed *PEDF*, and has been analyzed, including in these pages. Mostly recently, in *Logan v. Department of Environmental Protection*, EHB Docket No. 2016-091-L (adjudication issued Jan. 29, 2018), the board dismissed an appeal challenging DEP’s issuance of an air quality plan approval for construction of a soybean solvent extraction plant. After concluding that DEP did not violate the Air Pollution Control Act or any applicable regulations in issuing the plan approval, the board took up the appellants’ Section 27 argument, which the board said “essentially boils down to a contention that, because the department’s approval was allegedly contrary to the Air Pollution Control Act and its regulations, the department’s actions necessarily violated the Constitution.” The board found this to be an argument premised on the now-defunct *Payne v. Kassab* test. Post-*PEDF*, the board considers whether the DEP considered environmental effects, and whether the DEP’s actions “cause unreasonable degradation or deterioration of the air and water and other environmental interests enumerated in [Article I, Section 27]. See *Center for Coalfield Justice v. Department of Environmental Protection*, EHB Docket No. 2014-072-B (Aug. 15, 2017). The board in *Logan* found that, because it had concluded that the DEP did not violate the Air Pollution Control Act or its regulations—and that was the basis for appellants’ Section 27 argument—the Section 27 argument failed.

So far, post-*PEDF* rulings have been focused on discrete state actions, like the example in *Logan*. Those challenges have been first-sentence challenges, that is, whether the commonwealth unreasonably impaired the rights enumerated in Section 27. Those challenges give citizens an opportunity to challenge projects that may have environmental justice implications. The DEP’s Office of Environmental Justice was created to ensure vulnerable communities are not unfairly impacted by the impacts of pollution. But while environmental justice has been a consideration of state decisions in the past, the reinvigoration of the Environmental Rights Amendment may give a stronger voice to those concerns, and a more consistent voice. While a state action may have met statutory and regulatory requirements, if its impact on an at-risk community is found to be unreasonable, a court may find a violation of Section 27.

During the Trump era, the state's obligations under Section 27 could conceivably grow. If federal regulations protective of the environment are rolled back, is it the commonwealth's duty, as trustee of Pennsylvania's natural resources, to act to fill in those gaps? The most obvious example is climate change. Should Pennsylvanians expect the commonwealth to fill those gaps on behalf of its present and future citizens?

The answer, for now, is that we do not know. Although there have been several cases following *PEDF* that have interpreted the commonwealth's obligations under the Environmental Rights Amendment, we do not yet understand what obligations the Commonwealth has, and what rights Pennsylvanians have to protect those rights. As actions taken on the national platform impact Pennsylvania's natural resources, and the rights under Section 27 held by every Pennsylvania citizen, you can expect to see courts face the question of how much power the Environmental Rights Amendment has to address these problems, and whether it will give a stronger voice to those Pennsylvanians most likely to suffer from the impacts of environmental pollutants and degradation.

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