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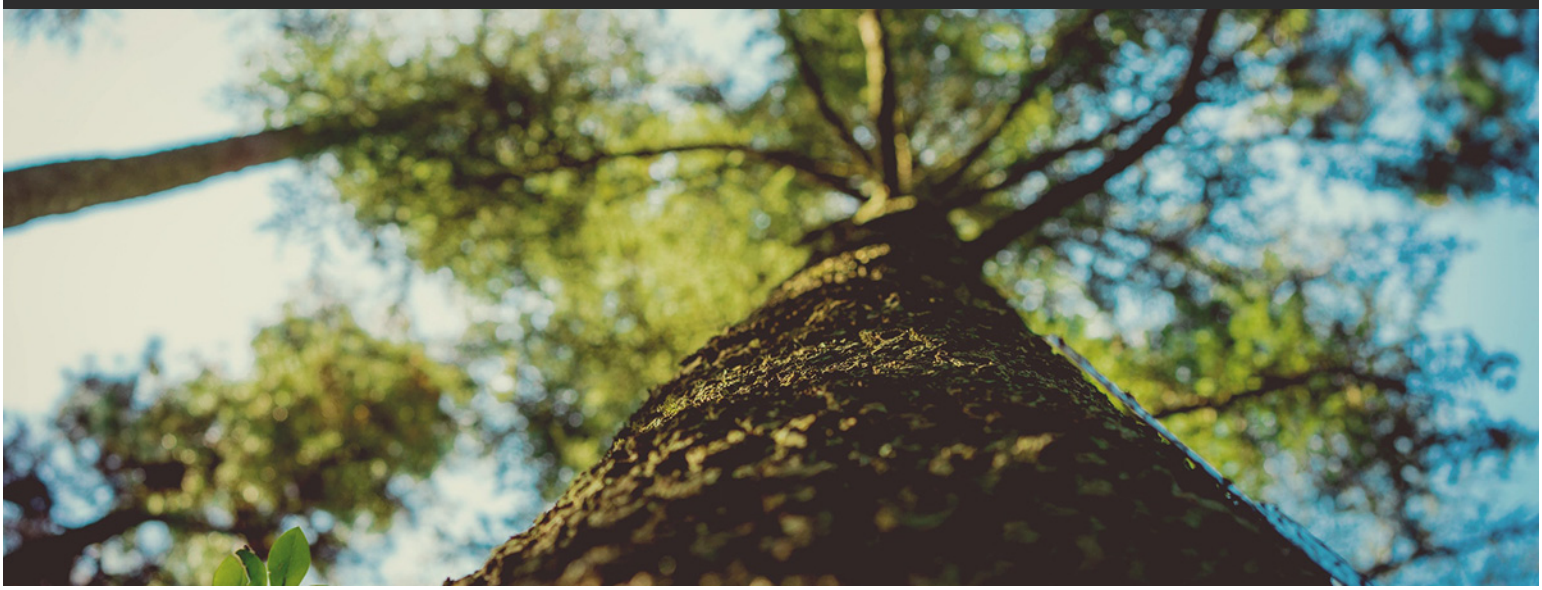
Procedure or Substance and Natural or Built Under the ERA



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By David G. Mandelbaum | June 16, 2022 | The Legal Intelligencer

The Environmental Rights Amendment to the Pennsylvania Constitution, Article I, Section 27, has become a feature of environmental litigation in our commonwealth over the nine years since a Pennsylvania Supreme Court plurality reanimated it in *Robinson Township v. Public Utilities Commission*, 83 A.3d 901 (Pa. 2013). In my February column I alluded to some analytical inconsistencies within the Pennsylvania appellate courts' post-*Robinson* opinions. This column seeks to sharpen up two large issues under the first sentence of Section 27, the one granting an environmental right. First, is that right substantive or procedural? Second, does the right apply to all environments, or just to "traditional environmental media?"

The first sentence of Section 27 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." The *Robinson Township* plurality read that sentence to impose an obligation on government: "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." That would suggest that the right is procedural.

Each person (or all the people) have a right to require a government agency taking an action to consider in advance the environmental effect of that action.

However, in its 2017 adoption of the *Robinson Township* plurality's analysis, the Supreme Court's majority said this: "The … right … contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." See *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017).

That language might suggest that the right protected by the first sentence of Section 27 has a substantive component. That is, there is some level of environmental effect that would impair the people's right to clean air, pure water and values of the environment unreasonably.

Assuming that were true, a substantive right might be absolute or relative. If one had a right to some absolute level of air or water quality, the constitution would prohibit government action that would allow environmental quality to fall away from that absolute level, and might also preclude governmental inaction—that is, it might mandate action—to achieve, or move toward, that absolute level.

The Pennsylvania Commonwealth Court appears hostile to that notion. See, e.g., *Delaware Riverkeeper Network v. Department of Environmental Protection (DEP)*, No. 525 M.D. 2017 (Pa. Commw. Ct. Aug. 3, 2021)(no summary judgment that the DEP must procure an enhanced cleanup under HSCA); *Delaware Riverkeeper Network v. Department of Environmental Protection*, 247 A.3d 1188 (Pa. Commw. Ct. 2021)(unreported), appeal denied, No. 38 MM 2021 (Pa. Sept. 9, 2021) (no constitutional obligation to adopt regulation of PFAS); *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016), aff'd mem., 158 A.3d 642 (Pa. 2017)(no constitutional obligation to adopt greenhouse gas regulatory scheme different from that established—or not—by existing statutes); but see *Gibraltar Rock v. DEP*, No. 500 C.D. 2020 (Pa. Commw. Ct. June 30, 2021), appeal granted, No. 441 MAL 2021 (Pa. Nov. 2, 2021)(the DEP's constitutional obligation required rescission of permits to avoid interference with HSCA remedy).

If there were an absolute level of quality to which one were constitutionally entitled, the courts are not clear on who would set that level. If you analogize environmental rights to other rights included in Article I (the Pennsylvania Bill of Rights), it would be the courts. No executive agency decides the constitutional minimum of due process or "efficient education." But that would require courts to determine whether the environmental quality existing at any given time and place met that minimum, presumably based upon expert testimony.

Alternatively, even if the first sentence right were substantive, it might be relative or directional. One might have a right to preclude the government from taking any action that would allow or cause too large a degradation of environmental quality from existing conditions. The courts have been clear that Section 27 does not impose a nondegradation obligation; government can permit some adverse environmental effects, provided they are not "undue" Again, the magnitude of "undue" would have to be determined. If the right is substantive, a nonarbitrary determination by the executive agency that effects are not undue cannot suffice. There would be an absolute level of degradation that counts as undue, and it would have to be set in each case by the courts.

Notice that if Section 27 sets an absolute right to no more than an undue degradation of environmental quality from current condition, that would imply that the constitution places a strong weight in all governmental decision-making in favor of current facilities, operations, discharges, and conditions. That

presents two potentially problematic corollaries. First, it would make change more difficult. Inhibiting change tends to reduce degradation from current conditions, but it does not really accelerate improvement. Energy transition, for example, becomes harder to do.

Second, this absolute-level-of-degradation reading of the first sentence right will keep degradation *where* it is currently. Clean areas would remain cleaner than dirty areas permanently. That seems contrary to the emphasis on achieving environmental justice.

But maybe the right is only procedural. That is, if the governmental agency appropriately considers environmental impacts of its actions, then it satisfies Section 27. This at times appears to be how the Commonwealth Court sees the first sentence right. Indeed, it appears to treat reliance by an agency (or municipality adopting or implementing land use regulation) on another's analysis of the same matter or a similar one. So maybe Section 27 is just NEPA-light. How that would assure clean air or pure water, is a little obscure.

And in all of this, the courts seem uncertain what water has to be pure, what air has to be clean, and which environment has to provide values. Most Pennsylvanians live and work in urban or suburban places. Do they have a constitutional right to a certain level of quality in the air, water, or other environmental media that they actually encounter? Is there a constitutional right to clean water from one's tap? Is there a constitutional right to air quality on a dairy farm or in a Philadelphia subway station? Does one have a right to street trees as well as state forests?

On this question the courts may be less hostile to expansion of Section 27's scope to include what otherwise would not be considered traditional environmental media. For example, in *Delaware Riverkeeper Network* the Commonwealth Court last year rejected the position that Section 27 required action on a petition for adoption of drinking water standards for PFAS, but *not* on the ground that Section 27 does not create a constitutional right to pure tap water as opposed to pure water "in the environment." Indeed, there may be a right to preserve the historic value of buildings. See *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993).

Because Section 27 is constitutional, all these questions have to be answered by litigation. There is no way to clarify what the first sentence means by statute, regulation or policy. Statutes and rules can be adopted with an express intention of satisfying Section 27, but only the courts can decide what the constitution mandates.

As in other contexts, a case-by-case standard—knowing it when you see it—creates a lot of uncertainty. But the first sentence of Section 27 applies to large projects, not to adult films. A "know it when you see it" nonstandard may have important economic and environmental policy implications. Standardless governmental decision-making is arguably the opposite of due process, also protected by Article I. Some analytical sharpness would help here.

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