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Is the Pa. High Court Deciding the Most Helpful Environmental Rights Amendment Cases?

The Supreme Court can only decide so many cases. If we are to have a constitutional environmental provision with relevance to the interaction of private activities with the government, Pennsylvania business, organizations, and their lawyers need some guidance on both parts of the ERA.

By David G. Mandelbaum | September 1, 2022 | The Legal Intelligencer

Earlier this month, the Pennsylvania Supreme Court issued another opinion in the long-running PEDF litigation about the public trust provisions of the Environmental Rights Amendment to the Pennsylvania Constitution. See *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 65 MAP 2020 (Pa. Aug. 5, 2022)(*PEDF VI*). PEDF challenged several years' appropriation of proceeds from oil and gas leasing under state forest and park land. There is a lot of money at stake. But are the issues posed here really the sorts of things that the courts have to resolve in order to help businesses, governments, and courts figure out what Article I, Section 27, of the Pennsylvania Constitution means in practice?

In this iteration of PEDF, the court held that proceeds of oil and gas leases could be allocated to the Department of Conservation and Natural Resources even though some would be used for DCNR's general operations and some would be used for DCNR purposes outside the Marcellus Shale region.

Further the majority held that legislation putting the General Assembly, rather than DCNR, in direct control over the fund was not facially unconstitutional because the statute directed consideration of the Environmental Rights Amendment obligations when appropriating the money. Similarly, commingling of lease proceeds with the Keystone Fund, which might not be impressed with the public trust, did not violate the ERA because an accounting could be kept.

To review, the ERA, adopted in 1971, is Section 27 of Article I, the declaration of rights. That is, the ERA establishes certain constitutional environmental rights of Pennsylvanians against the government and certain obligations of the government to Pennsylvanians. The provision remained fairly moribund until the Supreme Court plurality rejected prior jurisprudence and read the ERA to invalidate certain provisions of the Oil and Gas Act Amendments imposing, among other things, statewide uniform land use regulation of oil and gas activities in *Robinson Township v. Public Utililites Commission,* 83 A.3d 901 (Pa. 2013).

The ERA consists of three sentences. The first sets out a right to "clean air, pure water," and certain values of the environment. Other than *Robinson Township*, the Supreme Court has not really decided a first-sentence case in the last 10 years. Nevertheless, the court's majority opinion in *PEDF II,* 161 A.3d 911 (Pa. 2017) adopted the reasoning of the *Robinson Township* plurality, and thereby made that decision binding law, presumably about the first sentence as well as the second and third.

In the June column of this series, I raised some important open issues under that first sentence of the ERA—the one establishing the right to clean air and pure water. Is the right substantive or procedural? Does the right apply everywhere, or just in some places? The *PEDF* cases do not address either of them head-on, and if at all, only obliquely. Until the courts fill in what the first sentence means, environmental practitioners will have some difficulty advising their clients on the validity of permits and the necessity for environmental reviews.

PEDF has to do with the second and third sentences of the ERA. Those two sentences establish a public trust. The corpus of the trust is all the "public natural resources" of Pennsylvania. The commonwealth is the trustee. The beneficiaries are "all the people, including generations yet to come." In *PEDF II,* the court held that oil and gas resources owned by the state because they underly state parks and state forests are "public natural resources," and so when the trustee sells them, the trustee must return the proceeds of the sale to the trust corpus. What has followed is an elaboration of that principle and its application to different components of the compensation for leasing oil and gas and different years' disposition and appropriation of that compensation.

The numbering of the PEDF series can be confusing. The plaintiff brought its original challenge to the transfer beginning in the late 2000s of the bulk of the proceeds from oil and gas leasing to the General Fund. The Pennsylvania Commonwealth Court would not declare the pertinent statutes to be facially unconstitutional. See *PEDF I*, 108 A.3d 140 (Pa. Commw. Ct. 2015). In *PEDF II,* 161 A.3d 911 (Pa. 2017), the Supreme Court reversed, holding that royalties were clearly proceeds of the sale of a trust asset, but remanded for a determination of whether rents (including prepaid "bonuses" paid at the inception of a lease) and fees were in the same category.

In *PEDF III*, 214 A.3d 748 (Pa. Commw. Ct. 2019), the Commonwealth Court on remand engaged in a complicated analysis of the different positions of current Pennsylvania residents and future Pennsylvanians, attributing an income interest to the former and a remainder interest to the latter. Then, it assigned different payments to the two interests, allowing distribution to the General Fund

of the income, but not the principal. The Supreme Court partially reversed in *PEDF V*, 255 A.3d 289 (Pa. 2021), holding that all receipts from royalties, bonuses, rents, and fees were impressed with the public trust and had to be spent for trust purposes.

In the interim, the plaintiff filed a challenge to dispositions of lease payments in more recent fiscal years. Those appropriations were informed by *PEDF II*. The Commonwealth Court resolved the newer challenge in an unpublished opinion, *PEDF IV,* 241 A.3d 119 (Pa. Commw. Ct. 2020)(table), issued before the Supreme Court's *PEDF V* decision. On appeal in *PEDF VI,* the Supreme Court affirmed, holding that all of the 2017 and 2018 appropriations survived a facial challenge, but on different reasoning.

The Supreme Court did very little in *PEDF VI* to resolve some of the more important issues presented by the two public trust sentences of the ERA. Importantly, the court seems confused or imprecise about which resources are the "public natural resources" impressed with the trust. The rhetoric of the majority opinion focuses on the impacts that oil and gas development had on state forests and parks. Presumably, that means impacts to environmentally significant resources, most on or near the surface, like trees, plants, wildlife, water, and the like. There are no real perceptible environmental impacts of removing natural gas, unless the gas leaks to the atmosphere. The degree of impact for each well depends on individual facts. Some of the wells, for example, did not allow the lessee to access the oil and gas from the surface on the public land; lateral drilling can separate surface impact from the leasehold. Moreover, it is a different thing to affect timber in a state forest from trees in a state park. The forest exists for the purpose of growing exploitable timber; the park exists to preserve a wild area.

Are the resources impressed with the trust only resources that the state can sell, like the oil and gas? Are the second and third sentences only about public land and the mineral resources under it? (Public buildings are arguably not "natural resources.") Or, instead, are resources that no one owns—like air—also impressed with the trust? What about waterways owned by a private person, but impressed with a navigational servitude? And, as I argued in the column in this series on *PEDF V*, how should the loss of trust assets be valued?

The Supreme Court can only decide so many cases. If we are to have a constitutional environmental provision with relevance to the interaction of private activities with the government, Pennsylvania business, organizations, and their lawyers need some guidance on both parts of the ERA. In the 1970s, case selection buried this amendment. Is that the path we are on again?

About the Author:

David G. Mandelbaum is a shareholder in the environmental practice of Greenberg Traurig. He maintains offices in Philadelphia and Boston. Mandelbaum teaches "Environmental Litigation: Superfund" and "Oil and Gas Law" in rotation at Temple Law School, and the Superfund course at Suffolk Law School in Boston. He is a Fellow of the American College of Environmental Lawyers and was educated at Harvard College and Harvard Law School. Contact him at mandelbaumd@gtlaw.com.

David G. Mandelbaum
mandelbaumd@gtlaw.com