



Annotated Guide to PENNSYLVANIA ENVIRONMENTAL HEARING BOARD and Selected Appellate Court Decisions on the Environmental Rights Amendment



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In the discussion that follows, we provide an annotated guide to Pennsylvania Environmental Hearing Board (“EHB,” “the Board”) decisions that apply and/or analyze Article I, Section 27 of the Pennsylvania Constitution (“Section 27”), also known as Pennsylvania’s Environmental Rights Amendment. The cases below, presented chronologically, postdate the Pennsylvania Supreme Court’s decision in *Robinson Twp., Delaware Riverkeeper Network, et al. v. Commonwealth* (“Robinson II”), 83 A.3d 901 (Pa. 2013), which reinvigorated the Environmental Rights Amendment. Following the EHB cases, we provide a similar annotated guide for selected Pennsylvania appellate court decisions involving the Environmental Rights Amendment.

By way of brief summary, Robinson II was the result of a case filed in March, 2012, by the Delaware Riverkeeper Network, Maya van Rossum the Delaware Riverkeeper, seven municipalities, and Dr. Mehernosh Khan challenging Act 13 of 2012, which was signed into law by Governor Corbett on February 14, 2012. Act 13 amended the Pennsylvania Oil and Gas Act and sought to impose drastic changes in existing law. These changes included: displacing local zoning; granting eminent domain authority to the drilling industry for purposes of gas storage; continuing to limit notifications regarding contamination of private drinking water wells; providing a medical gag rule to shield information sharing regarding industry chemicals, including between physician and patients; and providing automatic waivers for the minimal environmental protections the law included. The plaintiffs challenged the new law on the grounds that, amongst other things, it violated Article I, Section 27 of the Pennsylvania Constitution and endangered public health, natural resources, communities, and the environment.

On December 19, 2013, the Pennsylvania Supreme Court issued a final decision in the case *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, (2013). In the plurality opinion written by the Chief Justice of the Court, the justices vindicated the importance and power of the Environmental Rights Amendment of the Pennsylvania Constitution, including the Amendment’s promise to all generations of Pennsylvanians that they

will benefit from pure water, clean air and a healthy environment, and have the ability to defend that right in the courts if it is violated.

The battle to fully define and defend the environmental rights of the people of Pennsylvania continues.

The annotated guide below begins with Pennsylvania Environmental Hearing Board decisions, and finishes with selected Pennsylvania appellate court decisions on the Environmental Rights Amendment, all decided since Robinson II.

For each case, the discussion will center largely around the Environmental Rights Amendment components of each case, including standing, and not address other matters that may have been involved in the case.

A. Pennsylvania Environmental Hearing Board

Brockway Borough Muni. Auth. v. DEP, 2015 EHB 221.

This was the first EHB case decided after Robinson II. It involved a challenge to an unconventional gas well permit on a water authority's property. The challenger lost its appeal to the permit.

As context for this decision, between the time that the Pennsylvania Supreme Court decided Robinson II in 2013, and the Board decided Brockway in 2015, the Pennsylvania Commonwealth Court rendered a decision in a case known as Pa. Env'tl Defense Foundation v. Commonwealth ("PEDF")¹. In that case, the Commonwealth Court chose to continue using the same three-factor test courts had used in Environmental Rights Amendment claims, even though the plurality in Robinson II had rejected the test as inconsistent with the plain meaning of the Amendment.² The test was as follows:

(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?

¹ 108 A.3d 140 (Pa. Commw. Ct. 2015), reversed in part, vacated in part by 161 A.3d 911 (Pa. 2017).

² Id. at 159; Robinson II, 83 A.3d at 966-67 (plurality).

(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?³

The test came to be known as the “Payne” test, after the case from which it came. However, although the Commonwealth Court refused to jettison the Payne test, it looked to Robinson II’s exposition on the Environmental Rights Amendment’s rights and obligations as guidance throughout its decision.

In Brockway, the Board retained the Payne test in adjudicating Environmental Rights Amendment claims. 2015 EHB at 249. However, similar to the Commonwealth Court, the Board changed how it approached Environmental Rights Amendment claims. For instance, prior to Robinson II, the Board had applied the test as if it had only one prong – compliance with statutes and regulations. After Robinson II, the Board applied all three prongs of the test. This became increasingly apparent in the cases that followed Brockway.

The Board also made clear that both initial permits and renewal permits would be subject to the same constitutional standards. 2015 EHB at 248.

Tri-County Landfill, Inc. v. DEP, 2015 EHB 324.

This case involved a challenge by a landfill to a Pennsylvania Department of Environmental Protection (“PADEP”, “Department”) permit denial based on two grounds: conflict with local zoning requirements, and a history of noncompliance under Pennsylvania’s solid waste statute.

Several intervenors filed a motion for summary judgment on the zoning issues, and in the alternative, sought to bifurcate the zoning issues. The intervenors argued, in part, that “the Department was constitutionally compelled to deny the permit pursuant to Article I, Section 27 of the Pennsylvania Constitution.” 2015 EHB at 325. Although the Department joined the intervenors’ motion, it “disagree[d] that it is bound by Article I, Section 27 to comport its action with local zoning requirements.” Id. In essence, both the landfill and the Department agreed that the Department had to consider local zoning, but that it retained discretion to deny a permit if issuing the permit would violate local zoning. Id. at 326.

The Board disagreed, finding that prong 1 of the Payne test, which pertains to compliance with statutes and regulations “relevant to the protection of the Commonwealth’s public natural resources” included compliance with local zoning requirements. Id. at 327-30. In coming to this determination, the

³ Payne v. Kassab (“Payne”), 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), rejected by 161 A.3d 911 (Pa. 2017).

Board relied in part on Robinson II's discussions of the role of zoning ordinances in local environmental protection. Id. at 328. The Board also outlined what the Department's role was as to local zoning conflicts, and how to address them in the permitting framework. Id. at 330-34.

Ultimately, this case ended with the landfill withdrawing its appeal. It is not known if a settlement was involved.

Sludge-Free UMBT v. DEP, 2015 EHB 469.

This case involved a challenge by local residents, the Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper to three Department approvals allowing biosolids (also called sewage sludge) to be spread on three agricultural properties in Northampton County, Pennsylvania.

Both the Department and Synagro, the permittee, filed for partial summary judgment, which the Board ultimately denied. Among the arguments Synagro raised were that the appellants could not show, as a matter of law, that the Department violated the Environmental Rights Amendment.

The Board continued to use the Payne test, but made clear that it would apply all three prongs, not just the first prong. 2015 EHB at 471-73, 475. For instance, the Board stated:

Strict compliance with all regulatory requirements is not *necessarily* coextensive with a reasonable effort to reduce the environmental incursion to a minimum, and notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project.

Id. at 473. The Board also rejected one of its past cases, cited by Synagro, as inconsistent with the Commonwealth Court's decision in PEDE, which not only emphasized all three prongs of Payne, but also relied on Robinson II's language regarding prevention of unreasonable degradation. Id. at 473-74.

Based on its emphasis that Payne requires analysis of three factors, not one, it rejected summary judgment as factual inquiry into and expert testimony on whether harms had been minimized and whether the harms clearly outweighed the benefits. Id. at 475-78.

Ultimately, prior to a hearing in this matter, the challengers obtained a victory in the form of a settlement with the Department and Synagro that prohibited the land application of Class B (non-exceptional quality) biosolids, and provided additional protections during application of Class A (exceptional quality) biosolids.

Hudson v. DEP, 2015 EHB 719.

Local residents challenged a stormwater permit granted to an entity seeking to build a large industrial hog breeding and gestation facility ("CAFO"). The residents filed for a supersedeas (a stay) of the stormwater permit because appeals to the Board do not act as automatic stays. To obtain a supersedeas, an appellant must show likelihood of success on the merits, irreparable harm, and that no harm to the public will occur if the stay is granted.

The proposed facility would have required extensive earth-moving and alteration, including cutting approximately 30 feet of earth off a property and filling in 40 feet in other places to flatten the property. The site was near headwater fishing streams and had poor soils for infiltration of stormwater.

The Board granted the supersedeas based largely on the fact that the permittee had provided no data, as the regulations required, to support the fact that its design was actually going to function properly, comply with the law, and protect the environment. The Board found that the Department had essentially approved an experiment, even though the regulatory framework required "data-based decisionmaking." Id. at 726, 729. During its discussion of the lack of supporting data, the Board cited language from Robinson II regarding the PADEP's obligation under the Environmental Rights Amendment to consider the environmental effects of the proposed action prior to acting. Id. at 729-30.

The Board also expressed concern that while multiple permits had been issued for the site, the Department had not looked at the site holistically and had not considered whether the proposed facility was appropriate for the location in which it was proposed. Id. at 739-41.⁴

Also, in analyzing whether harm would result to the public, the Board considered whether issuance of a supersedeas would "harm the natural, scenic, historic, or esthetic values of the environment or in any way endanger public safety, welfare, or the environment," indicating that the Board was including rights protected under the Environmental Rights Amendment in its analysis. Id. at 745.

This case is still ongoing. In the intervening years, there has been no construction activity.

Stedge v. DEP, 2015 EHB 577.

⁴ "Focusing exclusively on an individual aspect of a project seems rather artificial. The piecemeal review advocated by [the permittee] brings to mind the story of a blind man feeling the trunk of an elephant who thinks he has found a snake." Id. at 740.

This case involved an appeal of the Department's approval for coverage under a general permit for an oil and gas liquid waste storage and beneficial use facility. The appellants raised several arguments, including that the Department failed to protect the public and thus violated the Environmental Rights Amendment.

The Board found that the appellants did not meet their burden of demonstrating a constitutional violation under the Payne test.

Snyder v. DEP, 2015 EHB 857.

Snyder involved an appeal of an air quality plan approval for a natural gas compressor station. The permittee moved to dismiss for several reasons, including regarding the appellants' Environmental Rights Amendment claims and local land use claims (that the Department failed to address local land use requirements in its permitting review) claims. Regarding the Environmental Rights Amendment, the permittee claimed that the appellants' objections should be dismissed because it claimed that the Department's compliance with all applicable "statutory and regulatory requirements automatically constitutes compliance with Article I, Section 27." 2015 EHB at 880 (emph. in original). The Board denied the motion.

The Board referred back to its decision in Tri-County Landfill, reiterating that the Department has an obligation to consider local land use requirements and cannot simply ignore legitimate concerns brought to its attention, which appellants contended had occurred. Id. at 876-80.

The Board rejected the permittee's argument that compliance with the Environmental Rights Amendment, was equal to compliance with statutes and regulations. It referred back to its decision in Sludge-Free UMBT, where it had rejected the same premise. Id. at 880-83.

The permittee also tried to claim that the appellants might be challenging the constitutionality of the regulations themselves, rather than just the application of the regulations, and thus the Board lacked jurisdiction for such a challenge. The Board rejected both arguments. Id. at 884.

National Fuel Gas Corp. v. DEP, 2015 EHB 909.

In a concurring opinion regarding an appeal of the Department's single-source determination that required aggregation of a well pad and nearby compressor station, Judge Labuskes stated the following:

Finally, I agree completely with the Department's argument in its post-hearing brief regarding Article I, Section 27 of the Pennsylvania Constitution. Whether or not it is appropriate to treat multiple sources as one "facility" for purposes of permitting, the Department has the authority pursuant to Article I Section 27 of the Pennsylvania

Constitution to ensure that the emissions from the permitted source or sources when considered in the context of other nearby sources will not individually or cumulatively have an adverse impact on the people's right to clean air and the preservation of the natural, scenic, historic, and esthetic values of the environment. Regardless of what the complex regulations governing air quality might otherwise require, the Department is obligated to ensure that reasonable efforts have been made to reduce the environmental incursion of the permitted activity to a minimum, and having done that, ensure that the remaining environmental harms do not clearly outweigh the benefits of the project.

2015 EHB at 953.

The Department had argued that the permittee's arguments in its appeal "would . . . prevent the Department from fulfilling its obligations under Article 1, Section 27 of the Pennsylvania Constitution, because the [permittees'] approach prevents any consideration of the cumulative effect of emissions on the Commonwealth's public natural resources by a common development scheme." DEP Post-Hearing Brief, at p.35. Preventing the Department from aggregating emissions in the circumstances in the case would prevent the Department from minimizing the environmental "incursion" of the industrial development on "the Commonwealth's public natural resources." Id. at p.36.

Ultimately, this case ended with the appellants withdrawing their appeal. It is not known if a settlement was involved.

Logan v. DEP, 2016 EHB 531.

Local residents challenged an air quality plan approval for a soybean oil extraction facility. The township in which the facility was to be located sought to intervene in the appeal to support the Department's issuance of the approval. It argued, among other things, that:

it has an interest in ensuring adequate consideration of the local benefits of the proposed facility in relation to the environmental and social costs. It tells us that it seeks to advance and protect the environmental well-being and economic stability of the Township and its residents. It argues that Perdue's facility will result in increased employment opportunities for its residents, and it will provide an outlet for farmers to sell their crops to the facility. The Township seeks to intervene to present evidence to this effect.

2016 EHB at 532. The Board restated the prongs of the Payne test, and noted that the type of evidence that the Township sought to present went straight to the third prong of the Payne test. Id. at 534. This weighed in the Board's decision to allow the Township to intervene. Id. at 535.

Friends of Lackawanna v. DEP, 2016 EHB 641 (Opinion and Order on Motion for Summary Judgment).

A community organization challenged the Department's approval of a renewal permit for a 714 acre landfill; the renewal allowed the facility to continue operating for the default period of ten years, without any additional conditions, despite a history of groundwater contamination and other problems at the facility. The landfill sought summary judgment, arguing lack of standing and that the appellants' claim that the approval violated the Environmental Rights Amendment was in fact a challenge to the solid waste management regulatory framework. The permittee also claimed that once the General Assembly passes an environmental statute, no one – not even the courts – “have any further role to play with respect to the [Environmental Rights Amendment].” 2016 EHB at 650. The permittee also argued that the Board could only consider compliance with statutes and regulations as part of its Environmental Rights Amendment analysis. The Board denied the motion.

After finding that the appellants had standing, relying in part on Robinson II's majority opinion, the Board rejected the permittee's Environmental Rights Amendment arguments. First, the Board rejected the claim that the appellants were challenging the regulations themselves. It also rejected the permittee's “rather extreme position” regarding the role of the General Assembly, the executive branch, and the courts as “quite simply, wrong.” Id. at 650. “[E]xecutive branch agencies such as the Department from time to time are also put in the position of striking the balance between environmental and other societal concerns, even after the Legislature has initially spoken. Our role is to ensure that the Department has done so correctly.” Id. at 651.

The Board likewise rejected the permittee's one-prong view of Payne, stating that the Board's role is “to consider the ‘environmental effect of any proposed action.’” Id. at 652 (quoting Feudale v. Aqua Pa., Inc., 122 A.3d 462, 467 (Pa. Commw. Ct. 2015)); see also id. at 653. “As we said in Brockway, . . . we must ensure that activities with environmental impacts are intelligently regulated ‘so that regulatory standards are met, environmental incursions are minimized, and any remaining harms are justified.’” Id. at 652 (quoting Brockway Borough Muni. Auth. v. DEP, 2015 EHB 221, 243).

Pine Creek Valley Watershed Ass'n v. DEP, 2016 EHB 748.

In an earlier case, the appellant had previously successfully challenged a sewage plan approval for a residential subdivision; the Board found that the Department had failed to comply with water quality antidegradation requirements. After the Board's decision, the General Assembly amended the Sewage Facilities Act to state that, when the Department was considering sewage plans and plan revisions for individual on-lot and community on-lot sewage systems, the use of such systems complied with the Clean Streams Law (including antidegradation requirements) so long as the systems were designed and approved in accordance with the Sewage Facilities Act and associated regulations. 2016 EHB at 751. The same concept was also inserted into the statute for sewage system permits. Id.

The appeal in this case thus was of a sewage plan revision for the same subdivision, but after the statutory change and after the developer made changes to the sewage layout in the subdivision. The Department also conducted additional analysis pertaining to nitrate impacts on the watershed. Id. at 754.

Among the claims raised, the appellants brought an Environmental Rights Amendment challenge to the approval. The Board ultimately rejected all the appellants' arguments, including their Environmental Rights Amendment arguments.

The Board addressed the interplay of its role in applying the Payne test and the "basic policy choices" the General Assembly made in the statutory revision. In particular, it noted that "[m]aking approval of the plan revision contingent upon whether the Frederickville Farms on-lot systems will actually degrade the special protection waters of the Commonwealth would not be consistent with the legislative mandate." Id. at 756. However, despite the "balance" between "environmental and societal concerns in" the statutory revision, it emphasized that the Department still had a responsibility to comply with the Environmental Rights Amendment. Id. at 757. The Board found that the statutory revision "simplified the first step" in Payne by "superseding all other applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." Id. It also noted that reducing harm to a minimum, not to zero, is the second prong inquiry under Payne, and that the Department had taken additional steps in this regard, including through conditions on the approval. Id. at 757-58. Lastly, based on the testimony and facts presented about the "negligible impact" on the nearby wetland and stream, the appellants failed to meet their burden on the third prong to show that the harms clearly outweighed the benefits of the approval. Id. at 758-59.

Friends of Lackawanna v. DEP, 2016 EHB 815 (Opinion and Order on Motion *in Limine*).

The appellants filed a motion *in limine*, seeking to exclude one of the permittee's experts. The expert was proffered to give testimony on "the application of the constitutional harms-benefits test to Keystone's permit renewal." 2016 EHB at 815. The Board denied the motion.

In analyzing the arguments, the Board noted that, in a renewal appeal, the Board does "not evaluat[e] whether the environmental harm of the facility outweighs its benefits; we . . . evaluat[e] whether the harm associated with the *continued operation* of an existing facility pursuant to its existing permit without any changes for another 10 years is outweighed by the benefits of the *continued operation* of the existing facility." *Id.* at 818. That said, the Board recognized the Department has a duty to consider, at renewal time, whether continued operation is appropriate. *Id.* at 818-19.

Thus, in this case we face the challenge of implementing the harms-benefits analysis in a way that recognizes that renewals require something more than the mindless application of a rubber stamp but something less than a reexamination of the merits of any earlier permitting decisions regarding the landfill.

Thus, our review in this case necessarily includes a *de novo* analysis of whether the environmental harm which will result from the renewal of [the landfill's] preexisting permit for 10 years so clearly outweighs the benefits to be derived therefrom that allowing the renewal to stand would be an abuse of discretion. The question remains: How do we do that?

Id. at 819. The Board noted the general lack of guidance on the balancing of harms and benefits, and thus "[g]iven the difficulty in defining harms and benefits and the concept of weighing the two, we believe [the permittee's expert's] proposed testimony as described in his report would be helpful." *Id.* at 819-20. The Board noted that, "[a]lthough difficult, we need to strive for objectivity, and [the permittee's expert's] report is not inconsistent with that goal. Without objectivity, the harms-benefits test is too easily subject to abuse based on criteria that have nothing to do with the safe and environmentally sound operation of a facility." *Id.* at 821-22.

On June 20, 2017, in PEDE, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme Court explicitly rejected the Payne test and ruled that compliance with the Environmental Rights Amendment is to be determined by applying the plain language of the amendment and trust law as it stood at the time the amendment was enacted. The cases below postdate that decision.

Ctr. for Coalfield Justice v. DEP, 2017 EHB 799.

Two community organizations challenged two longwall coal mining panel permits that the Department issued for mining near Ryerson Station State Park. Longwall coal mining is a highly-mechanized form of underground coal mining in which a machine shears the coal off the mine face. As the machine advances forward, the ground above where the coal used to be falls due to lack of support,

causing subsidence. This subsidence has damaged homes, water wells, and streams, including leading to complete flow loss in some streams.

The appellants contended that mining the two approved longwall panels would result in damage to streams and violated Pennsylvania mining laws, water quality laws, and the Environmental Rights Amendment. The Board ultimately found in favor of the appellants as to one of the longwall panels. This was significant because it meant that the Department could no longer approve longwall mining where mining was predicted to cause so much damage to the stream that the only “remediation” method was to destroy the existing streambed and “rebuild” it, effectively eliminating the stream as it previously existed. The Board noted that heavy construction for multiple months was required to build a new stream, with significant disruption and/or elimination of pre-mining habitat and aquatic life. The Board’s ruling that such an approval violated the Clean Streams Law and the Environmental Rights Amendment was an important step to protecting streams in counties where longwall mining occurs.

This was the first decision after PEDF to lay out the standards the Board would use to determine Environmental Rights Amendment claims. As to one of the longwall panels and its complete destruction of the stream above it, the Board did not have to delve significantly into the Amendment’s standards because it found that the Department’s approval violated the Clean Streams Law. “At a minimum, a Department permitting action that is not lawful under the statutes and regulations in place to protect the waters of the Commonwealth, cannot be said to meet the Department’s trustee responsibility under Article I, Section 27 and is clearly a state action taken contrary to the rights of citizens to pure water.” 2017 EHB at 857.

As to the second longwall panel and stream damage, the Board delved directly into the plain language of Environmental Rights Amendment, as the PEDF decision directed. The Board also relied on the plurality opinion in Robinson II for further guidance in its analysis.

It separately analyzed the individual right to a clean and healthy environment (under the first clause of the Environmental Rights Amendment) and the rights and duties under the Amendment’s trust clause. It also reviewed how the Department came to its decisions, reinforcing the need for a pre-action analysis⁵ under both sets of rights. The Board confirmed that streams are “public natural resources”

⁵ DRN has argued that a pre-action analysis must take into account local conditions and must involve science and public health expertise and/or research in order to truly inform a governmental entity about what the short-term, long-term and cumulative impacts of a proposed action will be on the local environment, and present and future generations.

under the Environmental Rights Amendment, and recognized that statutory and regulatory compliance is not coextensive with constitutional compliance.

The permittee appealed the ruling to the Commonwealth Court, but discontinued its appeal in January 2018.

Friends of Lackawanna v. DEP, 2017 EHB 1123 (Adjudication).

This is the Board's decision on the merits of the landfill renewal challenge discussed above. The Board ultimately found that the landfill renewal was improper due to an approximately 14-year unresolved groundwater contamination inquiry. The Board modified the permit to include a condition relative to the permittee's regulatory obligations. See, e.g., 2017 EHB at 1171-74. Although the Board rejected the appellant's remaining claims, it did acknowledge merit in the appellant's claims that the Department had failed to oversee the landfill in a manner consistent with the Department's constitutional obligations. Specifically:

We do have some doubts about whether the Department has fulfilled its responsibilities as a prudent, loyal, and impartial trustee of the public natural resources. The record does not demonstrate that it has consistently exercised vigorous oversight of the landfill consistent with its regulatory and constitutional responsibilities with just as much concern about the rights of the landfill's neighbors as the rights of the landfill. The Department appears to have been rather tolerant of chronic odor and leachate management issues. At one point, a Department witness cynically speculated that community complaints regarding odors seem to go up when Keystone has a permit application pending. (T. 1309.) The record does not support that allegation. The witness was not willing to opine on the extent to which odor complaints go down when it becomes clear that they are falling on deaf ears. (T. 1310.) Aside from the odor issue, it is difficult to understand how the Department could allow the groundwater degradation being seen at MW-15 to go unresolved for 14 years. The Department's limited oversight has in turn resulted in what appears to be a less than comprehensive review of the landfill's compliance history in support of the renewal decision. Article I, Section 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day operating in such close proximity to densely populated areas. If the Department is unable or unwilling to exercise that responsibility, the permit cannot be renewed consistent with Section 27. The lack of effective oversight will almost certainly lead to an impingement of the neighbors' constitutionally assured rights.

Id. at 1183-84.

As it had done at summary judgment, the permittee challenged the appellant's standing, and raised a new argument in its post-hearing briefing that the appellant lacked standing to assert Environmental Rights Amendment claims. The Board rejected this, noting that it did not find any separate inquiry in Robinson II for standing in constitutional claims. Id. at 1154. It further stated, "The individual members of FOL [the appellant], on whose behalf FOL is litigating, are precisely the sort of people that Article I, Section 27 is designed to protect, and FOL unquestionably has standing to advance Article I, Section 27 challenges on their behalf." Id. at 1154-55.

The Board applied the Environmental Rights Amendment standards developed in the CCJ opinion discussed above. Id. at 1160-62. The Board expressly rejected the permittee's notion that Environmental Rights Amendment compliance must be equivalent to statutory and regulatory compliance. Id. at 1161. The permittee had also argued that state action must be required for the Environmental Rights Amendment to apply. The Board stated, "If that is true, the state action here is obvious: the Department's permitting action, without which Keystone would no longer be able to operate a landfill. The state may not sanction the use of private property that will impermissibly infringe upon the constitutional rights of others." Id. at 1162-63.

The Board also recognized that offsite landfill odors can unreasonably interfere with residents' constitutional environmental rights, although it did not find that an interference had occurred in the case. Id. at 1182-83.

Clean Air Council, Delaware Riverkeeper Network, et al v. DEP, EHB Dkt. No. 2017-009-L (Opinion and Order on Motion for Summary Judgment, January 1, 2018).

Three environmental organizations challenged erosion and sedimentation permits and water encroachment permits issued for the Sunoco/Energy Transfer Partners Mariner East 2 pipeline project.

The appellants moved for summary judgment, arguing that pipelines are not water-dependent as a matter of law and thus cannot be permitted in Exceptional Value ("EV") wetlands; that the Department failed to analyze the existing uses of the EV wetlands affected by the pipeline in its antidegradation review; and that the permittee failed to submit certain stormwater management plan consistency and floodplain review letters from all local governments through which the pipeline would run. The Board denied the motion.

In its discussion of the Department's antidegradation analysis, the Board acknowledged that the water encroachment regulations require protection of the functions and values of wetlands and that the term "values," while undefined likely was intended to reference the values set forth in the first clause of

the Environmental Rights Amendment. Id. at 8-9. The Board rejected appellants' arguments that the Department violated the Environmental Rights Amendment by not performing an adequate analysis of the EV wetlands' existing uses, finding that the EV classification ensured the "maximum protection afforded by law." Id. at 12-13. The Board did agree that the "Department has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding," and that there might have been other "aspects of the Department's pre-action analysis" that may or may not have been robust, but that were beyond the scope of the appellants' motion. Id. at 13.

Logan v. DEP, EHB Dkt. No. 2016-091-L (Adjudication).

Residents challenged the Department's air quality approvals for a proposed soybean solvent extraction plant. They included an Environmental Rights Amendment claim in their arguments, although the majority of the Board's decision is devoted to the arguments on statutory and regulatory standards. The residents lost the appeal.

The appellants' limited Environmental Rights Amendment arguments focused on the fact that, because the Department's approval failed to meet statutory and regulatory standards, it violated the Pennsylvania Constitution. The Board noted the argument mirrored the first prong of Payne, which had been overruled already. However, the appellants also failed to explain "how the Department has, in their view, sanctioned a project that unreasonably degrades the environment and infringes on the Appellants' rights to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment." Id. at p.45. As a result, because the Board had already rejected the appellants' arguments regarding statutory and regulatory compliance, their Environmental Rights Amendment arguments failed.

Center for Coalfield Justice v. DEP, EHB Dkt. No. 2018-028-R (Opinion and Order on Petition for Supersedeas, Apr. 24, 2018).

Two community organizations appealed the Department's approval of longwall coal mining in a panel located near to and under Ryerson Station State Park. The appellants filed for a supersedeas, claiming that the mining would likely impair the section of stream running over the mining panel, which had already been experiencing flow loss from prior mining. The Board denied the petition.

The Board's Environmental Rights Amendment analysis in this case departed significantly from its prior opinions, focusing substantially more on the Board's view of the facts and less on discussing how the facts matched up to the legal standards. One issue involved stream grouting post-mining, which is essentially grouting cracks in the streambed resulting from mining subsidence in an attempt to maintain flow in the stream. The Board acknowledged that "there may be circumstances in which grouting could

constitute a violation of Article I, § 27,” but it found that “the extent of grouting that is likely to be required here does not rise to that level. The evidence indicates that if grouting is needed, it will only be required in some sections of Polen Run and not the entire length of the stream in the 5L panel.” *Id.* at 19-20. The Board acknowledged that the stream could be harmed to a worse extent by the time the hearing arrived, but it concluded that the evidence in front of it did not merit halting mining until the hearing. *Id.* at 20.

Delaware Riverkeeper Network v. DEP, 2014-142-B (Consolidated with 2015-157-B) (Adjudication, May 11, 2018).

The Delaware Riverkeeper Network, another environmental organization, and local residents challenged six unconventional gas wellsite permits and their renewals, raising objections primarily as to air pollution and health, water contamination, and noise. The Board ruled in favor of the Department.

The Board applied its Environmental Rights Amendment standards developed in its first two cases post-PEDF, but found that the Department had complied with them. The Board found under the facts of the case, the Department’s compliance with the regulatory framework and the few extra actions the Department took were sufficient in meeting its constitutional obligations.

Delaware Riverkeeper Network v. DEP, EHB Dkt. No. 2018-020-L (Opinion and Order on Motion to Quash Discovery, July 2, 2018).

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, challenged settlement agreements for a contaminated site in Chester County, Pennsylvania. The Department filed to quash the appellants’ discovery, arguing that the “scope and standard of review in th[e] matter are controlled by” a provision of Pennsylvania’s Hazardous Sites Cleanup Act, under which the settlement agreements were issued. *Id.* at 4. The Department argued that in such cases, there is no discovery and the Board is limited to the administrative record.

The appellants responded with several arguments, including that the appellants’ Environmental Rights Amendment challenge to the agreements required the Board to engage in its typical *de novo* review of the Department’s actions. *Id.* at 5. The Board disagreed, stating:

The scope and nature of our review under Section 1113 does not turn on what substantive objections are being raised to the Department’s action. It is true that the Department must always conform its actions with Article I, Section 27, but we are capable of evaluating whether it has done so by entering into a HSCA settlement based upon an AR. The existence of a constitutional challenge does not trump the strict limits set on our review of a

HSCA settlement in Section 1113. The constitutional challenge does not create a basis for allowing the discovery requested by the Riverkeeper.

Id. at 7.

B. Pennsylvania Commonwealth Court Decisions

Hess v. Pa. Public Utility Comm'n, 107 A.3d 246 (Pa. Commw. Ct. 2014).

Residents petitioned for review of a Pennsylvania Public Utility Commission (“PUC”) order that approved PPL’s application to acquire rights-of-way and easements to construct an 11.54 mile long 69 kV transmission line (Richfield-Dalmatia Tie Line) and a new 69 12 kV substation. 107 A.3d at 250. The residents and others had previously provided public comment stating that outages and reliability were not a problem, contrary to PPL’s claims.

The Court ultimately affirmed the PUC’s order, but two Judges dissented from the decision, citing the Environmental Rights Amendment. Judge Mary Hannah Leavitt, joined by Judge McCullough, wrote:

I would affirm the conclusion of the administrative law judges that PPL Electric’s (PPL) plan to place a new transmission line across the Susquehanna River in a pristine location is not necessary for the “service, accommodation, convenience or safety of the public.” 15 Pa.C.S. § 1511(c). In any case, PPL’s proposal to degrade the environment in this way does not, in my view, satisfy the test set forth in Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86, 94 (1973) for evaluating the environmental impact of a project, which is subject to regulation by the Public Utility Commission.

Hess, 107 A.3d at 267 (footnote omitted). Judge Leavitt cited testimony from the record that the power line crossing “would despoil a beautiful part of the river” and potentially harm hunting and fishing industries by causing further loss of habitat. Id. at 267-68. She also noted that a river crossing already existed a mile north of the site, and that agricultural land would be negatively impacted. Id. at 268.

The dissent noted that “ironically” the ALJs did not disapprove the transmission line on these bases because the 69 kV transmission line was not subject to the PUC’s regulation that was designed to implement Payne v. Kassab. Id. at 268. The dissent sharply disagreed, stating: “Nothing in this constitutional amendment supports the arbitrary line drawn by the Public Utility Commission between high voltage transmission lines and 69 kV transmission lines” and thus the inapplicability of Payne v. Kassab. Id. at 268. Judge Leavitt recognized that that PUC had made its decision prior to Robinson II. However, she relied on Robinson II as part of her analysis, stating:

In *Robinson Township*, a plurality of our Supreme Court explained that the Environmental Rights Amendment requires “each branch of government to consider in advance of proceeding the environmental effect of any proposed action [on the environment].” Additionally, the Supreme Court stated that “economic development cannot take place at the expense of an unreasonable degradation of the environment.” *Id.* at 954.

The Supreme Court in *Robinson Township* explained that this Court’s test established in *Payne v. Kassab* applies to cases involving a “failure to comply with statutory standards enacted to advance Section 27 interests.” *Id.* at 967. The Supreme Court suggested that the constitutional duties of executive agencies should not be dependent upon legislative enactments or quasi-legislative regulations, such as the one applicable to high voltage transmission lines. *Id.*

Id. at 268. She noted that the proposed power line was not being constructed because of projected service needs, but “rather, to allow PPL to satisfy its own self-imposed guidelines on reliability” that it “invokes . . . on a selective basis.” *Id.* at 268-69.

Thus, the dissent agreed “with Protestants that PPL does not need the transmission tie line to provide reliable service and that Protestants’ proposed alternatives for improving reliability were rejected by the Commission without a sound basis. Those alternatives would advance the rights of the people under Article I, Section 27 of the Pennsylvania Constitution.” *Id.* at 269.

Pa. Env’tl. Defense Found’n v. Com. (“PEDF”), 108 A.3d 140 (Pa. Commw. Ct. 2015), reversed in part, vacated in part by 161 A.3d 911 (Pa. 2017).

Pennsylvania Environmental Defense Foundation (“PEDF”) challenged a variety of state government decisions involving leasing of state forest land for unconventional shale gas development (a/k/a, “fracking”). PEDF claims had two main focal points, as follows: 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; and 2) the role of DCNR in leasing, including whether the Governor had a duty to consult with DCNR.

The Commonwealth’s Court’s PEDF decision re-affirmed that the constitutional text of the Environmental Rights Amendment must be honored and that it restricts government from infringing on environmental rights and from failing to fulfill its public trust obligations. PEDF, while noting that Robinson II was a plurality decision, also noted that none of the other justices had contradicted the plurality’s textual analysis of Environmental Rights Amendment. The Commonwealth Court proceeded to quote extensively from the Robinson II decision throughout its statements of governing legal principles and its analysis.

The Commonwealth Court also concluded that government officials are “vested by law with the duty to protect and preserve our natural resources,” and “the people of Pennsylvania are entitled to expect that those officials will ‘support, obey and defend’ Article I, Section 27 of the Pennsylvania Constitution in the discharge of

their powers and duties ...” PEDE, 108 A.3d at 171-72. The Court noted that government officials take an oath of office to support the Pennsylvania Constitution. Having taken that oath, those officials must discharge their duties under and in accordance with the Environmental Rights Amendment.

Thus, the Court also affirmed that these duties require that government officials at all levels avoid unduly infringing on citizens’ rights to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” in which they live every day in their community. Pa. Const., art. I, § 27. In order to avoid infringing on the people’s inherent individual environmental rights, officials must engage in science-based decision-making. As the Commonwealth Court noted, “The first clause of the Environmental Rights Amendment ‘requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.’” 108 A.3d at 156 (quoting Robinson II, 83 A.3d at 952 (plurality)).

The Commonwealth Court also agreed that the Environmental Rights Amendment makes every level and branch of government a trustee of public natural resources. Id. at 160, 171-72 (stating that government officials are “vested by law with the duty to protect and preserve our natural resources,” and “the people of Pennsylvania are entitled to expect that those officials will ‘support, obey and defend’ Article I, Section 27 of the Pennsylvania Constitution in the discharge of their powers and duties ...”).

Like the Robinson II plurality, the *en banc* Commonwealth Court in PEDE gave a broad reading of the term, “public natural resources.” The Court held that “public natural resources” include both publicly-owned land, and “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.” 108 A.3d at 167-68 (quoting Robinson II, 83 A.3d at 955).

The Commonwealth Court followed the Robinson II plurality in finding that, as part of government’s obligations as a trustee of public natural resources, it must conduct a pre-action analysis of whether a proposed governmental action will cause unreasonable degradation, diminution, or depletion of public natural resources, whether because of the municipality’s actions itself, or by the failure to restrain third parties. Id. at 156-57; see also id. at 172 (stating that adequate lease protections are not sufficient and that the state agency must consider whether further gas development impacting state forest land is in the best interests of the Commonwealth *and* consistent with Environmental Rights Amendment obligations); see also Robinson II, 83 A.3d at 957.

The Commonwealth Court likewise found that as a trustee under the Environmental Rights Amendment, an agency or a municipality has a duty of prudence, and as part of that duty, it cannot perform its obligations unreasonably. PEDE, 108 A.3d at 157, 168; Robinson II, 83 A.3d at 957.

Further, the Commonwealth Court held that a governmental entity has a fiduciary duty to “deal impartially with all beneficiaries and . . . the trustee has an obligation to balance the interests of present and future beneficiaries 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.” PEDF, 108 A.3d at 157 (quoting Robinson Twp., 83 A.3d at 958-59 (citations omitted)).

The Commonwealth Court’s PEDF decision also recognized that “when environmental concerns of development are juxtaposed with economic benefits of development, the Environmental Rights Amendment is a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process.” Id. at 170. Thus, allowing unfettered development simply does not respect environmental rights – there must be a give-and-take.

As discussed below, the Pennsylvania Supreme Court later issued its own decision in the PEDF case, further enshrining the legal standards set out in Robinson II.

Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016); affirmed per curiam by 158 A.3d 642 (Pa. 2017).

Young adults and minors brought a constitutional challenge against multiple state officials and agencies seeking declaratory and mandamus relief on the grounds that the defendants had failed to comply with their obligations under the Environmental Rights Amendment relative to climate change. Specifically, they argued that “by not developing and implementing a comprehensive plan to regulate CO2 and GHGs in light of the present and projected deleterious effects of global climate change, Respondents have not fulfilled their constitutional obligations to not infringe upon the rights granted to the people by the Constitution and have not adequately acted as trustees of the Commonwealth’s public natural resources, including the atmosphere.” 144 A.3d at 232-33.

The Court reviewed basic principles regarding the Environmental Rights Amendment, including the Payne test. However, it then stated, “The *Payne* test is particularly applicable in situations where a person challenges a government decision or action. This test is somewhat less satisfying when, as here, a person alleges that the government failed to affirmatively engage in an action required by its trusteeship duties under the ERA’s second provision.” Id. at 234-35.

The Court then declared:

Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation

of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action. See *Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 143 Pa.Cmwlth. 577, 600 A.2d 260, 265 (1991), *aff'd*, 533 Pa. 97, 619 A.2d 1063 (1993) (holding that the Governor can only execute laws and the balance required by the ERA was achieved through legislative enactments). While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General Assembly makes “basic policy choices” and imposes upon the agencies or departments “the duty to carry out the declared legislative policy in accordance with the general provisions of the statute.” *MCT Transp., Inc., v. Phila. Parking Auth.*, 60 A.3d 899, 904 (Pa.Cmwlth.), *aff'd sub nom. MCT Transp., Inc. v. Phila. Parking Auth.*, 622 Pa. 741, 81 A.3d 813, and *aff'd sub nom. MCT Transp., Inc. v. Phila. Parking Auth.*, 623 Pa. 417, 83 A.3d 85 (2013) (quotation omitted). The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to “expand the powers of a statutory agency....” *Cnty. Coll. of Delaware Cnty.*, 342 A.2d at 482. Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department’s enabling act. *Id.* at 473.

Id. at 235. Some of this reasoning and case law has been either overruled or remains significantly in doubt after the Pennsylvania Supreme Court’s decision in PEDF, discussed later in this guide. For example, the Court’s suggestion that individual agencies and departments of the Commonwealth may not have an obligation to comply with trustee obligations directly conflicts with PEDF and Robinson II.

The state entities filed preliminary objections, including on the basis of standing. The Court analyzed standing extensively, including relying on Robinson II’s majority opinion regarding standing.

The Court rejected the challengers’ mandamus arguments, saying that the Environmental Rights Amendment did not allow challengers to “disturb the legislative scheme” including separation of powers, and that the “climate change legislative scheme” did not impose mandatory duties requiring the kind of action that the challengers sought. Because of the Court’s findings relative to mandamus, it declined to entertain the challengers’ request for declaratory relief relative to climate change.

Pa. Independent Oil & Gas Ass’n (“PIOGA”) v. DEP, 146 A.3d 820 (Pa. Commw. Ct. 2016).

PIOGA challenged the Department’s application of certain statutory authority under the amended Oil and Gas Act, which had been impacted by the Pennsylvania Supreme Court’s decision in Robinson II. Specifically, certain parts of Section 3215 of the law had either been: 1) found unconstitutional and enjoined; or 2) so inseparable from the unconstitutional parts of the statutory provision that the Court enjoined them to the extent the

provision implemented or enforced the unconstitutional provisions. PIOGA thus challenged the Department's ability to, as one example, continue considering the impacts of proposed oil and gas wells on certain natural resources listed in the statute because the statutory provision was enjoined. The Court ultimately ruled in the Department's favor.

In a concurrence, Judge McCullough noted that the Environmental Rights Amendment obligates the Department to consider the impact of proposed wells on public natural resources, not simply those listed in the Oil and Gas Act.

Judge Covey dissented from the majority opinion, arguing that the majority was reopening the decision in Robinson II. She appeared to agree with the industry's position regarding the impact of the Robinson II decision on the Department's statutory authority.

Pa. Env'tl. Defense Found'n ("PEDF"), 161 A.3d 911 (Pa. 2017).

PEDF involved a challenge to a variety of state government decisions involving leasing of state forest land for unconventional shale gas development. The main focus of PEDF's claims was twofold: (1) diversion of royalties from state forest leasing away from maintenance of public trust resources (state forests) and into the General Fund, among other areas, and (2) the role of the DCNR in leasing, including whether the governor had a duty to consult with the DCNR.

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 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.

161 A.3d at 929.

In PEDF, the Pennsylvania Supreme Court rejected the non-textual Payne v. Kassab analysis that courts and the Pennsylvania Environmental Hearing Board had used since shortly after the Environmental Rights Amendment's enactment.

The Payne test, as it had become known, was developed by the Commonwealth Court in the mid-1970s in a challenge to a street-widening project in Wilkes-Barre. The test consisted of the following factors:

- (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).

The test was often applied, at least until after Robinson II, as if it had only the first prong, constraining environmental rights jurisprudence to statutory and regulatory obligations, rather than recognizing an independent constitutional provision with its own analysis.

For this and other reasons, PEDE, like the Robinson II plurality before it, rejected the test in favor of a true constitutional analysis. In fact, in PEDE, the Court explicitly overruled Payne.

Although the rejection of Payne was extremely significant by itself, the Pennsylvania Supreme Court went on to further explain 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.” Id. at 930. Thus, after over 40 years of courts avoiding the plain language of the Amendment, the Pennsylvania Supreme Court cleared the way for true constitutional jurisprudence to develop around individual environmental rights and the trust embedded in the Environmental Rights Amendment.

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.” Id. at 930-31.

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. Robinson Twp., 83 A.3d at 951. 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. *Id.*

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. *Id.* at 954. 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. *Id.* at 955

161 A.3d at 931. It 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. *Id.* 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). *Id.* at 931 n.22.

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.” *Id.* at 931. 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.” 161 A.3d at n.23. Thus, municipalities too are trustees under the Environmental Rights Amendment.

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.” *Id.* at 933; see also Robinson II, 83 A.3d at 957-58. 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.

Id. at 932 (quoting Robinson II, 83 A.3d at 956-57. 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 endorsed significant parts of Robinson II; as a result, the Robinson II plurality opinion is likely to be relied on by lower courts in analyzing claims under the Environmental Rights Amendment.

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. 161 A.3d at 934–35.

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.” Id. at 937.

It re-affirmed that the trust components of the Environmental Rights Amendment are self-executing. Id. at 937. 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.

It 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.” Id. at 939; see also id. at 933-35. 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. Id. at 935-36.

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.

Id. at 939.

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).

The remaining questions that the Pennsylvania Supreme Court remanded are still under consideration in the Commonwealth Court.

UGI Utilities, Inc. v. City of Reading, 179 A.3d 624 (Pa. Commw. Ct. 2017)(publication ordered Feb. 27, 2018).

UGI Utilities filed a declaratory judgment action seeking a determination that selected ordinances of the City of Reading were invalid, and that they should be enjoined. UGI filed for partial summary judgment on Count I of its action, which argued that the City's ordinance imposing restrictions on the location of gas meters in historic districts was preempted by the Public Utility Code. The Court granted the relief and enjoined the ordinance.

As part of its defense, the City argued that "preemption does not apply because the location of meters in historic districts implicates its protection of historic resources under Article 1, Section 27 of the Pennsylvania Constitution." 179 A.3d at 631. However, it did *not* argue that the PUC provisions in question violated the Environmental Rights Amendment or were otherwise unconstitutional. Id. In essence, it sought to use the Environmental Rights Amendment as an absolute shield against preemption, which the Commonwealth Court rejected. Id.

That said, the Court recognized:

Article 1, Section 27 can bar preemption of local regulation where the state statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision. *See Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 969–85 (2013)

(plurality opinion) (striking down “unprecedented” state law that barred all local zoning and environmental protection regulation on the grounds that the state law violated Article 1, Section 27). The reason that preemption fails in such a case is that the preempting state law itself is unconstitutional.

Id. Thus, aside from the fact that the City did not challenge the constitutionality of the PUC provisions at issue, the Court determined that the PUC’s “safety regulation of gas meters . . . in fact takes into account the interest in protection of historic resources by providing for consideration of indoor meter placement in historic districts.” Id. at 632.

Delaware Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Commw. Ct. 2018)(petition for allowance of appeal pending).⁶

Residents of West Goshen Township, Chester County filed an action to enforce their township’s local ordinances against the Mariner East 2 pipeline project, a highly volatile liquids pipeline, the siting of which neither Federal Energy Regulatory Commission (“FERC”) nor the Pennsylvania Public Utility Commission (“PUC”) regulates. Sunoco Pipeline L.P. had instead sought approval from the PUC for the Mariner East 2 project as an intrastate pipeline. It did so using preexisting certificates of public convenience dating back to the 1920s issued to former corporate entities, now operated by Sunoco, that owned the pipeline assets .

The residents argued that the proposed pipeline violates the Township’s zoning ordinances, and that a violation of the zoning in turn violated the residents’ substantive due process rights under Article I, Section 1 of the Pennsylvania Constitution. The residents distinguished their case from other cases in which zoning preemption by the Public Utility Code had been found because in this case, the PUC had no role in the siting of the Mariner East 2 line. They also argued that the General Assembly could not block local municipalities from applying their zoning authority, per Robinson II, and leave no one to fulfill the constitutional obligations dictated by the Environmental Rights Amendment. If the residents cannot pursue the action they brought, they are left with no ability to vindicate their constitutional rights because there is no agency in charge of pipeline siting.

The Commonwealth Court rejected the residents’ arguments, relying on prior zoning precedent upholding broad public utility preemption of local zoning. It also rejected the Environmental Rights Amendment arguments, claiming, in part, that “Plaintiffs do not explain how the ERA, Article I, Section 27 of the Pennsylvania Constitution, adopted in 1971, impacts long-standing, pre-existing law involving regulation of public utilities, without expressly referring to the topic. Similarly, Plaintiffs do not explain how the 2014 Ordinance impacts long-standing, pre-

⁶ Residents of Middletown Township, Delaware County also filed a similar lawsuit relative to Mariner East and their township’s local ordinances. The Commonwealth Court relied on the reasoning in DRN v. Sunoco in rejecting the Middletown Township residents’ suit. Flynn v. Sunoco Pipeline L.P., Not Reported in A.3d, 2018 WL 1463443 (Pa. Commw. Ct. 2018). Judge Brobson likewise concurred and dissented for the same reasons as in DRN, and was joined by Judge McCullough.

existing law involving regulation of public utilities.” 179 A.3d at 696. The court also claimed that the residents failed to show how the Township’s zoning ordinance in question “furthers the Township’s ERA trustee duties and relates to conserving public natural resources,” especially given that the new pipeline was being placed next to the old one. Id.

Judge Brobson filed a concurring and dissenting opinion; Judge McCullough dissented and joined his opinion. Both Judges had dissented from the Commonwealth Court’s initial decision regarding Sunoco’s public utility status. While Judge Brobson concurred as to the majority’s decision that the public utility status issue had been settled, he disagreed that the Court should have dismissed the case entirely. He viewed the matter as “essentially challenging the location of the ME2 Pipeline within West Goshen Township,” and that the matter should have been transferred to the PUC. Id. at 699-700 (Brobson, J., dissenting). Although he identified that such relief was not requested, he stated:

Nonetheless, I am moved by what appears to be an undisputed fact that no govern mental entity has ever reviewed, let alone approved, the location of the ME2 Pipeline. There is no specific statute and regulation that limits, let alone guides, Sunoco Pipeline, L.P.’s discretion to choose the location of the ME2 Pipeline. This pipeline, however, is currently in construction. Here, the majority acknowledges that Plaintiffs have a remedy before the PUC with respect to their challenge to the location of the ME2 Pipeline. (Maj. Op. at 682–83.) In this case, where private property rights and interests are at stake, I would not exalt form over substance. Plaintiffs clearly have a right to be heard, and the PUC, as the statewide agency with jurisdiction, has a duty to address their challenges (indeed, any challenges) to the location of the ME2 Pipeline.

Id. at 700 (Brobson, J., dissenting).

Clean Air Council v. Sunoco Pipeline L.P., 185 A.3d 478 (Pa. Commw. Ct. 2018).

Clean Air Council and two members filed a complaint in the Philadelphia Court of Common Pleas seeking declaratory and injunctive relief as to Sunoco’s ability to exercise eminent domain for the Mariner East pipeline project. After the Common Pleas Court denied Sunoco’s motion for summary judgment, the Court certified four questions of law for the Commonwealth Court’s review. The questions were:

(a) Are Plaintiffs’ claims outside the subject matter jurisdiction of the [trial court] or otherwise non-justiciable as collateral attacks on the Public Utility Commission’s (PUC) determinations?

(b) Are Plaintiffs’ claims based upon Pennsylvania Constitution Article I, Section 27 also outside the subject matter jurisdiction of the [trial court] or otherwise non-justiciable as collateral attacks on the Department of Environmental Protection’s issuance of environmental permits to [Sunoco] for the pipelines?

(c) Do Plaintiffs, as non-condemnees, lack standing to pursue their claims?

(d) Are Plaintiffs' due process claims legally insufficient because the procedural provisions of the Eminent Domain Code and remedies provided by the Public Utility Code satisfy any due process requirements?

185 A.3d at 481 (footnotes omitted). Of these questions, (b) and (c) involved questions relative to the Environmental Rights Amendment. Also, Sunoco sought permission to appeal to the Commonwealth Court, which the Commonwealth Court accepted, regarding whether "Sunoco is "the Commonwealth," such that it can be sued for violating the duties of the 'trustee' under Article I, Section 27 of the Pennsylvania Constitution." *Id.* at 481.

The Commonwealth Court considered question (b) and Sunoco's question together.⁷ It first determined that the plaintiffs were not collaterally attacking any PUC or DEP approvals for the Mariner East project. Rather, "Plaintiffs' legal claim is that Sunoco, and Sunoco alone, has violated the Environmental Rights Amendment in choosing to proceed with the project. Whether Sunoco has secured necessary regulatory approvals may have some relevance to its defense to Plaintiffs' claim, but anticipated defenses do not dictate our analysis of the trial court's subject matter jurisdiction." *Id.* at 493 (footnote omitted). It further noted that *PEDF*'s overruling of *Payne* did "not necessarily mean, however, that compliance with statutes and regulations is irrelevant to the inquiry, even under the new standards adopted by the Pennsylvania Supreme Court in *PEDF*." *Id.* at 493 n.21.

It next determined that plaintiffs' Section 27 claim should be transferred from the trial court to the Commonwealth Court because "Plaintiffs' Environmental Rights Amendment claim hinges on the theory that Sunoco is exercising the powers of the Commonwealth government as a public utility." *Id.* at 494. The Court expressly reserved "for subsequent proceedings the merits question of whether a public utility, such as Sunoco, exercising the power of eminent domain, acts as the Commonwealth government and thus has independent duties or obligations to the people of Pennsylvania under the Environmental Rights Amendment." *Id.* at 494-95.

On the second Environmental Rights Amendment-related question – standing – the Court easily found that the plaintiffs had standing based on *Robinson II*. *Id.* at 495.

The Environmental Rights Amendment claim from this case was transferred to the Commonwealth Court in June 2018, and is still active.

Marcellus Shale Coalition v. DEP, 185 A.3d 985 (Pa. 2018) (Memorandum Opinion).

⁷ The plaintiffs objected to Sunoco's question being considered on the basis that Sunoco did not raise it below. The Commonwealth Court stated the following: "It is apparent that Plaintiffs do not appreciate the purpose behind the Court's question." *Id.* at 493.

An oil and gas industry group challenged the DEP's new oil and gas regulations that, in part, instituted new standards for unconventional wellsite operations, including oil and gas wastewater impoundments. The Commonwealth Court in a one-judge opinion granted partial preliminary injunctive relief. The DEP appealed as of right to the Pennsylvania Supreme Court as to the regulations that were enjoined.

On appeal, the Supreme Court upheld the injunction as to the natural resources provision (specifically regarding privately-owned public places, and species of special concern), area of review regulations regarding abandoned wells, and centralized impoundments (as opposed to well-development impoundments). In regard to the natural resources provisions, and specifically privately-owned public places such schoolgrounds, the Court stated:

The Agencies maintain that they articulated reasons the general public regularly uses playgrounds and common areas of a school's property, and, moreover, such resources "share several similar characteristics with parks." Brief for Appellants at 36.

The Commonwealth Court did not disagree. It observed that the Agencies' interpretation of the statute **could be overly broad** as it might justify the inclusion of such items as shopping centers, movie theaters, sports stadiums, and amusement parks, all of which, per the doctrine of *ejusdem generis*, do not appear to be contemplated by Section 3215(c). See MSC, No. 573 M.D. 2016, *slip op.* at 17 n.11. **The court additionally noted that the Environmental Rights Amendment relates** to the protection of "natural, scenic, historic and esthetic values of the environment," and obligates the Commonwealth to conserve "*public* natural resources." PA. CONST. art. I, § 27 (emphasis added). It raised the possibility that the General Assembly intended to conform the list of items appearing in Section 3215(c) roughly to the scope of protection reflected in Article I, Section 27. **Under these circumstances, the court concluded a substantial question was raised whether it would be proper to interpret Section 3215(c) as authorizing regulations which subsume private resources open to the public**, such as playgrounds and common areas of schools, which are not inherently natural, scenic, historic, or esthetic. See MSC, No. 573 M.D. 2016, *slip op.* at 17–18 & n.10.

In our view, these observations support the court's determination that a substantial legal question was raised in relation to the challenged regulations' inclusion of playgrounds and school common areas as "public resources" and, concomitantly, the owners of these items as "public resource agencies."

185 A.3d at 996-97(emph. added).

Justice Donohue concurred as to the majority's reversal of the Commonwealth Court. However, she dissented as to the rest of the decision that affirmed the Court below. In regard to privately-owned public places, she wrote in a footnote:

In a footnote, the Commonwealth Court suggested that it is “possible” that when enacting section 3215(c), the General Assembly intended to protect only those “public natural resources” expressly protected under Article I, Section 27 of the Pennsylvania Constitution. . . . By highlighting the word “public” in Article I, Section 27’s reference to “**public** natural resources,” the Commonwealth Court implied that this provision of our Constitution includes a distinction of the type MSC insists exists in the present statutory analysis, namely between publicly-owned and privately-owned real property.

The Commonwealth Court’s interpretation of Article I, Section 27 of our Constitution as limiting the obligation of the Commonwealth to protect only natural resources located on lands owned by governmental entities is both undeveloped and unsupported by any analysis or citation to authority. The constitutional text emphasizes that “Pennsylvania’s public natural resources are the **common property of all the people**, including generations to come.” Pa. Const. art I, § 27 (emphasis added). Without explanation, the Commonwealth Court equated “**public** natural resources” with real property owned by **governmental** entities. I note that the natural resource at issue here is not real property, either publicly or privately owned, but rather environmentally healthy open space for recreation with access to all members of the public.

In any event, because the object of interpretation here is a statute and not Article I, Section 27 of our Constitution, and because neither this Court nor the Commonwealth Court had the benefit of detailed advocacy or constitutional analysis by the parties, further discussion of this issue is unnecessary.

Id. at 1010 n.5.

She further stated:

[N]o language in section 3215(c) suggests that public **ownership** of the resources at issue is a limiting factor in the DEP’s consideration of the impacts on those resources that may result from unconventional well drilling. To the contrary, of the six general types of public resources listed in section 3215(c), only “publicly owned parks” specifically refers to ownership, and as indicated above, “publicly owned parks” appears immediately after the “including, but not limited to” words of enlargement. Whether publicly owned or privately owned but open to the public, the general public uses recreational areas and playgrounds in precisely the same way, and neither the Commonwealth Court nor MSC has provided any compelling argument as to why impacts on these resources should not be considered in equal measure before the DEP issues a permit to allow fracking activities in these areas (i.e., within 200 feet of recreational areas and playgrounds).

Id. at 1010-11. She also noted that the Agencies had argued “many of the public resources listed in section 3215(c) are located on privately-owned property, including national or state scenic rivers, places identified on federal or state lists of historic places, sources used for public drinking supplies, and habitats of rare and endangered flora and fauna.” Id. at 1010 n.7. This is consistent with her prior discussion as to the Environmental

Rights Amendment. Further, she referenced Justice Baer's description of fracking operations in his Robinson II concurrence to illustrate the industrial nature of the operations and why more expansive consideration of its impacts was important. Id. at 1011 & n.8.

In regard to species of special concern, she again cited the Environmental Rights Amendment, stating in a footnote:

Pursuant to Article I, Section 27 of our Constitution, "species of special concern" are among the many public natural resources that are "the common property of all the people." Pa. Const. art. I, § 27. The Agencies' protective inclusion of species sensitive to environmental factors is precisely the stewardship that our Environmental Rights Amendment requires.

Id. at 1012 n.9.

The merits of this case have not yet been decided by the Commonwealth Court. It is currently scheduled for oral argument in October.

Delaware Riverkeeper Network v. DEP, No. 525 M.D. 2017, Not Reported in Atl. Rptr., 2018 WL 3554639 (Pa. Commw. Ct. July 25, 2018).

DRN, Maya van Rossum – the Delaware Riverkeeper, and DRN Member Kathleen Stauffer filed a mandamus action seeking to compel DEP to engage in environmental cleanup of the contaminated Bishop Tube Site. The plaintiffs brought claims under the Clean Streams Law, the Hazardous Sites Cleanup Act ("HSCA"), and the Environmental Rights Amendment.

DEP filed preliminary objections, alleging that the Court lacked jurisdiction, that DRN lacked standing, and that DEP's "pending federal lawsuit against some potentially responsible third parties" barred DRN's lawsuit. 2018 WL 3554639 at *1. The Court rejected all of DEP's claims.

On standing, the Court, as it did in prior cases, relied in part on Robinson II to find standing. The Court also found standing under HSCA.

In regard to DRN's ability to bring a mandamus action, DEP openly admitted the following:

Significantly, DEP acknowledges it does have some non-discretionary duties under the HSCA, the Clean Streams Law, and the Environmental Rights Amendment. Specifically, DEP admits the HSCA imposes a mandatory duty to develop programs to investigate and remediate contamination by hazardous substances. It admits the Clean Streams Law imposes a mandatory duty to receive and act on complaints of water pollution and other violations. It

admits the Environmental Rights Amendment imposes a mandatory duty to prevent degradation of the environment and to serve as a trustee for Pennsylvania's natural resources.

2018 WL 3554639, at *6. The Court also rejected DEP's attempt to distinguish "doing nothing" from "doing almost nothing" as hair-splitting. Id. It further determined that DRN did not seek to compel any particular result, but merely that DEP act. Thus, DRN's mandamus claims were proper. The Court further determined that there were no alternative remedies available.

Ultimately, after disposing of all of DEP's preliminary objections, it ordered the DEP to file an answer within 30 days of the Court's order in the decision. The fact that this case, based on mandamus and the Environmental Rights Amendment, has proceeded whereas Funk did not demonstrates that mandamus against governmental entities is a viable cause of action when chronic inaction infringes on protected environmental rights and public natural resources. Mandamus actions will have a greater likelihood of success when the plaintiff does not request any particular form or type of action because the Environmental Rights Amendment does not specify the action a governmental entity must take in order to protect clean air, water, and other aspects of a healthy environment. The plaintiffs in Funk sought a specific remedy and sued multiple different entities. Here, the plaintiffs sued only one agency, and simply sought that the agency act in accordance with its mandatory constitutional duties, rather than seeking a discrete type of action.