



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



**GREEN AMENDMENTS
FOR THE GENERATIONS**
Pure Water, Clean Air, Healthy Environment.

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.

Robinson Township, Delaware Riverkeeper Network
v.
Commonwealth
83 A.3d 901 (Pa. 2013).

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.

Pa. Const. art. I, § 27.

February 2012 the Pennsylvania legislature passed Act 13 amending the Pennsylvania Oil and Gas Act. The amendments were a drastic change to

existing law and included a one-size-fits-all zoning scheme for oil and gas operations across the entire Commonwealth of Pennsylvania. Among other things, Act 13 required all municipalities in the Commonwealth to allow oil and gas wells in *every* zoning district, including residential districts and near schools, playgrounds, and hospitals. In addition, communities had to allow in all zoning districts seismic testing including the use of explosives for location assessment activities. The full industrial array of gas development, including drilling and fracking well pads, were required to be allowed within close proximity to homes. For example, by virtue of the new law, wastewater impoundments and wellpads could be located less than a football field's distance from someone's home. Compressor stations could be 750 feet from someone's home or their child's school. The law also blocked local governments from applying to oil and gas operations stormwater management, grading, and other typical local requirements for industrial operations. In addition the law limited notification requirements regarding contamination of private drinking water wells; provided a medical gag rule to shield information sharing regarding industry chemicals, including between physicians and their patients; and provided automatic waivers for the shale gas industry from minimal environmental protection standards.

March 2012 the Delaware Riverkeeper Network, Maya van Rossum-the Delaware Riverkeeper, multiple municipalities, two municipal officials, and a physician challenged Act 13 as being unconstitutional. Challengers claimed, amongst other arguments, that Act 13 violated Article I, Section 27 of the Pennsylvania Constitution and endangered public health, natural resources, communities, and the environment.

December 19, 2013, the Pennsylvania Supreme Court rendered a decision in which a plurality of Justices, for the *first time* ever, struck down a state law for violating the state constitution's Environmental Rights Amendment. In the rendering of the decision, the author of the plurality opinion - Chief Justice Ronald Castille - emphasized the importance of the plain meaning of the language to be interpreted and applied:

In the process of interpretation, ***"[o]ur ultimate touchstone is the actual language of the Constitution itself."*** [*Stilp v. Com.*, 905 A.2d 918, 939 (Pa. 2006)] (quoting *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004)).

“[T]he Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Id.* Towards this end, we avoid reading the provisions of the Constitution in any “strained or technical manner.” *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 528 (2008). Indeed, “we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.” *Commonwealth ex rel. Paulinski v. Isaac*, 483 Pa. 467, 397 A.2d 760, 766 (1979).

(emph. added).

Justice Castille emphasized that the Environmental Rights Amendment is first and foremost a *limitation* on government authority, just like other fundamental rights protections in Article I of the Pennsylvania Constitution. The chief justice emphasized that the General Assembly’s legislative power “is not absolute and that it is “subject to restrictions enumerated in the Constitution”:

“[O]urs is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution.”

As explained by Justice Castille, the Pennsylvania Constitution essentially has two parts: 1) Article I - the Declaration of Rights; and 2) the rest of the document, which establishes a government via powers delegated *by* the people *to* particular governmental entities, such as the General Assembly. Article I, however, “as a general matter, is not a discrete textual source of police power delegated to the General Assembly,” or to any governmental entity. Pa. Const. art. I, § 25. Rather, “[t]he Declaration of Rights is that general part of the Pennsylvania Constitution which *limits* the *power* of state government” (emph. added).

In other words, the people hold the ultimate “check” against governmental action by expressly withholding from government the authority to trample on

their fundamental rights. Just as the government *lacks* the authority to conduct “unreasonable searches and seizures.” Pa. Const. art. I, § 8. Just as Pennsylvania governmental entities have *no* authority to compel any Pennsylvanian to attend a particular church or worship a particular deity, or to infringe on the people’s rights to free speech, bear arms, and petition the government; Pa. Const. art. I, §§ 3, 7, 20, 21. Likewise, the people did not delegate to government - at any level or in any branch - the authority to trample on their right to a clean and healthy environment. Pa. Const. art. I, § 27.

The chief justice also noted that “[t]he Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution . . . are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.”

Justice Castille expressly noted that while “[a]rticulating judicial standards in the realm of constitutional rights may be a difficult task ... [t]he difficulty of the task, however, is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights.” Justice Castille then ably embarked on the task of providing needed procedural and substantive guidance for the interpretation and preservation of the protected environmental rights.

Overall, the plurality opinion made clear that the Pennsylvania Environmental Rights Amendment accomplishes two primary goals, either or both of which can be the basis of a legal challenge to government action: “(1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”

The plurality then elaborated on the text of the Environmental Rights Amendment and its protections. The Amendment contains three clauses, each providing important limitations and obligations with regards to both the people and their government.

Clause 1, like other Article 1 provisions, specifies a particular right of the people of Pennsylvania to “clean air and pure water, and to the preservation of

the natural, scenic, historic and esthetic values of the environment.” This “initial, prohibitory clause . . . affirms a limitation on the state’s power to act contrary to” the people’s environmental rights. The plurality confirmed that these are *individual* rights, not merely a collective right of all Pennsylvanians.

The plurality further explained that “[w]hile the subject of the right certainly may be regulated by the Commonwealth, any regulation is ‘subordinate to the enjoyment of the right ... [and] must be regulation purely, not destruction’; laws of the Commonwealth that unreasonably impair the right are unconstitutional.” Id., quoting Page v. Allen, 58 Pa. 338, 1868 WL 7243, *8 (1868)).

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. 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.

Further, the plurality confirmed that, just as governmental entities must consider in advance whether an action may violate, for instance, free speech rights, or property rights, they must do the same for environmental rights:

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. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.

This last sentence significantly affirmed that the Environmental Rights Amendment - like all other constitutional provisions - stands above statutes and regulations.

Clauses 2 and 3 of the Pennsylvania Environmental Rights Amendment establish a trust framework in which “public natural resources” (e.g. air, water, fish, and wildlife, among other resources) are the body (or corpus) of the trust and the common property of *all* Pennsylvanians, including future generations. Further, the Commonwealth (all branches and levels of government) is set as the trustee and must “conserve and maintain” those resources “for the benefit of all the people.” The duty to “conserve and maintain” means that government must “prevent and remedy the degradation, diminution, or depletion of our public natural resources” and do so in a way that is consistent with its fiduciary obligations as a trustee, including the duties of prudence, loyalty, and impartiality. This includes a “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.”.

Thus, the Environmental Rights Amendment restrains government from pursuing actions or approving projects that infringe on the people’s protected environmental rights. In Robinson Twp., Delaware Riverkeeper Network, such action involved Act 13, which “command[ed] municipalities to ignore their obligations under Article I, Section 27 and further direct[ed] municipalities to take affirmative actions to undo existing protections of the environment in their localities. The police power, broad as it may be, ***does not encompass such authority*** to so fundamentally disrupt these expectations respecting the environment.” (emph. added).

The plurality also confirmed that the Environmental Rights Amendment is self-executing (the provision requires no further governmental action to be effective) and that Pennsylvanians can bring actions to enforce the Environmental Rights Amendment’s prohibitions on government authority.

The plurality did note that while the “Environmental Rights Amendment does not call for a stagnant landscape; .. the derailment of economic or social development; nor for a sacrifice of other fundamental values ... when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale....” Given that the first clause of Section 27 makes clear that the environmental rights enumerated are “inviolable”

it “necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment.” So government cannot simply claim that the economic benefits of an action sought can be used to override their obligation to protect the environmental rights of the people from unconstitutional infringement. When discussing government action that utilizes the natural resources of the state for the general welfare of the people the plurality emphasized the need for sustainable development as a means for promoting economic growth but at the same time protecting people’s environmental rights.

The plurality also emphasized the inclusion of future generations as beneficiaries of the natural resources to be protected, emphasizing the attendant obligations to “deal impartially with all beneficiaries” and the “an obligation to balance the interests of present and future beneficiaries”, i.e. generations. The court also recognized that environmental degradation may happen incrementally over time or generations and the court noted that the “Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.”

As Justice Baer wrote, the 2013 opinion “rejuvenated Section 27 and dispelled the oft-held view that the provision was merely an aspirational statement.” Id.

Key principles

- Environmental Rights Amendment is first and foremost a *limitation* on government authority.
- The trust obligation instills both prohibitory and affirmative obligations on the state to protect natural resources: “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.” (emphasis added)
- As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur

through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties.”

- Government must consider the generational impacts of its decisions and must ensure that the rights of future generations are both considered and protected.
- Governmental entities must consider the effects of their actions on environmental rights in advance of taking the considered action.
- Environmental Rights Amendment is self-executing (the provision requires no further governmental action to be effective).
- The constitutional obligation binds all levels of government - including both state and local.
- The constitutional obligation stands above statutes and regulations - merely demonstrating compliance with statute and regulation does not demonstrate de-facto compliance with the constitutional obligation.
- Public natural resources to be protected under the state's trust obligations include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”