



**Green Amendment Victories**  
**How Green Amendments Are**  
**Recognizing & Protecting**  
**Environmental Rights in PA & MT**



Pennsylvania and Montana are the only two states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate inherent, inalienable and indefeasible rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in these two states, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

**Pa. Env'tl. Defense Foundation ("PEDF")**  
**v.**  
**Commonwealth of Pennsylvania**  
**161 A.3d 911 (Pa. 2017).**

PEDF v. Commonwealth involved a challenge to a variety of state government decisions involving leasing of state forest land for unconventional shale gas development. PEDF challenged the constitutionality of: (1) the diversion of royalties from state forest leasing away from maintenance of public trust resources (state forests) and into the General Fund, among other areas, as unconstitutional and (2) the role of the DCNR in additional leasing of state forest land for to the fracking industry.

The Pennsylvania Supreme Court examined the following issues:

1. The proper standards for judicial review of government actions and legislation challenged under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, in light of Robinson Township,

Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (2013) (plurality);

2. Constitutionality under Article I, [Section] 27 of Section 1602-E and 1603-E of the Fiscal Code and the General Assembly's transfers/appropriations from the Lease Fund.

In PEDF, the Pennsylvania Supreme Court explicitly rejected the Payne v. Kassab analysis that relied on the following three factors when assessing whether there had been a violation of the Pennsylvania Environmental Rights Amendment: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973). For the most part the test had stood for the principle that if there had been demonstrated compliance with environmental statutes and regulations then there was deemed compliance with the constitution; overlooking the independent and overarching legal standing of the constitutional provision.

In PEDF the Court explicitly overruled the Payne v. Kassab test and confirmed and embraced the constitutional reasoning laid out by the plurality of the Pennsylvania Supreme Court in Robinson Township, Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (2013).

The Pennsylvania Supreme Court explained what standards should be applied to analyze claims under the Environmental Rights Amendment. Specifically, “when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”

The Court confirmed that environmental rights are on par with political rights, and that the General Assembly’s authority is “expressly limited by fundamental rights reserved to the people in Article I of our Constitution.”

The Court also explained and analyzed the various rights protected by the Environmental Rights Amendment, and the obligations on government to respect those rights, including the government's fiduciary duties as a trustee of public natural resources.

The first right is 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.

The second right reserved by Section 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. The "public natural resources" referenced in this second sentence include the state forest and park lands leased for oil and gas exploration and, of particular relevance in this case, the oil and gas themselves.

The court further noted that the phrase "public natural resources" was used to eliminate a list of types of resources to be protected (e.g. fish, water, wildlife) to prevent courts from limiting the phrase "public natural resources" to the listed resources. Further, it quoted the principal author of the Environmental Rights Amendment, Franklin Kury, as saying that the phrase "applied to 'resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest.' Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271-72 (1970) (statement by Rep. Kury).

The Court confirmed that the Environmental Rights Amendment "establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries." It also confirmed that "[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local." Thus, municipalities too are trustees under the Environmental Rights Amendment.

As explained by the court, the two most basic obligations of the trustee under the Environmental Rights Amendment, which flow from the words “conserve and maintain” are: 1) “to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties; and 2) “act affirmatively via legislative action to protect the environment.” The Court quoted Robinson II, stating that:

“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. See Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.”

(quoting Robinson Township, Delaware Riverkeeper Network v. Commonwealth).

In other words, when carrying out the duty to “conserve and maintain,” the trustee acts unreasonably if it fails to comply with its fiduciary duties. The Court further described the duties of prudence, loyalty, and impartiality.

The PEDF Court strongly embraced and endorsed significant parts of Robinson Township, Delaware Riverkeeper Network v. Commonwealth.

PEDF also clarified the meaning of the phrase, “for the benefit of all the people,” in the third clause of the Environmental Rights Amendment. In sum, the Court made clear that “for the benefit of all the people” does not mean *anything* that would benefit Pennsylvanians, regardless of the degree to which the activity would degrade public natural resources. This is another indicator that economic development cannot simply trump protection of environmental rights and of the public natural resources relied upon by Pennsylvanians.

Further, the Court reminded agencies that they have a duty to act in accordance with the Pennsylvania Constitution. Specifically, “it must be remembered that the Commonwealth, as trustee, has a constitutional obligation to negotiate and structure leases in a manner consistent with its Article 1, Section 27 duties. Oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources.”

The Court also re-affirmed that the trust components of the Environmental Rights Amendment are self-executing. Further, it noted: “We additionally find support in Section 27’s legislative history, in which Professor Broughton opined that the Amendment ‘would immediately create rights to prevent the government (state, local, or an authority) from taking positive action which unduly harms environmental quality.’ Legislative Journal-House at 2281 (Broughton Analysis).” Id. at 937 n.29.

The Court determined that “all proceeds from the sale of our public natural resources are part of the corpus of our environmental public trust and that the Commonwealth must manage the entire corpus according to its fiduciary obligations as trustee.” And it determined that royalties “are unequivocally proceeds from the sale of oil and gas resources,” and thus were part of the corpus of the trust and had to be managed accordingly. The Court, however, did not make a determination as to all oil and gas lease-related funds, such as bonus payments, and remanded for further analysis.

The Court also stated:

“We also clarify that the legislature’s diversion of funds from the Lease Fund (and from the DCNR’s exclusive control) does not, in and of itself, constitute a violation of Section 27. As described herein, the legislature violates Section 27 when it diverts proceeds from oil and gas development **to a non-trust purpose** without exercising its fiduciary duties as trustee. The DCNR is not the only agency committed to conserving and maintaining our

public natural resources, and the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27. By the same token, the Lease Fund is not a constitutional trust fund and need not be the exclusive repository for proceeds from oil and gas development. However, if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee's obligation to conserve and maintain our natural resources.”

Justice Baer concurred and dissented, as he disagreed with the majority's decision to include private trust law in the analytical standards for the trust under the Environmental Rights Amendment, and instead would have applied traditional public trust principles. He was concerned about how public funds would be affected by the majority's decision to use private trust law. He also disagreed with the majority's interpretation of “for the benefit of all the people,” which to him included not just “the enjoyment of the natural environment but also the utilization of the resources, without waste, for the current benefit of the public.” Id. at 947 (Baer, J., concurring and dissenting).

Justice Saylor “join[ed] the central analysis” of Justice Baer's dissent “based on the recognition that the Environmental Rights Amendment is an embodiment of the public trust doctrine.” Id. at 949 (Saylor, J., dissenting).