



12-6-2018

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Recommended Citation

Rebecca A. Cabrera, *Trust the Process? The Supreme Court of Pennsylvania's Broad Interpretation of the Environmental Rights Amendment Sent Shockwaves Through the Commonwealth in Pennsylvania* *Environmental Defense Foundation v. Commonwealth*, 29 Vill. Envtl. L.J. 229 (2018).

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TRUST THE PROCESS? THE SUPREME COURT OF
PENNSYLVANIA'S BROAD INTERPRETATION OF THE
ENVIRONMENTAL RIGHTS AMENDMENT SENT
SHOCKWAVES THROUGH THE COMMONWEALTH IN
*PENNSYLVANIA ENVIRONMENTAL DEFENSE
FOUNDATION V. COMMONWEALTH*

I. AN ENVIRONMENTAL REVOLUTION HAS EMERGED

In the early 1900s, Pennsylvania's natural resources were diminished as a result of the lumber industry cutting down trees, unregulated hunting that led to wildlife disappearance, and the coal industry causing long-lasting devastation on the environment.¹ In response, the Pennsylvania legislature acknowledged these shocks to the environment and enacted several statutes to enforce the citizens' rights to preserve the environment.² As a result of the statutes' enactment, the government strictly regulated conventional oil and gas drilling in Pennsylvania.³ The government, however, did not design the regulations and statutes to address unconventional gas development.⁴ The most common type of unconventional gas development is the extraction of natural gas from the Marcellus Shale Formation.⁵ Recently, new technologies for unconventional

1. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 917 (Pa. 2017) (summarizing environmental devastation from lumber, hunting, and coal industries).

2. PA. CONST. art. I, § 27 (articulating citizens' rights to preserve public natural resources); *see also PEDF III*, 161 A.3d at 918 (noting environmental devastation was prominent reason for drafters to create ERA). The drafters of the ERA stated "[w]e seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage We cut down our trees and erected eyesores along our roads We uglified our land and we called it progress." *Id.* The ERA was unanimously enacted in 1971. *Id.*

3. *See* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463, 478 (2015) (referencing enactment of Pennsylvania's 1969 Oil and Gas Act). Pennsylvania's Oil and Gas Act was one of the country's first oil and gas laws. *Id.*

4. *See* John C. Dernbach, James R. May & Kenneth T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, SSRN, Mar. 23, 2014, at 1171-72, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657.&download=yes (noting previous legislation did not contemplate unconventional gas development). In 2012, the Oil and Gas Act was amended to incorporate unconventional gas development and is currently known as "Act 13." *Id.* at 1172. Act 13 addresses unconventional gas development and imposes new permit requirements for oil and gas procedures. *Id.*

5. *See id.* at 1171 (describing popular type of unconventional gas development).

gas extraction in the Marcellus Shale have emerged in Pennsylvania.⁶

The Marcellus Shale Formation is a large sedimentary rock beneath Pennsylvania that is estimated to contain ten percent of North America's natural gas.⁷ The natural gas forms in "pockets" within the rock formation's fissures and cracks, which drillers then extract.⁸ New techniques for drilling in the Marcellus Shale have allowed drillers to access and recover the natural gas in enormous quantities.⁹ As a result, Pennsylvania is now one of the United States' preeminent natural gas suppliers.¹⁰

The discovery of and extraction from the Marcellus Shale Formation, however, has led to a rise in lease sales to capture the natural gas from the formation, and has been the subject of citizens' environmental concerns.¹¹ Drillers extracting gas from the Marcellus Shale have been shown to affect land, water, and air.¹² For example, drilling on forestlands requires a large number of trees to be cut down to build roads for the drilling equipment.¹³ In addition, large amounts of water are taken from rivers and lakes and then flushed into the rock formation to create cracks in the rock for gas extraction.¹⁴ Once the water is flushed into the rock formation, however, it becomes contaminated and cannot be re-

6. See generally *id.* (discussing discovery of new techniques for drilling in Marcellus Shale that led to enormous amounts of state land leases for gas extraction).

7. *Id.* (summarizing basic facts of Marcellus Shale Formation). The Marcellus Shale Formation lies beneath Pennsylvania and surrounding states. *Id.*

8. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 914 (Pa. 2013) (describing how gas is formed in Marcellus Shale).

9. See Dernbach, May & Kristl, *supra* note 4, at 1171 (describing various techniques to extract natural gas from Marcellus Shale). One technique includes drilling vertically and then horizontally into the shale. *Id.* Another technique is called "hydrofracturing," which involves injecting large amounts of water into the rock formation to capture the gas. *Id.* The various techniques used to extract natural gas from the Marcellus Shale can produce "millions of cubic feet of gas per day." *Id.*

10. See Gabriella T. Soreth, *Cracks' in the Courts Analysis? Court Strikes Balancing Act Between Citizens' Constitutional Rights and Government's Exploitation of Natural Gas Reserves in Pennsylvania Environmental Defense Foundation v. Commonwealth*, 27 VILL. ENVTL. L.J. 329, 329 (2016) (noting Pennsylvania's contribution to country's gas supply).

11. See Dernbach, May & Kristl, *supra* note 4, at 1171 (explaining effects of extracting gas from Marcellus Shale Formation).

12. *Environmental Impact, SHALE STUFF*, <http://shalestuff.com/education/environment/environmental-impact> (last visited Dec. 28, 2017) (discussing effects of drilling in Marcellus Shale).

13. *Id.* (describing how gas extraction affects lands).

14. *Id.* (noting that large amounts of water are taken from various bodies of water such as rivers, "municipal water, and recycled fracking water.").

turned into bodies of water.¹⁵ Lastly, drilling in the Marcellus Shale causes greenhouse gases to be released into the air and negatively impacts air quality.¹⁶

Despite the known environmental effects that coincide with extracting gas from the Marcellus Shale, private parties continue to push for access to the land with natural gas trapped beneath it.¹⁷ In 2008, the Commonwealth of Pennsylvania began leasing state lands for natural gas extraction.¹⁸ The lease sales generated enormous amounts of revenue for the Commonwealth and led to pressure on the Commonwealth to continue leasing state land.¹⁹ The Commonwealth fluctuated between permitting and prohibiting the lease sales because of the potential environmental harms that excessive amounts of drilling can cause to the land.²⁰ As a result of the ongoing lease sales, the government took several budgetary actions, which resulted in the environmental and constitutional dispute in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III)*.^{21,22}

This Note examines the Supreme Court of Pennsylvania's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III)*, which held various budgetary actions unconstitutional.²³ In *PEDF III*, the court overturned a test that was used for over four decades to analyze challenges under Article I, Section 27 of the Pennsylvania Constitution, also known as the Envi-

15. *Id.* (describing how drilling in Marcellus Shale affects water).

16. *Id.* (describing how gas extraction in Marcellus Shale affects air quality depending on drilling stage).

17. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF II*), 108 A.3d 140, 142 (Pa. Commw. Ct. 2015) (noting increase in demand for gas reserves were due to new technologies for gas extraction).

18. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 920 (Pa. 2017) (explaining government agency first approved lease sale for seventy-four thousand acres so drillers can extract gas from underneath land).

19. *See PEDF II*, 108 A.3d at 144 (detailing first lease sale generated \$163 million and Commonwealth pushed for additional lease sales to make up for budgetary shortfalls).

20. *See Soreth, supra* note 10, at 330 (explaining government agency's uncertainty about allowing additional lease sales). The government agency became concerned about the excessive amounts of drilling that would take place over the next five decades. *Id.* at 330 n.9.

21. 161 A.3d 911 (Pa. 2017) (creating new standard for interpreting challenges under ERA).

22. For a thorough discussion of the factual summary in *PEDF III*, see *infra* notes 33-54 and accompanying text.

23. *See PEDF III*, 161 A.3d at 911 (stating Supreme Court of Pennsylvania's holding).

ronmental Rights Amendment (ERA).²⁴ In doing so, the court drilled in place that a strict reading of the ERA's text is the proper standard of review for environmental challenges.²⁵ In addition, the court declared the Commonwealth to be the trustee of Pennsylvania's natural resources and unprecedentedly applied private trust principles to the Commonwealth's duties.²⁶

This Note also discusses the potential ramifications that the Supreme Court of Pennsylvania's decision could have on the environment and Pennsylvania's jurisprudence involving citizens' rights under the ERA.²⁷ Part II of this Note discusses *PEDF III*'s factual summary, its primary issues, and the court's holdings.²⁸ Part III provides the legal background of the ERA's history that influenced the court's decision in *PEDF III*.²⁹ Part IV reviews the Supreme Court of Pennsylvania's legal analysis of the ERA's text and interpretation of Pennsylvania private trust law.³⁰ Part V critiques the court's analysis, focusing on the court's failure to address the new standard's applicability to circumstances outside of *PEDF III* and the court's error in imposing private trust principles.³¹ Lastly, Part VI explores the potential impact the Supreme Court of Pennsylvania's decision could have on future environmental jurisprudence, the Commonwealth's ability to act as a trustee, and land development within Pennsylvania.³²

24. See *id.* at 930 (providing legal analysis to overturn previously used test). For over four decades, Pennsylvania evaluated environmental challenges with a test created in *Payne v. Kassab* (*Payne I*), 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). *Id.* For further discussion of court's reasoning to overturn the *Payne* test, see *infra* note 132 and accompanying text.

25. See *PEDF III*, 161 A.3d at 930 (explaining proper standard of review lies within ERA's text and private trust principles).

26. See *id.* at 932-33 (describing duties ERA imposes on Commonwealth as trustee of public natural resources).

27. For a prediction of the *PEDF III* decision's effects on future environmental claims, see *infra* notes 200-207 and accompanying text.

28. For further discussion of *PEDF III*'s factual background, see *infra* notes 33-54 and accompanying text.

29. For further discussion of the relevant legal background regarding Pennsylvania's environmental jurisprudence and prominent cases, see *infra* notes 54-122 and accompanying text.

30. For further discussion of the court's legal analysis of the issues presented in *PEDF III*, see *infra* notes 123-152 and accompanying text.

31. For a critique of the court's analysis and findings, see *infra* notes 166-198 and accompanying text.

32. For an analysis of the potential impact of the Supreme Court of Pennsylvania's holding in *PEDF III*, see *infra* notes 199-216 and accompanying text.

II. PENNSYLVANIA'S PUBLIC NATURAL RESOURCES TRUST FALL INTO THE SUPREME COURT OF PENNSYLVANIA'S ARMS IN *PEDF III*

In 2008, the Pennsylvania Department of Conservation and Natural Resources (DCNR) began leasing state land for natural gas extraction.³³ After the DCNR's lease sale in 2008, the DCNR refrained from leasing additional state land because of its concerns about large amounts of gas extraction taking place on Pennsylvania's land within the upcoming decades.³⁴ The DCNR, however, received significant pressure from the state to lease more land because the lease sales generated enormous amounts of revenue, which were used to help soften Pennsylvania's budgetary shortfalls.³⁵

In an effort to offset Pennsylvania's budgetary shortfalls, Governor Rendell amended the State Fiscal Code in 2009.³⁶ In 2010, Governor Rendell signed Executive Order No. 2010-05, which enforced a suspension on further leasing because of the potential harm it would cause to Pennsylvania's natural resources.³⁷ Within

33. Pa. Envtl. Def. Found. v. Commonwealth (*PEDF II*), 108 A.3d 140, 143 (Pa. Commw. Ct. 2015) (explaining state land leasing for natural gas extraction became popular due to development of new extraction technology). In 2008, the DCNR leased seventy-four thousand acres, which generated about \$163 million in revenue. *Id.* at 143-44. The DCNR's leasing activities became a primary interest for the Commonwealth because the 2008 lease sale "generated more revenue than the prior sixty years of leasing activity combined." *Id.*

34. See *PEDF III*, 161 A.3d at 921 (providing context for DCNR's refusal to lease additional land for natural gas extraction). The DCNR did not want to enter into further leases because they had previously leased about 540,000 acres that already had extraction activity being performed on it. *Id.* The DCNR felt strongly that until they could further monitor the activity, they "believed there should be no further leasing because we were going to be watching a tremendous amount of gas activity on the state forest for the next [fifty] years." *Id.*

35. See *id.* (describing need for DCNR to continue lease sales). For further discussion of revenues generated from state land leases, see *supra* note 33 and accompanying text.

36. See *PEDF II*, 108 A.3d at 145 (detailing Govern Rendell unilaterally amended Fiscal Code to add new Article XVI-E to govern oil and gas wells). Within Article XVI-E, Section 1602-E required that "no money in the fund from royalties may be expended unless appropriated by the General Assembly." 72 P.S.C.A. § 1602-E (West 2017), *invalidated by* Pa. Envtl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911 (Pa. 2017). Section 1603-E only allows the DCNR "up to \$50,000,000" to perform its duties under the Lease Fund Act. 72 P.S.C.A. § 1603-E (West 2017), *invalidated by* Pa. Envtl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911 (Pa. 2017).

37. Pa. Envtl. Def. Found. v. Commonwealth (*PEDF I*), No. 228 M.D.2012, 2013 WL 3942086, at *4 (Pa. Commw. Ct. 2013) (warning substantial amounts of natural gas extraction would have negative effects on environment and Pennsylvania's natural resources). Governor Rendell also signed the executive order because he feared that additional land leasing would "jeopardize DCNR's ability to fulfill its duty to conserve and maintain" Pennsylvania's natural resources. *PEDF III*, 161 A.3d at 923.

the following years, the government drafted more legislative enactments and made amendments to the Fiscal Code in order to continue to divert funds from the Lease Fund to the General Fund in Fiscal Years 2010-2011 through 2014-2015.³⁸ In 2014, Governor Corbett's Executive Order No. 2014-03 lifted Governor Rendell's sweeping moratorium on leasing state lands and only prohibited leases that would diminish the surface areas of state forests or parks.³⁹

On March 19, 2012, the Pennsylvania Environmental Defense Foundation (PEDF) filed suit against the Commonwealth of Pennsylvania, alleging that the 2009-2015 budgetary decisions violated the Environmental Rights Amendment (ERA).⁴⁰ PEDF alleged that the legislative enactments violated the ERA because the enactments diverted funds from the Lease Fund to the General Fund and compromised the DCNR's ability to preserve Pennsylvania's public natural resources.⁴¹ Further, PEDF argued that the Commonwealth did not properly evaluate the negative impact the granting of additional leases would have on Pennsylvania's land and public natural resources.⁴² Finally, PEDF asserted that the DCNR could not fulfill their obligations to conserve the environment because the budgetary enactments depleted DCNR's funding.⁴³ In the initial suit, the Commonwealth Court analyzed PEDF's claims under a test that was

38. See *PEDF III*, 161 A.3d at 921-24 (summarizing details of enacted appropriations for Fiscal Years, yearly changes to General Appropriations Act, passing of Act 13, and amendments to Fiscal Code). An example of an enacted appropriation was the General Assembly requiring \$180 million to be appropriated from the Lease Fund to the General Fund in Fiscal Year 2010-2011. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF II)*, 108 A.3d 140, 147 (Pa. Commw. Ct. 2015).

39. See *PEDF II*, 108 A.3d at 150 (detailing further state land leasing for resource development was allowed except in narrow circumstances).

40. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 925 (Pa. 2017) (describing grounds for PEDF's claim against Commonwealth and Governor Corbett). The PEDF is a non-profit organization whose objective is to protect and conserve Pennsylvania's public natural resources. See *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF I)*, No. 228 M.D.2012, 2013 WL 3942086, at *1 (Pa. Commw. Ct. 2013) (explaining purpose of PEDF). The PEDF challenged the 2009-2015 budget decisions because the decisions led to large portions of state lands being leased for resource extraction. *PEDF III*, 161 A.3d at 925 (noting PEDF's reason for challenging recent budgetary actions).

41. See *PEDF III*, 161 A.3d at 927 (alleging Commonwealth disregarded ERA in deciding to appropriate funds from Lease Fund to General Fund and leasing additional state lands for revenue).

42. *Id.* at 927-28 (describing PEDF's allegations that Commonwealth violated ERA).

43. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF I)*, No. 228 M.D.2012, 2013 WL 3942086, at *9 (Pa. Commw. Ct. 2013) (detailing PEDF's arguments in seeking declaratory relief).

created in *Payne v. Kassab*.⁴⁴ The court used the *Payne* test and found that it could not definitively say that PEDF failed to state a claim under the ERA.⁴⁵ The court, therefore, overruled the Commonwealth's demurrer and preliminary objections.⁴⁶

In 2015, upon the Commonwealth's appeal, the Commonwealth Court analyzed three issues: (1) whether Sections 1602-E and 1603-E violated the ERA; (2) whether the appropriations from the Lease Fund to the General Fund violated the ERA; and (3) who has the authority to lease state lands for resource extraction.⁴⁷ The court did not apply the three-part *Payne* test and instead, looked to the *Robinson Township v. Commonwealth*⁴⁸ plurality opinion for guidance in interpreting the ERA.⁴⁹ After analyzing the issues, the court granted partial summary judgment for the Commonwealth.⁵⁰ The Commonwealth Court held: (1) the statutes authorizing the appropriation of money from the Lease Fund to the General Fund did not violate the ERA; (2) there was no evidence that DCNR's funding was inadequate; (3) the lease sale revenues were not required to be used solely for conservation purposes; and (4) the Lease Fund is a special fund, not a trust fund.⁵¹

In 2017, upon PEDF's appeal, the Supreme Court of Pennsylvania reversed the Commonwealth Court's decision and set forth a broad interpretation of the ERA by imposing private trust law

44. *Payne v. Kassab (Payne I)*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976) (laying out *Payne* test for challenges under ERA); *see also PEDF I*, 2013 WL 3942086, at *9-10 (discussing application of *Payne* test to PEDF's facts). For further discussion of the *Payne* test's elements, see *infra* notes 87-88 and accompanying text.

45. *PEDF I*, 2013 WL 3942086, at *10 (finding it was too early to make determination on PEDF's claims under *Payne* test).

46. *See id.* at *10-13 (detailing preliminary objections that challenged legal sufficiency of complaint and alleged that PEDF's claims raised non-justiciable political questions).

47. *See* Pa. Envtl. Def. Found. v. Commonwealth (*PEDF II*), 108 A.3d 140, 155 (Pa. Commw. Ct. 2015) (providing list of issues for judicial review and setting up court's analysis).

48. 83 A.3d 901 (Pa. 2013) (holding ERA's text is proper standard of review for environmental challenges).

49. *See PEDF II*, 108 A.3d at 156-59 (describing how court adopted *Robinson Township* approach of looking at ERA's plain language). The court found the *Payne* test to be binding, but only applicable to a narrow set of cases. *Id.* at 159. For further discussion of the three-part *Payne* test, see *infra* notes 87-88 and accompanying text. For further discussion of the *Robinson Township* plurality decision, see *infra* notes 111-115 and accompanying text.

50. *See PEDF II*, 108 A.3d at 173 (stating Commonwealth was granted relief on two constitutional challenges).

51. *See id.* at 140 (listing court's holding). The court also determined that leasing decisions are exclusively under DCNR's authority. *Id.* at 172.

principles.⁵² In doing so, the court overturned the *Payne* test and found that a strict reading of the ERA's text is the proper standard of review for environmental challenges.⁵³ The court had three main findings: (1) laws that impair citizens' environmental rights are unconstitutional; (2) lease sale revenues are part of the "corpus of the trust," which is a sum of money used for the beneficiaries, and must be used only for conservation purposes; and (3) the ERA is self-executing, meaning a party does not need a separate legislative act to bring a claim under the ERA.⁵⁴

III. FORMING THE FOUNDATION OF TRUST

A. Protecting Pennsylvania's Public Natural Resources

The Commonwealth of Pennsylvania has a long history of leasing state lands for oil and gas extraction.⁵⁵ In the midst of Pennsylvania allowing for significant oil and gas extraction, the Commonwealth attempted to protect the Pennsylvania's natural resources by creating a variety of legislation, including: acts, formation of agencies, constitutional amendments, and executive orders.⁵⁶ The Commonwealth enacted the Oil and Gas Lease Fund Act (Lease Fund Act) in 1955 to govern rent and royalty collection from the Commonwealth's oil and gas leases.⁵⁷ The Act also required that the monies collected be deposited into the Oil and Gas Lease Fund (Lease Fund).⁵⁸

52. See Pa. Envtl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 930-32 (Pa. 2017) (detailing Supreme Court of Pennsylvania's interpretation of ERA); see generally Susan Phillips, *Pa. Supreme Court Upholds Broad Interpretation of Environmental Rights Amendment*, ST. IMPACT (June 20, 2017, 7:33 PM), <https://stateimpact.npr.org/pennsylvania/2017/06/20/pa-supreme-court-upholds-broad-interpretation-of-environmental-rights-amendment/> (describing significance of Supreme Court of Pennsylvania's decision).

53. Phillips, *supra* note 52 (noting court's broad analysis of ERA compared to previous precedent).

54. See *PEDF III*, 161 A.3d at 911 (listing Supreme Court of Pennsylvania's holdings).

55. *Id.* at 919 (describing state land leasing for resource extraction is common in Pennsylvania). The DCNR has been leasing state land since 1947. Pa. Envtl. Def. Found. v. Commonwealth (*PEDF II*), 108 A.3d 140, 143 (Pa. Commw. Ct. 2015).

56. Soreth, *supra* note 10, at 335 (explaining Pennsylvania's attempts to preserve and maintain public natural resources).

57. 71 P.S.C.A. §§ 1331-1333 (West 2017) (repealed 2017) (noting purpose of Lease Fund Act); see also *PEDF III*, 161 A.3d at 919-20 (detailing enactment of Lease Fund Act).

58. *PEDF III*, 161 A.3d at 919-20 (describing what Lease Fund governs). The Lease Fund is to be "used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes." 71 P.S.C.A. § 1331 (West 2017) (repealed 2017).

In 1995, the Commonwealth also enacted the Conservation and Natural Resources Act (CNRA) to protect Pennsylvania's public natural resources.⁵⁹ The CNRA created the DCNR as a "cabinet-level advocate" to protect state lands and uphold the Act's mission.⁶⁰ The CNRA also granted the DCNR sole discretion to enter into contracts regarding natural resource extraction as long as the DCNR believed it would be in the Commonwealth's best interest.⁶¹

In the past decade, the DCNR had increased the number of state land leases due to the creation and implementation of enhanced technology available to extract natural gas from the Marcellus Shale.⁶² The Marcellus Shale revolution prompted Governor Corbett to enact Act 13, which regulated natural gas development and prevented local governments from regulating resource extraction.⁶³ The DCNR's significant increase in state land lease sales for natural gas extraction, due to extraction-friendly legislation, has led to large amounts of revenue for Pennsylvania.⁶⁴

B. ERA's Enactment to the Pennsylvania Constitution

In the 1950s and 60s, Pennsylvania endured a period of environmental devastation from the lumber, hunting, and coal indus-

59. 71 P.S.C.A. §§ 1340.101-1340.103 (West 2017) (noting purpose of CNRA); see also *PEDF II*, 108 A.3d at 142 (explaining CNRA was enacted to protect natural resources).

60. See *PEDF III*, 161 A.3d at 920-21 (describing DCNR's role in protecting environment). The DCNR's primary mission is to "maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs" 71 P.S.C.A. §§ 1340.101 (West 2017).

61. See *PEDF III*, 161 A.3d at 920 (detailing DCNR is granted sole authority to lease state lands for natural resource extraction).

62. See *Pa. Envtl. Def. Found. v. Commonwealth (PEDF II)*, 108 A.3d 140, 142 (Pa. Commw. Ct. 2015) (describing increase in state land leasing due to new technology for extracting natural gas from Marcellus Shale). The Marcellus Shale is a sedimentary rock buried underneath the earth's surface that contains gas "pockets" within the rock formation that the drillers perforate to extract natural gas. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 914 (Pa. 2013) (describing Marcellus Shale Formation and extraction process); see also *Environmental Impact, SHALE STUFF*, <http://shalestuff.com/education/environment/environmental-impact> (last visited Feb. 4, 2018) (describing impact gas extraction from Marcellus Shale has on forestlands, water, and air quality).

63. For further discussion of Act 13, see *infra* note 109 and accompanying text.

64. For further discussion of the large amount of revenue generated in Pennsylvania from leasing state lands for natural gas extraction, see *supra* note 33 and accompanying text.

tries.⁶⁵ As a result of the devastating environmental impact, Pennsylvania's General Assembly unanimously enacted the ERA to the Pennsylvania Constitution in 1971.⁶⁶ The General Assembly designed the ERA to attempt to prevent further pollution, destruction, and misuse of Pennsylvania's natural resources.⁶⁷ The ERA, Article 1, Section 27 of the Pennsylvania Constitution, states:

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.⁶⁸

The ERA's first and second clauses established two separate rights for the Commonwealth's citizens: (1) the right to "clean air, pure water," and environmental preservation; and (2) common ownership of Pennsylvania's public natural resources.⁶⁹ The third clause of the ERA established the Commonwealth's role as the trustee of public natural resources and named the citizens as the "beneficiaries."⁷⁰

Typically, challenges brought under the ERA proceeded under three theories: either the government had violated the citizens' rights, the government failed to perform its trustee duties, or the

65. See *Robinson Twp.*, 83 A.3d at 960-61 (explaining three environmental events that led to ERA's enactment). The first environmental event was the boom in the lumber harvesting industry that resulted in large portions of Pennsylvania becoming barren. *Id.* at 960. Second, unregulated hunting, deforestation, and pollution led to the "game" wildlife disappearing and through various efforts, the Pennsylvania Game Commission sought to restore the wildlife populations. *Id.* Third, the lack of restrictions on the coal industry resulted in long-lasting effects on human health and devastation to the environment. *Id.* at 960-61.

66. *Id.* (summarizing ERA's purpose was to affirm citizens' environmental rights and preserve Pennsylvania's public natural resources).

67. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 940 (Pa. 2017) (discussing ERA centered on protecting Pennsylvania's public natural resources).

68. PA. CONST. art. I, § 27 (stating first paragraph of Article I, Section 27 of Pennsylvania Constitution that is also known as ERA).

69. See *Robinson Twp.*, 83 A.3d at 951-54 (discussing citizens' environmental rights and Commonwealth's inability to act contrary to citizens' environmental rights).

70. *Id.* at 955-56 (interpreting ERA's trust provisions). The Court explained that although the Commonwealth is the trustee, other branches of Pennsylvania's government also have authority over the natural resources. *Id.* at 956. This allows for checks and balances on the branches to work for the benefit of the people. *Id.*

government's action can run afoul to both theories.⁷¹ When faced with challenges brought under the ERA, courts consistently have not categorized whether the alleged action violated the peoples' rights under the ERA's first, second, or third clause.⁷² Nevertheless, the ERA has been "the law of the land in Pennsylvania" for decades.⁷³

C. ERA Lost Its Original Intention

Shortly after Pennsylvania adopted the ERA, its original meaning was quickly lost in two cases, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*⁷⁴ and *Payne v. Kassab*, decided by Pennsylvania courts in 1973.⁷⁵ In *National Gettysburg*, the Supreme Court of Pennsylvania handed down a controversial decision that impinged upon citizens' environmental rights under the ERA.⁷⁶ The Commonwealth sought to enjoin construction of a 307-foot observation tower near the Gettysburg Battlefield because the tower would ruin the historic environment, block the skyline, and "erode the natural beauty and setting which once was marked by the awful conflict of a brothers' war."⁷⁷ Since the local governments did not have regulations to govern the construction of towers, the Commonwealth could only seek relief under the ERA.⁷⁸ A divided court affirmed

71. *Id.* at 950-51 (addressing three theories that plaintiffs use to bring claims under ERA).

72. *Id.* at 964 (noting previous courts' lack of distinction between ERA's clauses when evaluating challenges). The courts' lack of distinction between which ERA clause was implicated created confusion for future courts and interfered with having consistent court rulings. *Id.*

73. Robert B. McKinstry & Harry Weiss, *Pennsylvania Supreme Court Extends Its Landmark Robinson Township Decision in Pennsylvania Environmental Defense Foundation v. Commonwealth*, BALLARD SPAHR, LLP (July 11, 2017), <http://www.ballardspahr.com/alertspublications/legalalerts/2017-07-11-pa-supreme-court-extends-landmark-robinson-twp-decision-in-pedf-v-commonwealth.aspx> (noting ERA's significance in Pennsylvania environmental law).

74. 311 A.2d 588 (Pa. 1973) (discussing plurality's holding that ERA is not self-executing and plaintiff needs legislation to bring action under ERA).

75. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 339 (2015) (explaining previous precedents disregarded ERA's original meaning).

76. *See Soreth*, *supra* note 10, at 338 (discussing controversy arising out of court's ruling that ERA is not self-executing).

77. *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 589-90 (Pa. 1973) (explaining state's claim focused on enforcing citizens' rights under ERA's first clause). The Commonwealth argued that the citizens have the ability to limit private development by enforcing their environmental rights. *See Dernbach & Prokopchak*, *supra* note 75, at 340 (summarizing one of Commonwealth's arguments against construction of tower on private land).

78. *Nat'l Gettysburg*, 311 A.2d at 590 (detailing Commonwealth could only challenge tower construction under ERA).

the lower court's decision to deny the injunction, but remained divided as to whether the ERA is self-executing.⁷⁹ The Supreme Court of Pennsylvania failed to reach a majority opinion, and this decision left future courts grappling with how to determine the proper analysis for challenges under the ERA.⁸⁰

Within the same year, the Commonwealth Court of Pennsylvania decided *Payne*, which rendered guidance for courts to determine the proper standard of review for challenges under the ERA.⁸¹ The citizens of Wilkes-Barre brought an action to enjoin the Pennsylvania Department of Transportation from widening River Street and taking roughly one-half acre of a public park, River Common, in the City of Wilkes-Barre.⁸² In part, the citizens argued that the Commonwealth's approval of the street widening project violated the ERA by disregarding the Commonwealth's obligations as the trustee of Pennsylvania's public natural resources.⁸³ The Commonwealth Court denied the citizens' relief and the Supreme Court of Pennsylvania affirmed, holding that the citizens failed to establish their burden of proof.⁸⁴ The court asserted that the Com-

79. *Id.* at 592-95 (summarizing division between Supreme Court of Pennsylvania's justices). Three justices found the ERA to not be self-executing, and therefore, the Commonwealth could not bring a claim without legislation allowing it. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 964 (Pa. 2013). One justice concurred with no specific opinion. *Id.* Two justices would have affirmed the lower court's decision that the Commonwealth failed to establish their burden of proof. *Id.* Lastly, two justices would have reversed the lower court's decision and believed that the ERA was self-executing. *Id.*

80. See Meghan A. Farley, *Did the Court Dig Too Deep?: An Analysis of the Pennsylvania Supreme Court's Decision in Robinson Twp., Washington County v. Commonwealth of Pennsylvania, et al.*, 26 VILL. ENVTL. L.J. 325, 333 (2015) (explaining Supreme Court of Pennsylvania failed to develop rule for applying ERA). The Commonwealth Court's decision, finding that the ERA is self-executing, is still binding authority. See Soreth, *supra* note 10, at 339 (recognizing lower court's decision of ERA being self-executing is binding on future courts).

81. See Farley, *supra* note 80, at 334 (explaining Commonwealth Court of Pennsylvania crafted test for future courts in analyzing challenges under ERA).

82. See *Payne v. Kassab (Payne I)*, 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976) (explaining construction details for street widening project). The Wilkes-Barre citizens argued that the street widening project would take about twelve feet of land from River Common, remove large trees, and diminish a pedestrian walkway. *Id.*

83. *Payne v. Kassab (Payne II)*, 361 A.2d 263, 272 (Pa. 1976) (detailing part of citizens' arguments against Commonwealth). The citizens also argued that the Commonwealth violated its obligations under Act 120, which requires the Commonwealth, before approving the project, to determine that the proposed project was the best option and the project is designed to minimize environmental harm. *Id.* at 269.

84. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 965 (Pa. 2013) (summarizing Supreme Court of Pennsylvania's holding in *Payne*). The court found the citizens' argument to be flawed because they sought "automatic relief by merely

monwealth's obligation as the trustee for public natural resources was not only to preserve the resources, but also to maintain a suitable highway that is beneficial to citizens.⁸⁵

The most cited, and now widely criticized, portion of the *Payne* opinion was the Commonwealth Court's creation of the three-part balancing test used to clarify the citizens' burden of proof under the ERA.⁸⁶ The Commonwealth Court of Pennsylvania found the correct approach for analyzing challenges under the ERA was to balance the interests between environmental and social concerns, instead of looking directly to the ERA's text.⁸⁷ For a party to obtain relief under the ERA, the court considered three factors: (1) compliance with laws that functioned to protect Pennsylvania's public natural resources; (2) evidence to show that reasonable efforts were used to decrease negative environmental effects; and (3) a balance between environmental harm and portrayed benefits from the challenged action.⁸⁸ The three-part *Payne* test became the "all-purpose test" for analyzing challenges that arose under the ERA.⁸⁹ The effects of the *Payne* test, however, were detrimental to citizens' rights claims.⁹⁰ The plaintiffs typically lost when they sought to protect their environmental rights, due to the *Payne* test's focus on the success of a local government decision rather than public rights.⁹¹ Over forty years later, Pennsylvania courts changed the legal landscape for plaintiffs by upholding plaintiffs' environmental rights in

asserting a common right to a protected value under the trusteeship of the state." *Id.*

85. See *Payne II*, 361 A.2d at 273 (explaining public trust doctrine allows for maintenance and expansion of highway systems).

86. See Farley, *supra* note 80, at 334 (introducing three-part test established in *Payne*).

87. See *Payne v. Kassab (Payne I)*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976) (summarizing balancing analysis for *Payne*'s three-part test). The Commonwealth Court of Pennsylvania further noted that the balancing interests "must be realistic and not merely legalistic." *Id.*

88. See *id.* (describing *Payne* three-part balancing test).

89. See Dernbach, *supra* note 3, at 476-77 (explaining *Payne* test had become standard test for future courts even though test is not based on public rights). Critics have observed that the *Payne* test does not function like a public trust doctrine but instead, is just "an administrative law test for determining the efficacy of an administrative agency or local government decision." *Id.* at 477.

90. Dernbach & Prokopchak, *supra* note 75, at 344 (noting plaintiffs lost "overwhelming majority" of environmental rights cases).

91. See *id.* (summarizing results of *Payne* test for plaintiffs); see also Dernbach, *supra* note 3, at 477 (discussing effects of *Payne* test's improper standard).

recent cases such as *Center for Coalfield Justice and Sierra Club v. DEP*.^{92,93}

D. This Case was a Real Payne: Challenges Presented by the *Payne* Test

The Commonwealth Court of Pennsylvania's decision in *Concerned Citizens for Orderly Progress v. Commonwealth, Department of Environmental Resources*⁹⁴ is an example of the difficulties associated with applying the *Payne* test.⁹⁵ In *Concerned Citizens*, a citizens' organization challenged the Department of Environmental Resources' (DER) authorization for the installation of a new sewer system.⁹⁶ The citizens' group argued that the DER and Environmental Hearing Board (EHB) violated the ERA because neither properly assessed the environmental harm the proposed project would cause before approving the permit.⁹⁷ Although the court acknowledged that the DER and EHB did not balance the benefits and harms of the proposed project under the *Payne* test, it nevertheless found in favor of the Commonwealth.⁹⁸ In ruling for the Commonwealth, the court applied its own *Payne* analysis and concluded that the issuance of the permit did not violate the ERA because the benefits of the sewer system outweighed the environmental impact.⁹⁹

92. See Nos. 2014-072-B, 2014-083-B, 2015-051-B, 2017 WL 3842580, at *37 (Pa. Env'tl. Hearing Bd. Aug. 15, 2017) (upholding plaintiff's environmental rights under new standard of review created in *PEDF III*).

93. For further discussion of *Center for Coalfield Justice*, see *infra* note 201 and accompanying text. See also Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 911 (Pa. 2017); Robinson Twp. v. Commonwealth, 83 A.3d 901, 901 (Pa. 2013) (ruling in favor of plaintiffs who challenged government actions).

94. 387 A.2d 989 (Pa. Commw. Ct. 1978) (ruling in favor of government's action for new sewer system).

95. See Dernbach & Prokopchak, *supra* note 75, at 345-46 (providing precedent to illustrate hardship created by *Payne* test).

96. See *id.* at 345 (describing citizens' opposition to DER's approval of water quality permit for developing new sewage system and treatment plan in trailer park). The permit would also allow for the sewage waste to be discarded in the Alleghany Creek. *Id.*

97. See *id.* at 346 (explaining part of citizens' argument against DER's permit approval). The citizens' argument is based off of the third factor in the *Payne* test, which requires a balance between the benefits of the proposed project and the environmental harm that will be caused. See *Concerned Citizens for Orderly Progress v. Commonwealth, Dep't of Env'tl. Res.*, 387 A.2d 989, 993 (Pa. Commw. Ct. 1978).

98. See Dernbach & Prokopchak, *supra* note 75, at 346 (noting *Payne* test was not followed but court ruled in favor of Commonwealth anyway).

99. See *id.* (describing Commonwealth Court's creation of their own *Payne* standard).

For many years, courts evaluated environmental challenges under the *Payne* test; however, the test recently came under heavy scrutiny.¹⁰⁰ Critics regarded the *Payne* test as an inappropriate standard for analyzing claims brought under the ERA because it applied only in a narrow set of circumstances.¹⁰¹ The *Payne* test was not favorable for litigants or practitioners because they both faced difficulties in applying the test to government actions that did not involve public resources but still affected the environment.¹⁰² The *Payne* test's limited scope could not be properly applied to government actions that affected the environment but did not involve public natural resources because *Payne* only involved an instance where a public resource was affected.¹⁰³ Critics also believed that the Commonwealth Court stepped outside its purview by creating the *Payne* test because it was not a proper interpretation of the ERA's text.¹⁰⁴ Lastly, the *Payne* test had also been regarded as "ill-fitted" to the ERA's text because it failed to consider whether the citizens' public rights remain protected under the ERA.¹⁰⁵ Instead, the *Payne* test only analyzed the effectiveness of a local government's decision.¹⁰⁶ Thirty-seven years later, the Supreme Court of Pennsylvania challenged the controversial *Payne* test in *Robinson Township v. Commonwealth*.¹⁰⁷

100. See *Pennsylvania Supreme Court Invalidates Test for Constitutionality of Commonwealth Environmental Actions and Applies Private Trust Law, Leaving Many Unanswered Questions*, FROST, TODD, BROWN, LLP (June 23, 2017), <http://www.frostbrowntodd.com/resources-pennsylvania-supreme-court-invalidates-test-for-constitutionality-of-commonwealth-environmental-actions.html> (laying out challenges to *Payne* test).

101. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 967 (Pa. 2013) (concluding *Payne* test appropriate only in "narrowest category of cases" alleging non-compliance with statutory standards).

102. See Terry R. Bossert, *Pa. High Court Addresses Scope of the Environmental Rights Amendment*, THE LEGAL INTELLIGENCER (July 25, 2017, 12:00 AM), <http://www.thelegalintelligencer.com/id=1202793747697/Pa-High-Court-Addresses-Scope-of-the-Environmental-Rights-Amendment> (explaining difficulties in applying *Payne* test because *Payne* only involved public resource that was affected).

103. See *id.* (noting *Payne* test did not apply if public natural resources were not specifically implicated).

104. See Dernbach & Prokopchak, *supra* note 75, at 343 (criticizing Commonwealth Court for substituting ERA's text with three-part test).

105. See *Pa. Envtl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 930 (Pa. 2017) (stating *Payne* test strips ERA of its meaning); Dernbach, *supra* note 3, at 477 (explaining *Payne* test "bears virtually no relationship to" ERA's text).

106. Dernbach, *supra* note 3, at 477 (detailing *Payne* test's improper focus).

107. See Soreth, *supra* note 10, at 341 (introducing court's *Robinson Township* opinion that refused to apply *Payne* test).

E. Beginning Restoration of the ERA's Original Intention

In 2013, the Supreme Court of Pennsylvania began to revive the ERA's original intent in *Robinson Township* when it considered whether the *Payne* test was the proper standard of review for challenges under the ERA.¹⁰⁸ The *Robinson Township* litigation ensued as a result of Governor Corbett enacting Act 13 to "impose uniform statewide land-use regulations on shale gas development" and remodeled the Pennsylvania Oil and Gas Act.¹⁰⁹ The citizens argued that Act 13 was unconstitutionally vague, violated the ERA, as well as other parts of the Pennsylvania Constitution, and encroached upon the government's separation of powers.¹¹⁰ The court first addressed whether the three-part *Payne* test was the appropriate standard in analyzing the challenge to Act 13.¹¹¹ The plurality rejected *Payne* and found the test: (1) too narrowly described the Commonwealth's obligations under the ERA; (2) assumed that relief under the ERA is contingent upon legislation; and (3) limited executive agencies and the judicial branch from performing their constitutional obligations.¹¹²

Instead of applying the *Payne* test, the plurality looked to the ERA's text and the drafters' intention.¹¹³ The plurality indicated that the first clause of the ERA established the citizens' rights to "clean air and pure water" and preservation of the environment.¹¹⁴ Next, the plurality found that the ERA's second and third clauses established the citizens' ownership of Pennsylvania's public natural

108. Steven T. Miano & Jessica R. O'Neill, *Pennsylvania's Environmental Rights Amendment Given New Life*, 32 No. 1 WESTLAW J. TOXIC TORTS 12, 1 (2014) (stating court's decision was important victory for Robinson Township's citizens).

109. *See id.* (summarizing Act 13's purpose). The challenged sections of Act 13 prohibited the local government to regulate resource operations and implemented uniform zoning ordinances for the development of oil and gas resources. *Id.*

110. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 915-16 (Pa. 2013) (detailing citizens' arguments to enjoin Act 13's implementation).

111. *See id.* at 965-67 (explaining plurality's analysis in rejecting *Payne* test).

112. *See id.* at 967 (identifying three issues with applying *Payne* test).

113. *See id.* at 950-51 (describing suggested standard of review for challenges under ERA). The plurality also concluded that the ERA is self-executing. Dernbach, May & Kristl, *supra* note 4, at 1178 (explaining court's reason for declaring ERA self-executing). The plurality reasoned that if the ERA was not self-executing, the government's power would be limited because their abilities would depend on what the legislature grants them. *Id.*

114. *Robinson Twp.*, 83 A.3d at 951-52 (establishing Commonwealth's obligation to refrain from violating citizens' rights through legislative enactment or executive action).

resources and invoked the public trust doctrine.¹¹⁵ Focusing on the ERA's text, the plurality noted that Act 13 eliminated the government's involvement in natural gas development, which allowed the Commonwealth to ignore their duties under the ERA.¹¹⁶ Therefore, the plurality declared Act 13's sections 3215(b)(4), 3215(d), 3303, and 3304 unconstitutional.¹¹⁷

The *Robinson Township* decision was significant because this was the first time a Pennsylvania court used the ERA to declare a statute unconstitutional.¹¹⁸ Commentators consider the Supreme Court of Pennsylvania's opinion in *Robinson Township* to be the "recovery" of the ERA's intention because of the focus on the ERA's plain language.¹¹⁹ The opinion, however, was reached by a plurality and not binding on future cases, which placed the ERA, litigants, and practitioners "back into legal limbo."¹²⁰ Pennsylvania courts refused to implement the *Robinson Township* decision and continued to apply

115. See *id.* at 954-56 (describing ERA's second and third clauses). The plurality explained that the Commonwealth has two obligations under ERA: (1) refrain from permitting the "degradation, diminution, or depletion of public natural resources," and (2) use legislative action to affirmatively protect the environment. *Id.* at 957-58.

116. See *id.* at 978 (stating reason for determining parts of Act 13 to be unconstitutional).

117. *Id.* at 910 (stating plurality's holding). Section 3215 governs restrictions on well locations and Section 3215(b)(4) grants waivers to avoid distance restrictions under certain circumstances. 58 P.S.C.A. § 3215(b)(4) (West 2017) (summarizing what Section 3215 governs). The plurality's difficulty with Section 3215(b)(4) was that the Department of Environmental Protection's (DEP) was able to waive parts of driller's well permit applications. See Farley, *supra* note 80, at 353 (describing difficulties associated with Section 3215(b)(4)). Section 3215(d) does not require the DEP to act upon submitted comments regarding determinations for well permits. 58 P.S.C.A. § 3215(d) (West 2017) (summarizing what Section 3215(d) governs). The plurality found Section 3215(d) decreased participation in protecting public natural resources. See Farley, *supra* note 80, at 354 (describing court's findings with Section 3215(d)). Section 3303 prevented the local regulation of oil and gas operations and violated the ERA because "the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry out into effect its constitutional duties." 58 P.S.C.A. § 3303 (West 2017); Dernbach, May & Kristl, *supra* note 4, at 1180 (summarizing what Section 3303 governs). Section 3304 requires the local ordinances to permit reasonable environmental development of natural resources. 58 P.S.C.A. § 3304 (West 2017) (describing requirements under Section 3304). The plurality referred to the Commonwealth Court's ruling that Section 3304 violated the citizens' rights by "requiring local governments to amend their existing zoning ordinances without regard for basic zoning principles." *Robinson Twp.*, 83 A.3d at 931 (detailing court's ruling for Section 3304).

118. See Dernbach, *supra* note 3, at 479 (describing how *Robinson Township* decision changed legal landscape for applying ERA).

119. See Soreth, *supra* note 10, at 343 (proclaiming *Robinson Township*'s positive effect on ERA's interpretation).

120. See Margaret Anne Hill et al., *ERA Revisited: Solutions for Navigating an Uncertain Legal Landscape*, THE LEGAL INTELLIGENCER (July 13, 2017, 12:00 AM),

the *Payne* test to future challenges brought under the ERA.¹²¹ The Pennsylvania courts' refusal to recognize the *Robinson Township* decision prompted the Supreme Court of Pennsylvania to completely overturn the *Payne* test and create a new standard of review in its 2017 landmark decision, *Pennsylvania Environmental Defense Foundation v. Commonwealth*.¹²²

IV. DIGGING INTO THE SUPREME COURT OF PENNSYLVANIA'S NEW STANDARD OF REVIEW

Prior to *PEDF III*, the Supreme Court of Pennsylvania lacked the ability to solidify the proper standard of review for challenges under the ERA.¹²³ When *PEDF III* reached the Supreme Court of Pennsylvania, the court analyzed the legislative challenges in accordance with a strict reading of the ERA's text and Pennsylvania private trust law.¹²⁴ The two primary issues before the court involved the proper standard of review for challenges under the ERA and the constitutionality of governmental budgetary actions.¹²⁵

The court first analyzed the ERA and determined that the proper standard of review lay within the ERA's text and the underlying

<http://www.thelegalintelligencer.com/id=1202792970565> (detailing on-going uncertainty for examining challenges under ERA).

121. See *id.* (explaining subsequent courts' refusal to apply *Robinson Township*'s decision to successive ERA claims). In 2016, the Commonwealth appealed the decision, but the Supreme Court of Pennsylvania did not evaluate the standard of review for challenges under the ERA that the plurality applied in 2013. See generally *Robinson Twp. v. Commonwealth*, 147 A.3d 536 (Pa. 2016); see also Joel R. Burcat, *We Meant What We Said: Pa. Supreme Court Issues Latest Decision in Robinson Township*, SAUL EWING LLP, <http://www.saul.com/publications/alerts/we-meant-what-we-said-pa-supreme-court-issues-latest-decision-robinson-township> (last visited Aug. 26, 2017) (noting analysis applied in 2013 *Robinson Township* opinion has not been addressed or examined again). The 2016 *Robinson Township* decision affirmed many of the plurality's prior decision and further ruled Act 13's Sections 3218.1, 3222.1(b)(10), 3222.1(b)(11), and 3241 to be unconstitutional. See *Robinson Twp.*, 147 A.3d at 588-89 (stating Supreme Court of Pennsylvania's holding).

122. See Joseph Brendel, *Pennsylvania Supreme Court Completes Revival of Environmental Rights Amendment*, JD SUPRA (June 28, 2017), <http://www.jdsupra.com/legalnews/pennsylvania-supreme-court-completes-85897/> (noting significance of *PEDF III*'s decision in reviving ERA's original meaning); see also Anthony R. Holtzman et al., *Pennsylvania Supreme Court Issues Transformative Decision in Environmental Rights Amendment Case*, K&L GATES (July 11, 2017), <http://www.klgates.com/pennsylvania-supreme-court-issues-transformative-decision-in-environmental-rights-amendment-case-07-11-2017/>; Phillips, *supra* note 52 (describing *PEDF III* opinion as "landmark decision").

123. See Philips, *supra* note 52 (detailing significance of *PEDF III* opinion); see also Pa. Envtl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 926 (Pa. 2017) (noting *Robinson Township* plurality is not binding precedent).

124. See *PEDF III*, 161 A.3d at 930 (describing analysis for PEDF's challenges).

125. *Id.* at 929 (laying out two main issues court examined).

ing principles of Pennsylvania private trust law.¹²⁶ Next, the court turned to the constitutionality of sections 1602-E and 1603-E.¹²⁷ The court declared the sections to be unconstitutional because they allowed the lease sale revenues to be used for non-trust purposes.¹²⁸ Finally, Justice Baer's dissenting opinion argued that the ERA was silent on funding and asserted that the revenues from the lease sales may be used for other public needs.¹²⁹

A. Drilling in the Proper Standard of Review for Challenges Under the ERA

The Supreme Court of Pennsylvania first analyzed whether the three-part *Payne* test was the proper standard of review for challenges under the ERA.¹³⁰ In doing so, the court accepted PEDF's argument that the issues in the present case did not fit in *Payne*'s narrow category.¹³¹ Ultimately, the court overturned the *Payne* test because it was not consistent with the ERA's text or the drafters' intention.¹³² Instead, the court determined that a strict reading of the ERA's text was the proper standard of review and recognized the underlying principles of Pennsylvania's private trust law when interpreting the ERA.¹³³

The court relied on the *Robinson Township* plurality opinion in examining the proper interpretation of the ERA's text.¹³⁴ The court recognized that the citizens had two rights under the ERA: (1) the right to clean air and pure water, and (2) ownership of the

126. For further discussion of the proper standard of review under the ERA, see *infra* notes 133-137 and accompanying text.

127. *PEDF III*, 161 A.3d at 937-39 (analyzing constitutionality of legislative enactments).

128. For further discussion of the majority's holding that Sections 1602-E and 1603-E are unconstitutional, see *infra* notes 149-152 and accompanying text.

129. For further discussion of Justice Baer's dissent, see *infra* notes 154-165 and accompanying text.

130. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 930 (Pa. 2017) (explaining *Payne* test is not proper standard for challenges under ERA).

131. *Id.* (identifying issues with applying *Payne* test).

132. *Id.* (summarizing court's reason to overturn *Payne* test). The court noted that the Commonwealth Court of Pennsylvania regarded the *Payne* test as being "ill-fitted" to the ERA's text and created inconsistent legal rulings. *Id.* The court overturned the *Payne* test because it destroyed the ERA's meaning. *Id.*

133. *Id.* (laying out court's analysis for determining proper standard of review under ERA).

134. *Id.* (noting this was not first time Supreme Court of Pennsylvania addressed citizens' rights and Commonwealth's obligations under ERA). The court referenced their *Robinson Township* plurality opinion in 2013 that suggested the proper standard of review for challenges under the ERA. *Id.*

natural resources.¹³⁵ In addition, the court found that the third clause of the ERA triggered application of Pennsylvania private trust law by naming the Commonwealth as the trustee of Pennsylvania's public natural resources.¹³⁶ The Commonwealth, as the trustee, had two duties under the ERA: (1) to prohibit the "degradation, diminution, and depletion" of public natural resources; and (2) to act affirmatively to conserve the environment.¹³⁷

The Commonwealth argued that royalties obtained from the lease sales do not need to be used solely for conserving public natural resources.¹³⁸ The court rejected the Commonwealth's arguments and considered PEDF's assertion that lease sale revenues are to remain in the "corpus of trust."¹³⁹ The court reiterated that under Pennsylvania's private trust law, lease sale revenues are part of the trust's corpus and the Commonwealth must manage the funds in accordance with the trust's purpose.¹⁴⁰ The court re-

135. For further discussion of the two rights granted to Commonwealth's citizens under ERA, see *supra* notes 114-115 and accompanying text. The court found the first sentence of the ERA to limit the state's power to act contrary to the citizens' rights and warned that any law that impairs the citizens' rights would be found unconstitutional. *Pa. Envtl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 931 (Pa. 2017). The court also concluded that the term "public natural resources," referenced in the ERA's second clause, includes gas extraction on state forests and parks. *Id.*

136. *PEDF III*, 161 A.3d at 931-32 (explaining third clause of ERA invokes private trust law). The Commonwealth, as the trustee of Pennsylvania's public natural resources, has a fiduciary duty to "comply with the terms of the trust" and act towards the "corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality." *Id.* (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956-57 (Pa. 2013)) (describing Commonwealth's fiduciary duty as trustee of public natural resources).

137. *Id.* at 932-33 (summarizing Commonwealth's duties under ERA). The court stated that the trustee can only use the assets of the trust to preserve public natural resources. *Id.*

138. *Id.* at 933-34 (outlining Commonwealth's argument against only using lease sale revenues for trust purposes). The Commonwealth first argued that the ERA does not specify how lease sale revenues may be used or address funding for conservation of natural resources. *Id.* The court rejected this argument and reasoned that the third clause of the ERA creates a trust and the revenues from the lease sales are part of the trust's corpus. *Id.* The revenues from the lease sales, therefore, must remain in the trust's corpus. *Id.* Second, the Commonwealth argued the General Assembly can use the lease sale revenues for any use that benefits the citizens, not just to conserve the public natural resources. *Id.* at 934. The court also rejected this argument because the Commonwealth's duty is to conserve the public natural resources; therefore, the lease sale revenues are to be used for conservation purposes as well. *Id.*

139. *Id.* at 935 (explaining court considered PEDF's argument but could not state with certainty that PEDF's assertion was correct).

140. *Id.* at 935-36 (determining how lease sale revenues must be used).

manded the case to determine the proper classification of other types of revenue under the ERA.¹⁴¹

B. Identifying the ERA as Self-Executing

The Supreme Court of Pennsylvania then evaluated PEDF's argument that the ERA's trust provisions are self-executing.¹⁴² The court noted that the question of whether the trust provisions were self-executing or required legislative action to be effective, would be an issue of first impression in regard to this specific circumstance.¹⁴³ The court referenced *Payne* and the *Robinson Township* plurality to support its analysis.¹⁴⁴ The court considered *Payne*'s conclusion that the ERA's trust provisions did not require legislative action to be enforced.¹⁴⁵ Further, the court considered the *Robinson Township* plurality's finding that the citizens had a right to seek enforcement of the Commonwealth's duties as the trustee of natural resources.¹⁴⁶ As a result, the court agreed with PEDF and concluded that the ERA's trust provisions are self-executing.¹⁴⁷

C. Addressing the Constitutionality of Section 1602-E and 1603-E

Following the Supreme Court of Pennsylvania's finding that lease sale revenues were trust assets and must remain in the trust's corpus, the court evaluated the constitutionality of Sections 1602-E and 1603-E.¹⁴⁸ The court explained that Sections 1602-E and 1603-E exclusively relate to revenues and ignore the Commonwealth's obligation, as the trustee of public natural resources, to conserve

141. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 936 (Pa. 2017) (noting it is unclear how to categorize other revenue streams such as up-front bonus bid payments).

142. *Id.* (laying out PEDF's argument for ERA being self-executing).

143. *See id.* (explaining previous precedent has not addressed ERA being self-executing in regard to enforcing citizens' rights against private property owners).

144. *Id.* at 936-37 (evaluating whether ERA's public trust provisions are self-executing).

145. *Id.* at 937 (summarizing *Payne II*'s finding that ERA's second and third clauses did not need legislative action to be enforced against Commonwealth). The court stated "[t]here can be no question that the Amendment itself declares and creates a public trust of public natural resources . . . [and that] . . . [n]o implementing legislation is needed to enunciate these broad purposes and establish these relationships; the [A]mendment does so by [itself]." *Id.* (quoting *Payne v. Kassab (Payne II)*, 361 A.2d 263, 272 (Pa. 1976)).

146. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 937 (Pa. 2017) (summarizing *Robinson Township* plurality's analysis).

147. *Id.* (concluding ERA does not need legislative action to be effective).

148. *Id.* (setting foundation for court's analysis of Sections 1602-E and 1603-E).

the resources.¹⁴⁹ The court reiterated that the Commonwealth may only use trust assets for conservation purposes and must handle the trust corpus in accordance with its trustee obligations.¹⁵⁰ The court reasoned that the government violated the ERA when it permitted the diversion of funds from the Lease Fund for non-trust purposes.¹⁵¹ The court, therefore, held Sections 1602-E and 1603-E to be facially unconstitutional and reversed the Commonwealth Court's ruling with respect to these sections.¹⁵²

D. Justice Baer's Concurrence and Dissent: The Majority's Imposition of Private Trust Law is Improper

Justice Baer concurred with the majority's opinion to overturn the *Payne* test and declare the ERA's trust provisions as self-executing.¹⁵³ Justice Baer disagreed, however, with the majority's holding that Sections 1602-E and 1603-E are unconstitutional.¹⁵⁴ Justice Baer argued that the majority imposed "inflexible private trust requirements" on the Commonwealth and found the majority's interpretation of the ERA to be "unmoored" from the ERA's text.¹⁵⁵ His analysis was based upon finding that the ERA's trust provisions do not impose private trust principles or discuss financial proceeds.¹⁵⁶

149. *Id.* at 937-39 (examining Sections 1602-E and 1603-E's constitutionality). For further discussion of what Sections 1602-E and 1603-E govern, see *supra* note 36 and accompanying text.

150. *PEDF III*, 161 A.3d at 937-39 (emphasizing trust's purpose and how trust assets may be utilized).

151. *Id.* at 939 (describing government's violation of ERA). The court reasoned that the government did not violate the ERA because it diverted funds from the Lease Fund; instead, the government violated the ERA when the fund's diversion was for non-trust purposes. *Id.*

152. *Id.* at 938-39 (stating Sections 1602-E and 1603-E are unconstitutional). The court reversed the Commonwealth Court's holding that the fund appropriations were proper because there was no constitutional mandate to reinvest the lease funds for solely conservation purposes. *Id.*

153. *Id.* at 940 (Baer, J., concurring) (stating Justice Baer's concurrence with overturning *Payne* and declaring ERA to be self-executing).

154. *Id.* (Baer, J., dissenting) (stating Justice Baer's dissent from majority finding Sections 1602-E and 1603-E to be unconstitutional). Justice Baer did not agree with the majority that the lease sale revenues are part of the trust's corpus. *Id.*

155. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 940 (Pa. 2017) (Baer, J., dissenting) (finding majority's reading of ERA to be erroneous and lacked attention to ERA's text).

156. *Id.* (laying out Justice Baer's reasoning for his disagreement from majority opinion). Justice Baer looked to the ERA's purpose and legislative history to determine that the ERA was meant to govern natural resources, not the lease sale revenues. *Id.* Justice Baer reiterated that the ERA's purpose was only to prevent further pollution and wasting of public natural resources. *Id.* Further, Justice Baer reasoned that the legislature did not consider financial proceeds when passing the ERA. *Id.*

Justice Baer began his analysis by looking at the common law public trust doctrine, which aimed to limit the state's usage of trust property and allowed funds to be used for the general public's benefit.¹⁵⁷ Justice Baer concluded that the lease sale revenues could be used for public needs beyond conservation purposes because the ERA created a public, not private, trust.¹⁵⁸ Next, Justice Baer argued that the Commonwealth's duty was to conserve public natural resources, regardless of the state's financial position.¹⁵⁹ Despite the Commonwealth's obligation to fund resource conservation, Justice Baer argued that the Commonwealth is not barred under the ERA from using excess lease sale revenues for the "public's health, safety, and welfare."¹⁶⁰

Lastly, Justice Baer criticized the majority's opinion that lease sale revenues are considered part of the trust's corpus.¹⁶¹ He argued that the ERA did not refer to or imply that the lease sale revenues should be part of the trust's corpus.¹⁶² To support his position, Justice Baer observed that the ERA did not refer to citizens as "beneficiaries," or define public natural resources as part of the trust's corpus.¹⁶³ Instead, Justice Baer argued that the majority isolates millions of dollars of revenue from resource extraction for only conservation purposes without considering what funding is necessary for the public.¹⁶⁴ In conclusion, Justice Baer believed the

157. *Id.* at 943 (summarizing how public trust law was first interpreted). Justice Baer stated that public trust law had originally be applied to state lands and later extended to natural resources when the ERA was enacted. *Id.*

158. *Id.* at 944 (declaring lease sale revenues can be used for more than just trust purposes).

159. *Id.* at 944-45 (determining Commonwealth's duty under ERA). Justice Baer noted that the word "conserve" required prudent use of public natural resources. *Id.* at 947. To illustrate what "conserve" means, Justice Baer used an example of the government telling citizens to conserve water during a drought. *Id.* In this example, the public may still use the water for necessary needs but should not waste the water. *Id.* Justice Baer analogized this to the Commonwealth using the lease sale revenues for conservation purposes and should not waste the leftover revenues by restricting them from being used for other general needs. *Id.*

160. *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 911, 948 (Pa. 2017) (Baer, J., dissenting) (explaining ERA created public trust, not private trust, and proceeds from lease sales may be used for other public needs).

161. *Id.* (detailing reasons for lease sale revenues not being part of trust's corpus).

162. *Id.* at 946 (showing ERA does not support majority's determination that lease sale revenues are part of trust's corpus).

163. *Id.* at 942 (detailing lack of private trust terms in ERA's text).

164. *Id.* at 941 (stating negative impact from majority's decision). Justice Baer argued that the majority's opinion threatens the government's branches from achieving a "constitutionally-mandated" state budget. *Id.* at 940-41.

majority should have imposed public, not private, trust principles when interpreting the ERA.¹⁶⁵

V. IN PUBLIC WE TRUST: PUBLIC TRUST LAW FURTHERS THE INTENTION OF THE ERA

The Supreme Court of Pennsylvania's decision in *PEDF III* represents a monumental decision in Pennsylvania's environmental law.¹⁶⁶ The decision drills in place the ERA's text as the proper standard of review for environmental challenges.¹⁶⁷ In doing so, the court made two significant statements: (1) the *Payne* test is overturned, and (2) private trust law governs the Commonwealth's duties under the ERA.¹⁶⁸ The court's decision to reject the three-prong *Payne* test bolstered the court's prior decision in *Robinson Township*, which was seen as beginning the restoration of the ERA's original meaning.¹⁶⁹ It is unclear, however, how the new standard of review applies to other circumstances outside of those in *PEDF III*.¹⁷⁰ The court also, for the first time, applied private trust principles to limit the way the Commonwealth manages its public natural resources.¹⁷¹ Whether these two changes were for the benefit of the Commonwealth's citizens remains unsettled.¹⁷²

165. Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 911, 941 (Pa. 2017) (Baer, J., dissenting) (concluding principles from public trust doctrine should have been applied to ERA's text). Justice Baer would have affirmed the Commonwealth Court's partial summary relief for the Commonwealth and deny relief to the PEDF. *Id.* Justice Baer does not believe the PEDF met its burden of proof to show the statutes "clearly, palpably, and plainly violate[d] the Constitution." *Id.* Chief Justice Saylor also dissented and agreed with Justice Baer's analysis that the ERA is "an embodiment of the public trust doctrine." *Id.* at 949 (Saylor, J., dissenting).

166. See Bossert, *supra* note 102 (highlighting significance of PEDF's decision).

167. See Phillips, *supra* note 52 (stating accomplishments associated with PEDF's decision for environmental challenges).

168. For further discussion of the Court's reasoning in overturning *Payne*, see *supra* notes 131-132 and accompanying text. For further discussion of the Court's analysis for imposing private trust law, see *supra* notes 136-140 and accompanying text.

169. See Soreth, *supra* note 10, at 351 (affirming *Robinson Township* decision to reject three-prong *Payne* test); see also Steven T. Miano & Jessica R. O'Neill, *supra* note 108, at 1 (explaining ERA's original intent was restored).

170. For further discussion of the questions *PEDF III*'s standard of review will raise, see *infra* notes 176-184 and accompanying text.

171. For further discussion of the majority's limitation on the Commonwealth's abilities to use lease sale revenues, see *infra* notes 195-196 and accompanying text.

172. See Bossert, *supra* note 102 (describing uncertainty created by court's new standard of review and imposition of private trust principles).

A. The Court Plowed Over *Payne*, but What Surfaced Next is Unclear

The Supreme Court of Pennsylvania's decision to overturn the *Payne* test created landmark precedent that the ERA's text is now unquestionably the "law of the land in Pennsylvania" for environmental challenges.¹⁷³ The court consistently followed the trend started in *Robinson Township*, which looked to the ERA's text in analyzing the challenged legislative enactments.¹⁷⁴ The new standard adopted in *PEDF III* requires claims to be assessed in accordance with the ERA's text and the underlying principles of private trust law.¹⁷⁵ Although this standard of review worked well for the issues in *PEDF III*, it is unclear how the standard will apply in other circumstances.¹⁷⁶

The decision in *PEDF III* dealt solely with public natural resources.¹⁷⁷ The court suggested that "public natural resources" might encompass privately owned resources that "involve a public interest."¹⁷⁸ The court did not, however, provide guidance on how the new standard would apply to government actions on private lands.¹⁷⁹ The *PEDF III* circumstances were unique because PEDF challenged Fiscal Code provisions that appropriated revenues from the Lease Fund to the General Fund.¹⁸⁰ The new standard of review was appropriate in *PEDF III* because the court was analyzing the Commonwealth's duties under the trust provisions of the ERA's second and third clauses.¹⁸¹ The first clause of the ERA, however, was not implicated by the facts of *PEDF III*.¹⁸² As a result, the court

173. McKinstry & Weiss, *supra* note 73 (finding ERA's text to be governing standard for environmental challenges); *see also* Phillips, *supra* note 52 (stating Supreme Court of Pennsylvania rejected over forty years of precedent by overturning *Payne*).

174. *See* Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 916, 930 (Pa. 2017) (describing *Payne* as inappropriate standard of review for examining ERA challenges and shifted towards looking at ERA's text).

175. *See id.* (describing proper standard of review for challenges under ERA).

176. *See* Bossert, *supra* note 102 (noting it is unclear how court's standard of review will apply to other circumstances).

177. *See PEDF III*, 161 A.3d at 916 (finding oil and gas to be public natural resource and revenues generated from their extraction are part of trust's corpus).

178. *See id.* at 949 n.22 (noting private property may have been included in court's standard of review under ERA).

179. *See* McKinstry & Weiss, *supra* note 73 (discussing possible limits to *PEDF III*'s standard of review).

180. For further discussion of *PEDF III*'s factual summary, *see supra* notes 33-54 and accompanying text.

181. *See* Bossert, *supra* note 102 (noting court's standard of review was well suited for issues in *PEDF III*).

182. *See id.* (observing first clause of ERA did not pertain to *PEDF III*'s facts).

failed to address how the new standard of review would apply to the ERA's first clause, even though most claims brought under the ERA are for a violation of the first clause.¹⁸³ Although the breadth of the new standard's application remains unclear, the standard will undoubtedly be applied to government and private actions that infringe on citizens' environmental rights and courts will be left guessing as how to apply the *PEDF III* decision.¹⁸⁴

B. Trust the Dissent: The Majority's Broad Interpretation of ERA's Trust Provisions Narrow the Process to Allocate Funds

The Supreme Court of Pennsylvania unprecedentedly used private trust principles to broadly interpret the ERA's public trust clauses.¹⁸⁵ The court asserts private trust law by describing the trust's corpus, which is owned by the beneficiaries and managed by a trustee, as being used only for conservation purposes.¹⁸⁶ According to the court's findings, private trust law was unambiguously implicated in its decision because the trust's assets were to be used for a specific purpose.¹⁸⁷ The court's imposition of private trust principles, however, is inconsistent and an overreach of the ERA's text.¹⁸⁸ The ERA's text does not refer to the citizens as beneficiaries or public natural resources as the "corpus of trust."¹⁸⁹ Instead, the ERA seems to invoke public trust principles, and Justice Baer in his dissent, accurately notes this observation.¹⁹⁰

183. See PA. CONST. art. I, § 27 (stating ERA's first clause gives citizens right to clean air and pure water); see also Bossert, *supra* note 102 (noting it is uncertain whether Commonwealth is also trustee for air, land, and water).

184. See Hill, *supra* note 120 (discussing recommendations for government and private parties to obtain approval for their environmental projects); see also *Ctr. for Coalfield Justice v. Dep't of Env'tl. Prot.*, Nos. 2014-072-B, 2014-083-B, 2015-051-B, 2017 WL 3842580, at *31 (Pa. Env'tl. Hearing Bd. Aug. 15, 2017) (noting *PEDF III* decision does not translate well to more typical types of cases that come before Environmental Hearing Board). In *Center for Coalfield Justice*, the citizens were challenging a government agency's decision. *Id.*

185. See Holtzman, *supra* note 122 (describing court's novel interpretation of ERA's trust provisions).

186. See Dernbach, *supra* note 3, at 472-73 (explaining private trust law principles and describing trust's purpose is to conserve public natural resources).

187. See *Pa. Env'tl. Def. Found. v. Commonwealth (PEDF III)*, 161 A.3d 916, 934-35 (Pa. 2017) (finding specific terms of ERA's trust provisions to require lease sale revenues to be used only for conservation purposes).

188. See *id.* at 940 (Baer, J., dissenting) (stating private trust principles are absent from ERA's text).

189. See *id.* at 942 (explaining ERA broadly provides for public natural resources to be people's common property).

190. See *id.* at 941 (asserting public trust doctrine requires Commonwealth to manage citizens' property for public's benefit).

Public trust principles are centered on benefitting the public.¹⁹¹ The legislature expanded the doctrine to encompass public natural resources, and encouraged governments to use any revenue gained from the resources to enhance the general public.¹⁹² Justice Baer properly asserted that the ERA required the Commonwealth to use the revenues, not only for conservation purposes, but also for pressing needs that are necessary to benefit citizens and future generations.¹⁹³ The ERA's purpose, to benefit the general public, directly aligns with Justice Baer's conclusion that the lease sale revenues may be used for other public needs.¹⁹⁴ The majority's decision to restrict the use of revenues for only conservation purposes, however, cannot fully benefit the people when there are other needs such as health, safety, and welfare that are also necessary for the public's benefit.¹⁹⁵

The majority's decision eliminates any use of the lease sale revenues, for purposes other than resource conservation, regardless of the positive impact on the general welfare.¹⁹⁶ The drafters of the ERA did not intend for such a narrow interpretation of the trust corpus's usage.¹⁹⁷ While the majority's narrow interpretation properly restricts the Commonwealth's power to act contrary to the citi-

191. See *id.* at 943 (discussing history of public trust doctrine). The public trust doctrine focuses on preserving the environment for the public's enjoyment and benefit. *Id.*

192. See Pa. Envtl. Def. Found. v. Commonwealth (*PEDF III*), 161 A.3d 916, 943-44 (Pa. 2017) (Baer, J., dissenting) (noting public trust doctrine's applicability). The doctrine originally applied to waterways and parkland and expanded to encompass public natural resources after the ERA was enacted in 1971. *Id.* at 943.

193. See *id.* at 944-45 (finding ERA intended lease sale revenues to be used to benefit all public, not just specifically conservation purposes). Once the Commonwealth has fulfilled its conservation duties, it is illogical to leave the revenues unused when there are other pressing needs the revenues could be used for. *Id.* at 945.

194. See Phillips, *supra* note 52 (describing court imposed limitations on Commonwealth's trustee abilities).

195. See *PEDF III*, 161 A.3d at 945 (Baer, J., dissenting) (explaining majority's interpretation of ERA does not fully benefit general public). Justice Baer described the majority's decision as "redrafting the Constitution to its own liking, ignoring the public trust doctrine, and usurping the appropriate role of the legislature." *Id.* at 948.

196. See *Pennsylvania Supreme Court Invalidates Test for Constitutionality of Commonwealth Environmental Actions and Applies Private Trust Law, Leaving Many Unanswered Questions*, FROST, TODD, BROWN, LLP (June 23, 2017), <http://www.frostbrowntodd.com/resources-pennsylvania-supreme-court-invalidates-test-for-constitutionality-of-commonwealth-environmental-actions.html> (noting there is uncertainty regarding whether lease sale revenues can be used for schools, infrastructure, or pension relief).

197. See *PEDF III*, 161 A.3d at 944-45 (Baer, J., dissenting) (explaining ERA does not mention any specific financial constraint).

zens' environmental rights, its broad interpretation illustrates a lack of literal construal of the ERA's text.¹⁹⁸

VI. TO BE CONTINUED: LOWER COURTS ARE LEFT FILLING IN THE MAJORITY'S HOLES

Many commentators regard the Supreme Court of Pennsylvania's decision in *PEDF III* as a paramount win for environmentalists.¹⁹⁹ Under the new standard of review for claims rooted in the ERA, it is expected that environmental challenges will now be resolved in favor of protecting citizens' environmental rights.²⁰⁰ Roughly a month after the court decided *PEDF III*, the Environmental Hearing Board struck down a government agency's permit revision for "longwall mining" as being in violation of the ERA in *Center for Coalfield Justice and Sierra Club v. DEP*.²⁰¹ The *Center for Coalfield Justice* decision has begun the trend towards impeding government actions that infringe on citizens' environmental rights.²⁰²

The Supreme Court of Pennsylvania's new standard puts government actions under heightened scrutiny, which creates a potential slippery slope for finding too many future government actions as affecting citizens' environmental rights and thus, violating the ERA.²⁰³ Challengers to government actions will be eager to use the *PEDF III* decision to postpone or prevent various environmental projects.²⁰⁴ The likely spike in striking down government actions

198. See McKinstry & Weiss, *supra* note 73 (summarizing positive effects of *PEDF III* opinion as well as some criticisms).

199. See generally Phillips, *supra* note 52 (regarding court's decision as "big win" for environmental advocates). In regards to the *PEDF III* decision, a commentator stated "this is a huge step forward for the rights of the people of Pennsylvania to a healthy environment." *Id.*

200. See *id.* (noting stricter duties imposed on Commonwealth when dealing with Pennsylvania's natural resources). An environmental attorney stated that the "Commonwealth can no longer treat our natural resources as government property." *Id.* For further discussion of Commonwealth's duties as a trustee, see *supra* note 137 and accompanying text.

201. See *Ctr. for Coalfield Justice & Sierra Club v. Dep't of Env'tl. Prot. and Consol. Pa. Coal Co.*, Nos. 2014-072-B, 2014-083-B, 2015-051-B, 2017 WL 3842580, at *37 (Pa. Env'tl. Hearing Bd. Aug. 15, 2017) (summarizing part of Environmental Hearing Board's holding). The Board found permit revision No. 189 to have violated the ERA because the Department did not act according to their trustee duties and violated the citizens' right to pure water. *Id.*

202. See *id.* (finding government agency's permit revision violated ERA); see also Hill, *supra* note 120 (discussing cases that challenged government actions that are currently being reviewed by lower courts).

203. See Hill, *supra* note 120 (noting court's new standard of review for challenges under ERA imposes stricter scrutiny on government actions).

204. See *id.* (describing how environmentalists may use *PEDF III* decision to their advantage).

for implicating citizens' environmental rights could mirror the detrimental effects of the highly criticized *Payne* test.²⁰⁵ Plaintiffs who attempted to enforce their environmental rights rarely won under the narrow *Payne* test.²⁰⁶ Now, due to the standard in *PEDF III*, it is likely that plaintiffs may predominantly win and the government's environmental actions will likely be struck down.²⁰⁷ In addition, the heightened scrutiny for government actions under the new standard of review will inhibit, or at a minimum, slow down the process for environmentally impactful projects.²⁰⁸

Although protecting citizens' environmental rights under the ERA is crucial, it is also necessary to find the proper balance between conserving the environment and benefitting the general public's needs.²⁰⁹ As a result of the majority's imposition of private trust law in the *PEDF III* decision, leftover revenues in the Lease Fund are prohibited from being used for purposes other than to conserve Pennsylvania's natural resources.²¹⁰ This holds substantial weight because millions of dollars from lease sales are fenced off from the government for any other public needs.²¹¹ Now that the *PEDF III* decision prohibits the lease sale revenues from being shared, other public needs will likely feel the effects of losing the additional funding.²¹²

The Supreme Court of Pennsylvania's monumental decision changed over four decades of Pennsylvania's environmental law precedent.²¹³ In comparison to where it began over forty years ago

205. For further discussion of the *Payne* test's criticisms, see *supra* notes 102-106 and accompanying text.

206. For further discussion of the difficulties faced by plaintiffs to enforce their environmental rights under the *Payne* test, see *supra* note 91 and accompanying text.

207. See Bossert, *supra* note 102 (noting *PEDF III*'s decision will enforce and uphold citizens' environmental rights).

208. See Hill, *supra* note 120 (discussing negative effects *PEDF III* standard could have on environmental projects).

209. For further discussion of the argument that revenues in the Lease Fund should be used for purposes other than solely conservation, see *supra* notes 158-164 and accompanying text.

210. For further discussion of the court's reason for strictly using the lease sale revenues for conservation purposes, see *supra* notes 138-140 and accompanying text.

211. For further discussion of the result from the court prohibiting the lease sale revenues to be used for purposes other than conservation, see *supra* note 164 and accompanying text.

212. For further discussion of Pennsylvania's budgetary shortfalls and how the government tried to make up for the shortage, see *supra* notes 35-38 and accompanying text.

213. For further discussion of *PEDF III*'s significance in environmental law, see *supra* notes 122-123 and accompanying text.

with the *Payne* test, the court is taking strides in the right direction towards protecting citizens' environmental rights.²¹⁴ The process to determine how the new standard of review applies to circumstances outside of *PEDF III*, however, will be ongoing.²¹⁵ The court has left questions unanswered that will undoubtedly result in litigation and allow for lower courts to grapple with the interpretation of the standard's applicability.²¹⁶

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214. For further discussion of the citizens' rights under the ERA's new standard, see *supra* note 135 and accompanying text. For further discussion of the detrimental effects of the *Payne* test for citizens who were trying to enforce their environmental rights, see *supra* note 91 and accompanying text.

215. For further discussion of what circumstances were not considered in *PEDF III*'s decision, see *supra* notes 176-184 and accompanying text.

216. For further discussion of the unanswered questions in *PEDF III*, see *supra* note 183-184 and accompanying text.

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