

## EXPERT ANALYSIS

### Pennsylvania's Environmental Rights Amendment Given New Life

By Steven T. Miano, Esq., and Jessica R. O'Neill, Esq.,  
Hangley Aronchick Segal Pudlin & Schiller

The Pennsylvania Supreme Court's December 2013 decision in *Robinson Township v. Commonwealth*, 2013 WL 6687290 (Pa. Dec. 19, 2013), sent shockwaves through the commonwealth. The practical outcome of the decision was the invalidation of an attempt to impose statewide land-use rules for the oil and gas industry, which was a critical victory for the municipal and environmental plaintiffs who brought the case. This was not as surprising, though, as the Supreme Court's reinvigoration of a previously moribund constitutional provision in Pennsylvania guaranteeing public environmental rights.

While the constitutional provision in Pennsylvania is unique, the sentiments expressed by the court could potentially reach beyond the commonwealth's borders.

#### ACT 13 AND THE COURT CHALLENGE

Act 13 was enacted in February 2012 and represented the commonwealth's attempt to impose uniform statewide land-use regulations on shale gas development.<sup>1</sup> The act included more mundane provisions such as fees for producers of unconventional gas wells, the use of funds from the Oil and Gas Lease Fund, and programs to encourage projects to convert vehicles to natural gas.

The critical and controversial sections of Act 13 prohibited any local regulation of oil and gas operations, including via environmental legislation, and required local governments to amend their zoning codes to permit industrial uses in all zoning districts. Another section set rules for the well permitting process, including limited setback provisions requiring certain distances between wells and water bodies. The setback provisions included, however, a requirement that the Department of Environmental Protection "shall waive the distance restrictions" upon submission of a plan identifying additional measures "necessary to protect the waters of this commonwealth."

The act was immediately challenged in the Commonwealth Court by a group of municipalities, municipal elected officials, the Delaware Riverkeeper Network and its executive director, and a doctor. The challengers raised a number of due process and other constitutional issues. The zoning provisions were stayed early in the litigation, and the challenge proceeded on an expedited basis.

The Commonwealth Court ultimately found the act unconstitutional in part, as violative of due process, and enjoined the setback waiver provisions as well as the local regulation and zoning provisions.<sup>2</sup> The Commonwealth Court rejected some of the challengers' other constitutional claims, however, including claims that the act violated Article 1, Section 27 of the Pennsylvania Constitution, that Act 13 is a "special law," and that Act 13 is unconstitutionally vague. The parties cross-appealed to the Pennsylvania Supreme Court.

#### THE ENVIRONMENTAL RIGHTS AMENDMENT

One of the constitutional arguments rejected by the Commonwealth Court was the challengers' claim that Act 13 violated Pennsylvania's Environmental Rights Amendment, Pa. Cons. Art. 1 § 27.



*Act 13 prohibited any local regulation of oil and gas operations, including via environmental legislation, and required local governments to amend their zoning codes.*

That amendment provides, in its entirety:

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.

The amendment is unique. Nothing like it exists under federal law. Only a few other states specifically affirm citizens' environmental rights in their constitutions. While some other states mention conservation or natural resources, they do not include specific rights.

Pennsylvania adopted the amendment by popular vote in 1971. After being added to the constitution, however "limited decisional law developed" under the amendment.<sup>3</sup> The case law that did develop largely minimized the impact of the amendment. For example, in *Payne v. Kassab*, the Commonwealth Court created a three-part balancing test, which first required consideration of whether the challenged action had complied with all applicable statutes and regulations governing natural resources.<sup>4</sup> The test then asked whether the record demonstrated a reasonable effort to reduce the environmental harm to a minimum and whether the environmental harm resulting from the challenged action would clearly outweigh the benefits of the action.

The Supreme Court affirmed the Commonwealth Court in *Payne* but did not adopt the Commonwealth Court's test; the Supreme Court found some balancing of interests was required and had already occurred in the course of adopting the challenged legislation in *Payne*.<sup>5</sup> In effect, under the *Payne* test, which the Commonwealth Court applied in subsequent cases under the amendment, judicial review focused on the Legislature's policy choices after its balancing of the relevant interests.<sup>6</sup> As a result, the amendment was not used much by plaintiffs challenging government actions for their potential negative impact on the environment.

### THE PENNSYLVANIA SUPREME COURT OPINIONS

In *Robinson Township*, the Supreme Court unexpectedly breathed new life into the amendment. The Supreme Court affirmed the Commonwealth Court in declaring the challenged provisions of Act 13 unconstitutional. The court invalidated the restrictions on local regulations, the requirement to amend local zoning ordinances to permit industrial uses in all zoning districts and the setback/waiver requirements for well siting. Though there was a majority for the conclusion that the act was unconstitutional, the justices in the majority differed as to how to reach that conclusion. Chief Justice Ronald D. Castille issued a plurality opinion for the court, reasoning that the act violated the Environmental Rights Amendment.

The plurality opinion approached the Environmental Rights Amendment with a blank slate. First, the plurality dismissed both the Supreme Court's and the Commonwealth Court's prior decisions under the amendment. The plurality found that prior cases had "provided this court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision" and "weakened the clear import of the plain language of the constitutional provision in unexpected ways."<sup>7</sup> Instead, the plurality undertook its own comprehensive text-based analysis of the amendment.

The plurality gave independent meaning to each sentence of the amendment. It said the first sentence grants the right to clean air, pure water and preservation of the values of the environment. Because this right belongs to the people, the plurality said, the commonwealth's power to act contrary to this right is limited by the amendment. The second sentence vests in the people, including future generations, common ownership of Pennsylvania's natural resources. Finally, the third sentence embraces the public trust doctrine and establishes the commonwealth as trustee of Pennsylvania's public trust resources, assigning to the commonwealth the requirements and obligations attendant with its trustee role.

The plurality then evaluated the interaction between these rights and obligations and Act 13. The plurality said Act 13's preemption of local regulation of oil and gas operations violated the amendment because it "commands municipalities," who are also trustees of the public's natural

resources, “to ignore their obligations under [the amendment].” Furthermore, Act 13 “directs municipalities to take affirmative actions to undo existing protections of the environment in their localities.”<sup>8</sup>

The zoning provisions were similarly invalidated, as the act’s requirement that municipalities change their laws to permit oil and gas operations in every pre-existing zoning district “degrades the corpus of the trust” by negatively impacting public natural resources. Additionally, the zoning provisions have the effect of imposing differential environmental burdens on different communities, which violates municipalities’ obligations as trustees to manage the trust for the benefit of all the people.

The plurality also invalidated the setback and waiver provisions of the well-permitting section of the act, finding them unconstitutional because the act provides no real standards for what measures are necessary for a waiver of the setbacks. Furthermore, the act provides citizens or municipalities no ability to appeal the department’s decision to grant a waiver.

The Environmental Rights Amendment was not the challengers’ main argument, though they preserved it; the Commonwealth Court had held that the challengers failed to state a claim for relief under the amendment, after which the challengers cross-appealed. The three-justice plurality (of Chief Justice Castille, Justice Debra Todd and Justice Seamus McCaffery) was joined in the result by Justice Max Baer. Justice Baer thought the plurality opinion was “well-considered” and “pioneering” but said the parties’ substantive due process arguments were “better developed and a narrower avenue to resolve this appeal.”<sup>9</sup>

### THE IMMEDIATE IMPACT ON THE OIL AND GAS INDUSTRY

As a practical matter, the *Robinson Township* decision returns the state of the law governing the oil and gas industry to its pre-Act 13 status. This status does include some limitations on municipal authority over oil and gas operations, which the *Robinson Township* decision keeps intact. The Pennsylvania Supreme Court had ruled in 2009 that a municipality could use zoning to regulate the location of oil and gas activity but not the activity itself, which is regulated by the Commonwealth’s Oil and Gas Law.<sup>10</sup> Those rulings and their limitations on the use of zoning still stand.

Those limitations aside, municipalities can examine their zoning codes and make decisions about where to permit or prohibit oil and gas activities within their borders. This is not an easy task for municipalities. Without statewide preemption, the onus remains on local governments to make difficult political decisions about whether to encourage or discourage shale gas operations through local zoning rules.

For the oil and gas industry, not much has changed. Before Act 13 was enacted, according to DEP, nearly 5,000 unconventional gas wells were drilled in Pennsylvania.<sup>11</sup> Though Act 13, had it been upheld, might have led to more oil and gas activity, the industry was operating in the Commonwealth without Act 13’s protections and will certainly continue to operate without it. The oil and gas industry is familiar with working under municipal zoning codes, seeking permits and variances where it needs to and cooperating with local zoning boards.

### THE POTENTIAL IMPACT ON ENVIRONMENTAL LITIGATION

Future cases will determine the impact of the Robinson plurality’s revival of the Environmental Rights Amendment. The sweeping language in the plurality opinion with regard to the commonwealth’s obligations to exercise its “plenary police power ... in a manner that promotes sustainable property use and economic development” could be applied in many other contexts. Creative plaintiffs are, no doubt, brainstorming ways to use the Environmental Rights Amendment to challenge other commonwealth actions or inactions that negatively impact public trust resources.

The language of the amendment applies the public trust protections to all “public natural resources,” which could include air, water, public lands and extractive resources such as coal. The potential for trans-boundary impact of using the amendment exists as well. Though as a part of the Pennsylvania Constitution, the amendment explicitly applies only to the public

*“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.”*

natural resources of the commonwealth, air (or the atmosphere) is a shared and trans-boundary resource. Large waterways such as the Delaware River are also a shared resource. Moreover, trust resources like public lands can be subject to operations that physically cross state lines, such as pipelines. Challenges to commonwealth decisions or policies regarding these public trust resources could have out-of-state impacts.

In particular, the public trust protections of the amendment seem highly applicable to climate change issues. Climate change is an inter-generational issue; the use of natural resources in the present has direct consequences for potential users of those resources in the future. Suits challenging the government's failure to act to combat climate change brought under the public trust doctrine have not, so far, seen a great deal of success.

For example, in *Alec L. v Jackson*, a group of children and environmental organizations brought suit against the federal government, saying it had a fiduciary obligation under the public trust doctrine to refrain from taking actions that destroy the atmosphere.<sup>12</sup> The U.S. District Court for the District of Columbia held that because the public trust doctrine is created by state law, the federal court had no jurisdiction over the plaintiffs' complaint.<sup>13</sup>

The state courts that have confronted the issue have taken divergent views on the status of the public trust doctrine and its reach. The plurality's view of the power of the Environmental Rights Amendment, however, may provide a constitutional grounding for challenges to the failure to combat climate change as a matter of Pennsylvania law. Indeed, the full impact of the *Robinson Township* decision remains to be seen. **WJ**

## NOTES

- <sup>1</sup> 58 Pa. Cons. Stat. § 2301.
- <sup>2</sup> *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012).
- <sup>3</sup> *Robinson Twp. v. Commonwealth*, 2013 WL 6687290, \*25 (Pa. Dec. 19, 2013).
- <sup>4</sup> 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976).
- <sup>5</sup> *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).
- <sup>6</sup> *Id.*; see also *Community College of Del. County v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975).
- <sup>7</sup> *Robinson Twp.*, 2013 WL 6687290, \*32.
- <sup>8</sup> *Id.* \*56.
- <sup>9</sup> *Id.* \*77 (Baer, J., concurring).
- <sup>10</sup> *Huntley & Huntley Inc. v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009); *Range Res.-Appalachia LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).
- <sup>11</sup> See, e.g., PA. PUB. UTIL. COMM'N, ANNUAL REPORT ON THE COLLECTION AND DISTRIBUTION OF FUNDS UNDER ACT 13 OF 2012 (Dec. 28, 2012), available at <http://bit.ly/1jOMBqq>.
- <sup>12</sup> 863 F. Supp. 2d 11, 13-14 (D.D.C. 2012).
- <sup>13</sup> *Id.*



**Steve Miano** (L) heads the environmental law practice at **Hangley Aronchick Segal Pudlin & Schiller** in Philadelphia and is the chair-elect of the American Bar Association Section of Environmental Energy and Resources. He began his career as an assistant regional counsel for Region 3 of the Environmental Protection Agency. **Jessica O'Neill** (R) is an associate in the environmental law practice group at Hangley Aronchick Segal Pudlin & Schiller in Philadelphia. Before joining the firm she served as an assistant regional counsel for Region 3 of the Environmental Protection Agency and as counsel to the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.