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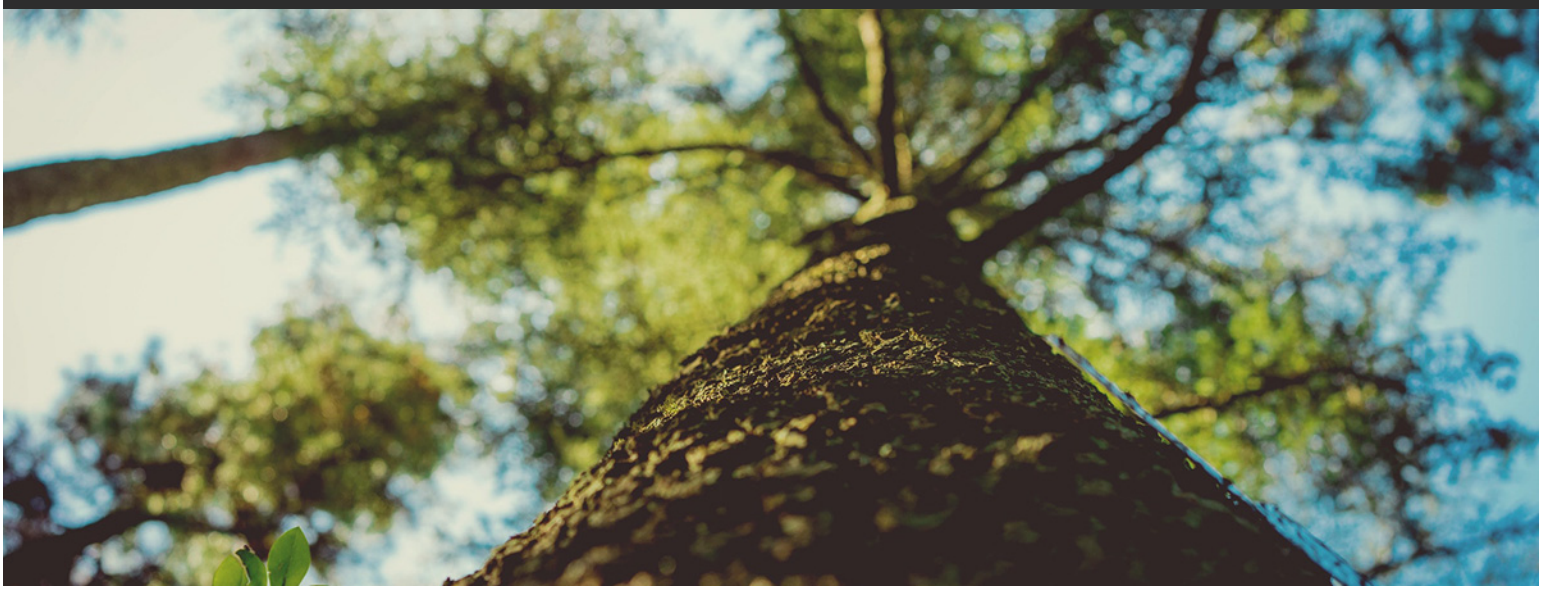
Identifying the Natural Resources Subject to the Environmental Rights Amendment



The Pennsylvania Supreme Court reversed the Commonwealth Court and held that all the amounts received by the commonwealth when it leased state lands for oil and gas development had to be appropriated to conservation and protection of public natural resources.

By David G. Mandelbaum | August 12, 2021 | The Legal Intelligencer

On July 21, the Pennsylvania Supreme Court revisited the Environmental Rights Amendment, Article I, Section 27, of the Pennsylvania Constitution when Pennsylvania *Environmental Defense Foundation v. Commonwealth* returned to the court after remand. The Supreme Court reversed the Commonwealth Court and held that all the amounts received by the commonwealth when it leased state lands for oil and gas development had to be appropriated to conservation and protection of public natural resources.

The disposition of the *PEDF* litigation may have troubling implications for development of the law under the ERA. The seven justices split into four opinions largely over whether and how to apply private trust principles to the proceeds of oil and gas leasing. Perhaps the problem is that the case identifies the public natural resource at issue as if it were a private asset, and then values it similarly.

As is familiar, the 1971 ERA provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all

the people, including generations yet to come. As trustee of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people.

The first cases arising under the amendment did not really address "clean air" or "pure water." For example, *Commonwealth v. National Gettysburg Battlefield Tower,* 311 A.2d 588 (Pa. 1973), addressed the impact on historical values at the Gettysburg battlefield of an observation tower on private land. After its first decade, the individual rights and limits on governmental power recognized by the ERA had become defined by the environmental statutes adopted by the legislature.

Chief Justice Ronald Castille's plurality opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), recognized that that is not how a constitution works. The legislature cannot by statute establish the standards for the constitutionality of legislation. Four years later, the court majority in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), followed his analysis. The first sentence of Section 27 creates a right to clean air, pure water and certain values of the environment. The second and third sentences create a trust, the corpus of which is Pennsylvania's public natural resources, the trustee is the commonwealth, and the beneficiaries are all the people.

PEDF reasoned that allowing extraction of oil and gas from under state lands entailed selling a public natural resource impressed with that trust, and that private trust law as it existed in 1971 would govern how the Commonwealth had to appropriate the proceeds of those oil and gas leases. The consideration for the leases has several components. Clearly, the royalties on the oil and gas production were compensation for the oil and gas. The remand involved the question whether prepaid rent, or "bonus," payments at the inception of the lease, delay rentals, and similar payments also were compensation for the oil and gas. Proceeds of the sale of a trust asset, reasoned the court, had to be returned to the corpus of the trust.

This reading of Section 27 constrains government, perhaps materially. The commonwealth cannot convey an interest in anything that can be characterized as a "public natural resource" without appropriating the proceeds of that sale for the purpose of "conserving and maintaining" other public natural resources. Thus, no disposition of any asset of the commonwealth that could be characterized as a natural resource—oil, gas, coal, limestone, groundwater, timber, a mansion with large trees, the median strip on a highway, wild deer, fish in a stream—can ever benefit the General Fund; all the proceeds must go to the Department of Conservation and Natural Resources or some other appropriate conservation agency.

None of the courts to have considered this case seem to have questioned that oil and gas under state lands is a "public natural resource" included in the corpus of the ERA trust. Oil and gas is a quintessential "natural resource." Oil and gas owned by the commonwealth would therefore be a "public natural resource."

However, note that oil and gas a mile under the surface do not provide any natural resource services enumerated in the first sentence of Section 27. They do not contribute to clean air, pure water, or any natural, scenic, historic and esthetic values of the environment. Extracting them only reduces air or water quality or degrades any of the enumerated values of the environment because oil and gas development adversely affects some *other* natural or environmental resource. The objection to oil and gas development is that the industrial activity in otherwise rural or agricultural areas poses threats to groundwater or surface water quality, surface habitats, or the like.

Now, just because the first sentence of Section 27 enumerates certain natural resource services or values to which individuals have a right does not mean that the only natural resources impressed with the trust of the second and third sentences. But if "public natural resources" in the second and third sentences refers only to natural resources to which the commonwealth has an ownership interest that it can sell, then the two parts of the ERA become almost entirely disjoint.

All the oil and gas underlying Pennsylvania are natural resources. Section 27 does not make that oil and gas the property of all the people. Only the "public" oil and gas is impressed with the Section 27 trust. The "public" oil and gas apparently is the oil and gas to which the commonwealth has legal title.

The focus on oil and gas in the recent Section 27 cases, though, has drawn attention to the value of the oil and gas as commodities. That is not their value as described in the first sentence of Section 27. Indeed, they probably have no value in that sense when they are in the ground.

If, instead, we understand "public natural resources" to be resources that provide the services enumerated in the first sentence, then the trust assets sold by the commonwealth when it entered into the oil and gas leases at issue in *PEDF* would have been the surface resources impacted by the right of the lessees to access their resources. One would then value the diminution in the value of the trust corpus from an oil and gas lease as the value of the loss of those first-sentence services. Oil and gas lessees conventionally pay the lessor for timber removed in order to access a well site. Read in this alternative way, the amount due to be returned to the trust corpus would have been the amount sufficient to compensate for all the surface impacts, not just the lost trees. But that amount might be far less than the value of the oil and gas; if it were not, then the lease probably would make no economic sense. It also might be zero if the oil and gas were accessed from neighboring private land.

Note that this reading might also better align the analysis of environmental impacts required by the first sentence of Section 27 according to *Robinson Township* with the trust obligations of the second and third sentences. It would key both to the same set of enumerated environmental services: clean air, pure water, and the natural, scenic, historic and esthetic values of the environment.

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