



Office of Chief Counsel

# The Environmental Rights Amendment *Right Now*

Environmental Law Forum  
April 3, 2019

## Disclaimer

These materials do not necessarily reflect the views of the Commonwealth, the Office of General Counsel or the PA Department of Environmental Protection.





**Art. I, Sec. 27 Cases 2014 - Present**

- Post *Robinson* DEP Statistics
- 12 Take-aways from cases



**Post Robinson  
Appeal Statistics**

19 Appeals involving DEP with  
27 Decisions referencing ERA

## Statistics – Which Programs

- O&G – 3
- Waste – 5
  - Landfills – 3
  - Biosolids – 1
  - Beneficial Reuse General Permit - 1
- Air – 4
  - Plan Approval -2
  - Single Source Determination -1
  - Petition for Rulemaking – Climate Change -1
- Water - 5
  - NPDES/ESCGP – 3\*
  - 537 – 1
  - 105 – 1\*
- Mining – 1
- HSCA – 2

\*Appeal involves multiple DEP actions



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## Statistics – Which Sectors

- O&G – 8
  - Gas Well
  - Liquid Gas Waste Storage
  - Compressor Stations
  - Pipeline
  - Waste
  - Regulation
- Landfills - 3
- Biosolids - 1
- Ag - 2
  - CAFO
  - Soybean Oil Extraction
- Mining - 2
- Residential Development - 1
- Utility (Maintenance) – 1
- Cleanups – 2
- General/All - 1



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## DEP Regions - Appeals

- Northwest Region – 3
- Northcentral Region – 3
- Northeast Region – 3
- Southwest Region – 3\*
- Southcentral Region – 4\*
- Southeast – 3\*
- Reg Counsel/Central Office – 3\*

\* Appeals involve multiple offices



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## Types of Decisions

- Adjudication – 8
- Motion to Dismiss – 1
- Motion for Summary Jdgmt – 6
- Procedural/Discovery/Evidentiary – 5
- Supersedeas Petition – 3
- Cmwlth Court (Mandamus/Decl Jdgmt) - 4



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## Years & DEP Outcome

- 2015 – 7
- 2016 – 9
- 2017 – 4
- 2018 – 7
- Dispositive Rulings
  - DEP Upheld - 14
  - DEP Overruled - 4



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## Who is Raising Art. I, Sec. 27?

- Municipal Entities – 2
- Third Party/Citizen Groups – 16
- DEP – 2
- EHB – 1



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## Pending Cases of Significance

- *MSC v DEP* (Chapter 78a challenge)
  - Argument 10/2018 Cmwth Court
- *PEDF* Remand
  - Argument 12/2018 Cmwth Ct
- EQB Climate Change Petition
  - Filed 2/2019; EQB Mtg 4/16/2019



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## Post Robinson Caselaw Take-Aways

### Number 1:

- Third Party Appellants bear the burden of proving that the DEP action violated Article I, Section 27.
  - It is not enough to simply assert that the Environmental Rights Amendment was violated.

Cases: *Stedge* (EHB 2015), *Friends of Lackawanna* (EHB 2017), *Logan* (EHB 2018), *Feudale* (Cmwth. Ct. 2015)



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## Post Robinson Caselaw Take-Aways

### Number 2:

- Appellant cannot overcome defects in a filing by citing Article I, Sec. 27.
  - Nunc Pro Tunc standard not satisfied simply by raising compliance with Art I, Sec. 27 (which is a question on the merits of issuing a permit – not an explanation for why the filing was untimely).

Cases: *Feudale v. DEP* (EHB 2016); *Feudale v. Aqua Pa and DCNR* (Cmwlth Ct 2015)



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## Post Robinson Caselaw Take-Aways

### Number 3:

- Art. I, Sec. 27 creates no automatic right to relief
  - Commonwealth's duties under ERA must be **balanced** against other duties owed by Commonwealth to its citizens.
  - ERA is a thumb on the scale.
- Article I, Sec. 27 allows for "controlled" development of resources rather than no development.

Cases: *PEDF* (Cmwlth Ct.); *Brockway* (EHB 2015& Cmwlth Ct 2016); *Funk* (Cmwlth Ct 2016); *Feudale* (Cmwlth. Ct 2015)



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## Post Robinson Caselaw Take-Aways

### Number 4:

- DEP should consider multiple environmental authorizations needed for a project holistically.
  - Relevant where project requires multiple permits from DEP.

Case: *Hudson* (EHB 2015)



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## Post Robinson Caselaw Take-Aways

### Number 5:

- Amendment does not require “no impact.”
  - Argument that “DEP could have done more” is not the proper question.
  - But, not enough to simply demonstrate compliance with statute and regulations
  - While expansive in its language, the ERA was not intended to be read in absolutist terms.
  - EHB describes specific examples in several cases.

Cases: *Friends of Lackawanna* (EHB 2016); *Pine Creek Valley Watershed Ass’n* (EHB 2016); *Clean Air Council v. Sunoco and DEP* (EHB 2017); *Center for Coalfield Justice* (EHB 2017); *Brockway* (EHB 2015); *Funk* (Cmwlth. Ct. 2016)



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## Post Robinson Caselaw Take-Aways

### Number 6:

- Art I, Sec. 27 cannot expand DEP's statutory or regulatory authority
  - "Courts assessing the duties imposed upon executive branch 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. "

Cases: *Funk* (Cmwlth Ct 2016); *Friends of Lackawanna* (EHB 2016).



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## Post Robinson Caselaw Take-Aways

### Number 7:

- In response to Point No. 6, . . . but "executive agencies cannot disregard their independent duty to comport their actions with the ERA."

Case: *Friends of Lackawanna* (EHB 2017)



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## Post Robinson Caselaw Take-Aways

### Number 8:

- DEP must consider local zoning but retains discretion.
  - Where project has potential conflict w/ local zoning:
    - DEP must account for the zoning dispute, but
    - DEP only required to decide the permit application.
  - DEP has neither the authority or the duty to act as statewide zoning hearing board.
  - DEP has no role in enforcing local land use and zoning req'ts.
  - DEP is NOT required to conduct an independent investigation into whether project complies w/ local req'ts before permitting a project.

Case: *Tri-County Landfill* (EHB 2015); *Snyder* (EHB 2015)



## Post Robinson Caselaw Take-Aways

### Number 9:

- *Payne v. Kassab* test rejected by Pa Supreme Ct. (2017)
- PEDF confirms ERA is self-executing
- PEDF established new framework for review:
  - Commonwealth must give proper consideration to environmental effects; decision must not cause unreasonable degradation, diminution or depletion
  - Commonwealth must act with prudence, loyalty and impartiality (private trust law principles)

Cases PEDF (Pa. 2017), CCJ (EHB 2017), R.E. Gas (EHB 2018)



## Post Robinson Caselaw Take-Aways

### Number 10:

- HSCA – Statutory Review Framework Not Inconsistent with ERA
- Pennsylvania “diligent prosecution” and pace of cleanup informed by ERA

Cases: *DKRN v DEP & Constitution Drive* (EHB 2018); *DRKN v DEP* (Cmwlth Ct. 2018) (both cases related to Bishop Tube HSCA site)



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## Post Robinson Caselaw Take-Aways

### Number 11:

- Public Natural Resources addressed by Cmwlth Ct:
  - Not only state-owned lands, waterways and mineral reserves
  - Resources that implicate the public interest
  - Ambient Air
  - Surface and groundwater
  - Wild flora and fauna (including fish)
  - NOT common areas of school property, nor playgrounds

Case: *MSC v. DEP* – (Cmwlth Ct 2018) (case not final)



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## Post Robinson Caselaw Take-Aways

### Number 12:

- Before and after *PEDF*, the analysis does NOT end at compliance with the regulations.
- The Supreme Court in *PEDF* rejected argument that the standard for evaluating ERA compliance is coextensive with compliance with statutes and regulations when it rejected *Payne* test.

Cases: *Sludge Free* (EHB 2015); *Friends of Lackawanna* (EHB 2016); *CCJ* (EHB 2017); *RE Gas* (EHB 2018)



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## Panel Questions

### Question #1

What are "Pennsylvania's public natural resources?"

Do they include air or water, to any degree?

Article I, Section 27 of the Pennsylvania Constitution:

*The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.*

Pa. Const. art. I, § 27.

## Panel Questions

### Question #2

If environmental statutes and regulations establish standards for air and water quality, do those standards ensure that there is “clean air” and “pure water” for purposes of Article I, Section 27?

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## Panel Questions

### Question #3

Do *Robinson Township* and *PEDF* affect how attorneys counsel applicants for DEP permits or those who might oppose the issuance of DEP permits? If so, in what way?

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## Panel Questions

### Question #4

Under what circumstances can a state action violate the first sentence of Article I, Section 27?

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## Panel Questions

### Question #5

Does the Commonwealth, as trustee of public natural resources, now have a duty to periodically report to the beneficiaries (the public) on the overall condition of these resources?

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## Panel Questions

### Question #6

Given that, in *PEDF*, the Court interpreted Article I, Section 27's public trust clauses in light of Pennsylvania private-trust principles that were in effect in 1971, how does DEP incorporate private trustee principles and duties in administering regulatory programs?

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**Thank you!**



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