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Pennsylvania Supreme Court invalidates test for constitutionality of Commonwealth environmental actions and applies private trust law, leaving many unanswered questions

On June 20, 2017, the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 10 MAP 2015, 2017 WL 2645417 (Pa. June 20, 2017), injected substantial uncertainty into environmental jurisprudence in Pennsylvania for the foreseeable future. For 44 years, Commonwealth courts and administrative bodies, including the Environmental Hearing Board, evaluated the constitutionality of Commonwealth actions under a three-part test established in *Payne v. Kassab*, 312 A.2d 86. The Payne Test has been under attack in recent years as groups challenged the constitutionality of various Commonwealth acts under Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment or ERA). Recent challenged acts include PADEP decisions to issue drill permits, ESCGP-2 permits and NPDES permits; municipal decisions to permit oil and gas development activity; and, at issue in *PEDF*, the broader use of royalties and other proceeds derived from leasing Commonwealth property for oil and gas development.

Article I, Section 27 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 invalidated Payne test

The Commonwealth Court in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), affirmed 361 A.2d 263 (Pa. 1976), first articulated a three-part test for analyzing whether the PADEP's final actions are constitutional under Article I, Section 27. The *Payne* test asked:

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- Does the environmental harm that 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?

The majority opinion in *PEDF* invalidated the *Payne* test, holding that the test, "strips the constitutional provision of its meaning." The Court held, "Instead, when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment." The Court held that Section 27 imposes fiduciary duties consistent with Pennsylvania trust law. Importantly, the Court rejected the Commonwealth's argument that it should apply a public trust doctrine to Section 27 matters, and instead applied private trust law. Justice Baer's dissent found the Court's reading of Section 27 "unmoored from the amendment's language and purpose," and argued that private law trust principles are absent from the ERA and are improper.

Article 27 challenges are now adjudicated using the Article 27 language itself and private trust law

The specific legal issues decided in *PEDF* are fairly narrow, but the holding has broad implications. The Court decided whether certain legislative acts were constitutional when they directed royalties and other proceeds from leasing Commonwealth land to the General Assembly and General Fund without restricting their use to

conservation purposes. As to certain fund transfers, *PEDF* argued that it impaired the ability of the Department of Conservation and Natural Resources (DCNR) to mitigate impacts from oil and gas development, removed DCNR's ability to act as trustee, and eliminated revenues that would otherwise have built the corpus of a fund to protect natural resources. The Commonwealth Court concluded that such transfer to the General Assembly does not "infringe upon the rights afforded the people" and does not "reflect a failure by the General Assembly to act consistent with its trust obligations under Article I, Section 27." As to other transfers, *PEDF* argued that money generated by oil and gas exploration of Commonwealth property "must be committed to furthering the purposes, rights, and protections afforded" under Section 27, rather than being intermingled with the General Fund. The Commonwealth Court held that Section 27 does not command that revenues derived from state leases "be funneled to those purposes and those purposes only." The Supreme Court reversed in part, and vacated and remanded in part, the Commonwealth Court's order for further adjudication. In doing so, the Supreme Court offered the following observations, in summary:

- Pennsylvania's environmental trust imposes two basic duties on the Commonwealth as trustee: 1) a duty "to protect the degradation, diminution, and depletion of public natural resources"; and 2) the Commonwealth "must act affirmatively via legislation to protect the environment."
- A trustee's discretion "is limited by the purpose of the trust and the trustee's fiduciary duties, and does not equate 'to mere subjective judgment.'"
- A trustee must use trust assets only for purposes authorized by the trust or necessary for the preservation of the trust.
- Revenue obtained from the disposition of trust assets must be returned to the corpus of the trust or otherwise dedicated to trust purposes for conservation and maintenance purposes.
- Royalties are unequivocally proceeds from the sale of oil and gas, are part of the corpus of the trust and must be so

managed.

- The Court was unable to similarly characterize bonus payments, delay rentals and other revenue streams, and remanded the responsibility to the Commonwealth Court to determine if those funds belong in the corpus of the Section 27 trust.
- The public trust provisions of Section 27 are self-executing and do not need implementing legislation.
- The legislature's diversion of funds from the DNCR's exclusive control "does not, in and of itself, constitute a violation of Section 27." It violates Section 27 when it "diverts proceeds to a non-trust purpose without exercising its fiduciary duties as trustee."

Matters impacted by change in law and unanswered questions

In the short term, matters adjudicating constitutionality under the *Payne* test are targets for appeal or motions for reconsideration under the new *PEDF* standard. Matters addressing proceeds from the sale or development of Commonwealth natural resources clearly will be evaluated under private trust principles in conjunction with the purported plain language of Section 27. It is much less clear how courts and administrative bodies are supposed to apply private trust principles to subjective administrative decisions such as issuing drill, ESCGP-2 or NPDES permits. Operators should be mindful in permit applications to include content to help the Commonwealth conclude that granting the application is proper exercise of their trustee duties.

More broadly, *PEDF* raises significant doubt, at best, as to whether the Commonwealth can ever use proceeds from the development of its natural resources for any purpose (schools, infrastructure, pension relief, etc.) other than to preserve such natural resources. Must proceeds be returned to the agency from which they were generated for its use, to the exclusion of other environmental agencies? Does the trust encompass only shale gas producing areas, prohibiting the Commonwealth from distributing proceeds to

non-shale gas producing areas? Will the legislature seek to restore public trust principles rather than private trust law, and if so, how? Legislative action may require a constitutional amendment of the ERA.

Frost Brown Todd's environmental and business litigation attorneys represent oil and gas producers and midstream operators in administrative proceedings and litigation in state and federal trial and appellate courts. Those matters include pending matters before the Environmental Hearing Board, trial courts and the Commonwealth Court implicating Section 27 appeals invoking the now-invalidated *Payne* test. As such, we are on the front lines as environmental jurisprudence develops under this new *PEDF* standard. For questions regarding implementation of this new standard, challenges under Section 27 or overall questions regarding the Commonwealth permitting or regulatory decisions in light of *PEDF*, please do not hesitate to contact [Kevin L. Barley](#) or [Kevin L. Colosimo](#).

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