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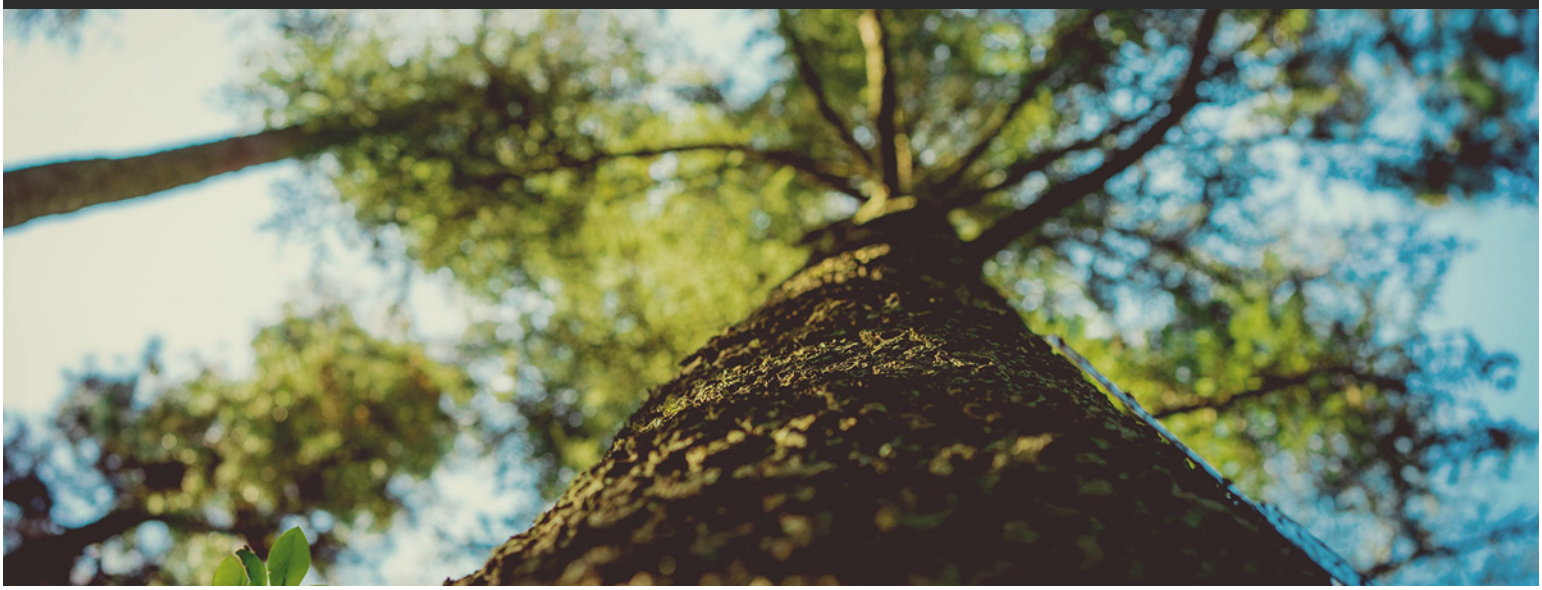
What Impact Review Does Pennsylvania's ERA Require?



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By David G. Mandelbaum | February 11, 2022 | The Legal Intelligencer

As is by now familiar, the Pennsylvania Constitution includes an Environmental Rights Amendment, Article I, Section 27. Because neither the General Assembly nor any administrative agency can definitively say what rights a constitutional provision confers, we must await elucidation from the courts. Last month, the Pennsylvania Commonwealth Court decided another in a series of cases applying the Environmental Rights Amendment to municipal land use decisions involving the oil and gas industry. See *Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board*, No. 579 C.D. 2020 (Pa. Commw. Ct. Jan. 24, 2022). That opinion may reflect some lack of judicial clarity with implications for ordinary government processes and therefore business.

For orientation, the first sentence of the ERA creates a right against the government: "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." The second and third sentences establish a public trust over the "public natural resources," which is not the issue here. That first sentence has implications for government action, including the grant of permits and approvals. That is the part of ERA jurisprudence that *Murrysville Watch Committee* addresses.

Nine years ago a plurality of the Pennsylvania Supreme Court breathed life into the ERA—which had been fairly moribund for the first 40 years since its adoption in 1971— when the Supreme Court decided *Robinson Township v. Pennsylvania Public Utilities Commission*, 83 A.3d 901 (Pa. 2013). That case had to do with the constitutionality of the Oil and Gas Amendments of 2012. Among other things that statute precluded local zoning from imposing anything but certain uniform requirements (setbacks, and so forth) on oil and gas activities, and called for oil and gas activities to be permitted in every zone. The Supreme Court plurality would have held that (a) all units of government must comply with the ERA, that is, they must act so as to afford "the people" their right to clean air, pure water, and environmental values; and (b) to do so, a municipality must have discretion to consider the particular environmental impacts of an activity in that municipality. Specifically,

The corollary of the people's Section 27 reservation of right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.

Because the Oil and Gas Act Amendments precluded municipalities from considering the environmental effects of their proposed zoning and land use ordinances as they applied to oil and gas activities, the *Robinson Township* plurality would have held those amendments unconstitutional; a fourth justice agreed, but on substantive due process grounds.

In *Murrysville Watch*, however, the Commonwealth Court upheld a zoning ordinance permitting oil and gas activities in the township for two reasons: the setback and other requirements imposed in Murrysville resembled those in other municipalities whose ordinances had previously been upheld, and the supervisors' primary reliance on the protectiveness of the DEP's regulations sufficed as a consideration of environmental effects. In reaching this outcome the Commonwealth Court relied on its own two prior opinions in *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677 (Pa. Cmwlth. 2018) (en banc), and *Protect PT v. Penn Township Zoning Hearing Board*, 220 A.3d 1174 (Pa. Cmwlth. 2019), which we have previously considered in this column.

With specific respect to the pre-action consideration of environmental effects, the Commonwealth Court wrote: "the municipality was not obligated to conduct a 'pre-action environmental impact analysis' and, in enacting an unconventional oil and gas well ordinance, a municipality need only demonstrate, through the ordinance's design or some other form of evidence, that it considered the citizens' rights under the ERA."

The practicality of this reasoning stands out. We ordinarily think a regulation that suffices for the purpose in one place ought to suffice in another, so an ordinance similar to another one already upheld ought to be upheld itself. Further, we cannot reasonably expect municipalities to do a better job of regulating environmental impacts than will the DEP, particularly if the impacts flow from a heavily regulated industry.

But that reasoning is in direct contradiction to the actual result in *Robinson Township*. There, uniform zoning restrictions were unconstitutional precisely because they were uniform. Moreover, municipalities could not be allowed to rely on environmental reviews by the DEP. Without expressing a view about which outcome is correct, inconsistent outcomes may create some uncertainty going forward.

One might say that the uncertainty focuses on how much pre-action environmental review a governmental agency must undertake, and whether judicial review of that exercise protects a substantive or procedural right. The cases seem to suggest that some review is required to assure that a governmental action does not unreasonably impair the constitutional rights protected by the first sentence. Environmental reviews can

be cursory or extraordinarily detailed. For example, decades of litigation and regulatory development have resulted in requirements that environmental impact statements under the National Environmental Policy Act consider a plenary set of impacts, resulting in reviews that take months or years and result in reports spanning hundreds of pages. Similarly, many New York practitioners have argued that the newly-enacted New York Environmental Rights Amendment will not disrupt state decision-making because the statutory procedures under the New York State Environmental Quality Review Act will meet constitutional muster and nothing different or additional will be required by the courts. But we do not have a universally applicable environmental review program in Pennsylvania, and the legislature cannot dictate what the constitution requires. We have to wait for court decisions to scope that out, and the courts are not being particularly clear.

When no statute or regulation specifically requires any formal analysis, *Murrysville Watch* seems to suggest that thinking about environmental impacts, even informally, is enough. Further, it seems to suggest that the question of whether whatever is done by the government sufficed will be reviewed deferentially.

Judging whether a governmental unit considered environmental impacts of a proposed action adequately probably turns at least somewhat on whether the environmental right protected by the first sentence of ERA is substantive or procedural. That is, we are used to thinking about NEPA environmental reviews as procedural obligations of decision-makers. They must look carefully at environmental impacts based upon a thorough review, but if they have an adequate report to analyze and actually think about it, then their decision to proceed or not to proceed is reviewed deferentially; courts will only overturn it if the decision is arbitrary or capricious.

On the other hand, if the ERA creates a substantive right—a right to a certain substantive level of environmental quality—the procedure used by the governmental decisionmaker is unlikely to be constitutionally significant. What matters is how much change in air or water quality or other environmental values a governmental action will entail. A substantive right begs the question how anyone knows what level of environmental quality the constitution—as opposed to a statute or a regulation—requires, and who would set it. Asking township supervisors to know when adopting a zoning ordinances seems like a tall order.

I had a law school professor long ago in the days of Shepardizing from books who used to say: "To see confusion clearly is truly to understand." The courts would serve us all by figuring out what they believe the ERA means, and then expressing it with internal consistency. Is it substantive or procedural? Is the pre-decisional review cursory or in-depth? Can one agency rely on another expert agency's review?

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