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A Prophecy Misread That Could Have Been: Regulatory Adjudications and a Weakening of the Environmental Rights Amendment in Logan v. Department of Environmental Protection

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A PROPHECY MISREAD THAT COULD HAVE BEEN: REGULATORY ADJUDICATIONS AND A WEAKENING OF THE ENVIRONMENTAL RIGHTS AMENDMENT IN *LOGAN V. DEPARTMENT OF ENVIRONMENTAL PROTECTION*

I. Introduction

The extent to which state administrative agencies afford environmental protections complicates the issue of environmental protections under the Pennsylvania Constitution.[1] Pennsylvania is one of the many states to grant environmental protections under its constitution.[2] The legislature enacted the Environmental Rights Amendment (ERA) amid growing concern about the state's environmental resources after decades of degradation from the agriculture, mining, and lumber industries.[3] This new amendment also arose in a legal current which advocated for additional state constitutional protections for individual rights.[4]

This Note discusses the impact of *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF*)[5] in the Environmental Hearing Board (EHB) adjudication of *Logan v. Department of Environmental Protection* (*Logan*) and its impact on future adjudications.[6] The Pennsylvania Supreme Court in *PEDF* articulated a new understanding of the Pennsylvania Constitution's Environmental Rights Amendment (ERA)—a ruling environmental law scholars and practitioners lauded for giving more stringent protections to the envi-

1. James M. Lammendola, *The Environmental Rights Amendment of Pennsylvania: Pennsylvania's Challenge To Act As A Trustee To Conserve And Maintain Its Public Resources. Can Other States Learn From The Pennsylvania Experience?*, 47 Real Est. L.J. 25, 66-67 (2018) (describing impact of EHB's authority in interpreting ERA).

2. Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. Envtl. Aff. L. Rev. 173, 181 (1993) detailing similar environmental rights amendments across states).

3. Pa. Envtl. Def. Found. v. Commonwealth (PEDF), 161 A.3d 911, 917 (Pa. 2017) (detailing history of environmental degradation and developments leading to ERA creation).

4. Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 Temp. L. Rev. 1369, 1369 (1993) (describing Justice Brennan's argument favoring states as protectors of individual rights).

5. 161 A.3d 911, 932 (Pa. 2017) (articulating new test for Environmental Rights Amendment (ERA)).

6. 2018 WL 679381 2016-091-L at *24 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (rejecting plaintiff's argument after falling under older *Payne* ERA understanding).

ronment against industrial and agricultural interests.[7] These groups were also critical of the older test articulated in *Payne v. Kassab*,[8] a three-pronged test for determining the constitutionality of state actions prior to the ruling in *PEDF*.[9]

The Pennsylvania Department of Environmental Protection (DEP) has statutorily-granted authority to issue permits to industrial and agricultural projects that have environmental impacts.[10] The EHB is part of the judicial branch of government; it operates under the principles of Pennsylvania administrative and environmental law and is the first tribunal to hear DEP actions.[11] The EHB has the power to hear disputes arising from DEP actions and provide relief to aggrieved parties by striking down agency actions.[12] This authority gives the EHB significant influence in interpreting legislation and constitutional provisions.[13]

This Note will argue that the praise afforded to *PEDF* for providing more stringent legal protections to environmental rights was premature, as the ruling has left the DEP and EHB to fill in the details of how to interpret the ERA.[14] Given the DEP's extensive authority to issue permits and make regulations pursuant to the ERA, the rigor of these protections is in question.[15] While the EHB and other courts have acknowledged that some DEP actions can be

7. *PEDF*, 161 A.3d at 928 (discussing rejection of older interpretations of Pennsylvania's Environmental Rights Amendment (ERA). For further discussion of the history of Pennsylvania's ERA and interpretation, see *infra* notes 160-180. For commentary on the impact that *PEDF* was projected to have, see *infra* notes 76-85 and accompanying text. While the impact was thought to be one of great significance for environmental protection and offer a new way for activists to protect the environment through litigation, this Note argues that these pronouncements were premature and did not consider the effect that regulatory adjudications can have in weakening or forestalling the impact of *PEDF*. *See infra* notes 189-200.

8. 312 A.2d 86, 96 (Pa. Commw. Ct. 1973) (creating a three-pronged test for determining unconstitutional environmental damage under ERA).

9. For further discussion of Payne's three-pronged test, see *infra* notes 72-74.

10. 3 PA.C.S. § 505 (1) (2019) (listing DEP's statutory grant of powers).

11. 35 PA.C.S. § 7514(a) (2019) (describing review process of EHB adjudications).

12. § 7514(a-c) (detailing EHB's statutorily granted jurisdiction to hear challenges arising from final DEP actions).

13. Zoey H. Lee, *Standing up for a Cleaner Town: How the EHB's Broad Definition of Standing in Friends of Lackawanna v. Department of Environmental Protection Expands Citizens' Appellate Rights*, 29 VILL. ENVTL. L.J. 259, 280-81 (2018) (explaining EHB's broad interpretative powers under *Friends of Lackawanna*). For further discussion of the impact of *Friends of Lackawanna* and other EHB decisions, see *infra* notes 124-128 and accompanying text.

14. For a discussion of the lack of guidance in matters of state constitutional interpretation, see *infra* notes 189-200 and accompanying text.

15. For further discussion of the EHB's authority to issue permits, see *infra* notes 189-200 and accompanying text.

unconstitutional under the ERA, the EHB has sparingly used this power without setting a clear standard on how these actions qualify as such.[16] In practice, the courts do not have a method to make this determination, leaving application of the ERA to an administrative agency.[17] This Note will argue that those observers who heralded the resurrection of a once-forgotten amendment missed an important piece of the puzzle: state administrative adjudications.[18]

This Note will frame the current state of the legal puzzle by analyzing *Logan* as a bellwether case for the EHB's interpretation of the ERA's protections.[19] Part II will detail the relevant facts that led to the adjudication in *Logan*.[20] Part III will describe the history of the ERA, its older interpretation in *Payne*, and its new interpretation in *PEDF*.[21] Part III will discuss the relevant statutes and regulations directing the EHB and DEP and their interactions with Pennsylvania environment law.[22] Part IV will analyze the holding of the EHB in *Logan* and examine its central holding in light of *PEDF*.[23] Finally, Part V of this Note will discuss the impact of *Logan* and similar EHB holdings and their effect on the protections afforded by the ERA under Pennsylvania law.[24]

II. FACTS

In 2012, prior to the adjudication in *Logan*,[25] Perdue Agribusiness filed for a permit with the Department of Environmental Pro-

16. *See* Thomas M. Duncan, *EHB Upholds Plan Approval, Rejecting Challenge Under Article I, Section 27*, MGKF LITIGATION BLOG (Jan. 31, 2018), https://www.mgkflitigationblog.com/Logan_Purdue_Air_Quality_Environmental_Rights_Amendment (noting possibility of agency actions being statutorily compliant but not constitutionally compliant).

17. *See id.* (illustrating EHB's acknowledgement that not all agency actions are compliant with ERA).

18. *Id.* (detailing role of administrative agencies in constitutional interpretation).

19. For further discussion of *Logan* as an accurate state of the legal landscape, see *infra* notes 110-128 and accompanying text.

20. For further elaboration on the facts of *Logan*, see *infra* notes 25-48 and accompanying text.

21. For further discussion of the background of environmental litigation and the Pennsylvania Constitution see *infra* notes 49-74.

22. For a further discussion on the corpus juris of Pennsylvania environmental law, see *infra* notes 75-128 and accompanying text.

23. For further discussion of the holding of the EHB in *Logan*, see *infra* notes 110-128. For further discussion on the potential criticisms to the EHB's decision, see *infra* notes 168-202.

24. For a discussion of the impact that *Logan* will have, particularly on *PEDF* and the ERA, see *infra* notes 203-217 and accompanying text.

25. Logan v. Dep't. of Envtl. Prot., 2018 WL 679381 2016-091-L at *2-7 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (delineating facts of case).

tection (DEP) to operate a soybean processing plant in Lancaster County, Pennsylvania.[26] In the permit application, Perdue sought permission to operate a facility that could process 1,500 tons of soybeans per day, or approximately 525,000 tons per year.[27] Perdue later revised this plan to increase the number of tons processed per day to 1,750 tons, increasing the tons processed per year to 638,750.[28] In 2016, the DEP approved Perdue's revised permit.[29]

There are two ways to process raw soybeans.[30] The first involves mechanically processing raw soybeans to process into other materials.[31] The second, referred to in the industry as "chemical treating," uses the chemical hexane in processing to achieve the same result.[32] The Federal Government has classified hexane as a chemical with potential harmful environmental effects.[33] The Environmental Protection Agency (EPA) defines fugitive emissions as gases that "could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening."[34] These gases are released from industrial activity in an irregular fashion from unforeseen leaks, emissions, or other events.[35] This was cause for concern for the appellants and used as part of the basis of their challenge in this case.[36]

Using hexane to process soybean is standard industry practice, and, globally, approximately ninety-eight percent of soybean processing plants use this method.[37] Perdue's permit application acknowledged that its Lancaster County plant would release hexane gas.[38] Perdue maintained that this emission would be in low quantities, still allowable under the statutory and constitutional

26. *Id.* at *2 (discussing Perdue's soybean processing plant, which was projected to produce "soybean oil, soybean meal, and soybean hulls") *Id.*

27. *Id.* at *2 (describing proposed output of soybean processing).

28. *Id.* at *4, (noting different permit applications).

29. *Id.* at *3 (noting amendments to original permit application).

30. *Logan*, 2018 WL 679381 at *3 (describing the procedures for soybean processing)

31. *Id.* at *2 (describing two procedures for soybean processing and their environmental impacts).

32. *Id.* (affirming Perdue's utilization of hexane processing).

33. *Id.* (noting environmental impacts from heating soybeans through its release of hexane gas).

34. 40 C.F.R. § 70.2 (2016) (stating EPA's definition of fugitive air chemicals).

35. *Id.* (further defining fugitive air chemicals).

36. *Logan*, 2018 WL 679381 at *3 (describing appellants' argument against the permit because of hexane gas emissions).

37. *Id.* at *2 (noting heating procedures as standard industry practice).

38. *Id.* at *6 (noting Perdue's acknowledged hexane emissions in its permit application).

schemes.[39] While hexane gas is a pollutant under federal standards, small emissions are not known to be harmful to humans or the environment.[40] Some hexane emissions are inevitable in using hexane to process soybeans.[41] To achieve the same output under a mechanical processing plant, Perdue would have needed a much larger plant, which would have had a greater environmental impact than a hexane plant.[42] In accordance with the DEP's permitting requirements, Perdue held two sessions of public hearings on the project.[43] These types of hearings are meant to inform affected citizens and provide an opportunity for public comment.[44] After attending the mandated hearings, two citizens, Annette Logan and Patty Longnecker, sued to prevent the DEP from issuing the permit to Perdue.[45]

This suit occurred after the second set of Perdue's public hearings were held under the direction of the DEP.[46] The first set of public hearings was for the initial permit, in which Perdue planned to process 1,500 tons of soybeans per day.[47] Under this permit, the hexane emitted from the plant would be less than the emissions under Perdue's second permit.[48]

III. BACKGROUND

A. A Brief History of the Environmental Rights Amendment

The DEP has statutory authority to issue permits under the Air Pollution Control Act.[49] This authority is not plenary and is subject to legislative override.[50] The two key restrictions on the DEP's determinations are: (1) 25 Pa. Code § 123.1(a)(9), which prevents the

39. *Id.* at *6 (noting that emissions would be within acceptable range).

40. *Id.* at *5 (describing limited health and environmental impact of hexane emissions in small quantities).

41. *Logan*, 2018 WL 679381 at *5 (acknowledging realities of limited hexane emissions).

42. *Id.* at *9 (noting Perdue's commitment to soybean heating processing).

43. *Id.* at *5 (noting statutory demands for public hearing and comment).

44. *Id.* at *1 (discussing purpose of public hearing requirements).

45. *Id.* at *10 (noting final actions of concerned citizens to prevent this permit).

46. *Logan*, 2018 WL 679381 at *12 (describing timing of lawsuit in relation to public hearing).

47. *Id.* at *5 (noting changes in permit application that required second public hearings).

48. *Id.* at *4 (noting differences in hexane emissions under (two different permits).

49. 35 PA.C.S. § 4004 (2019) (mandating DEP comply with air pollution controls when issuing permits).

50. *Logan*, 2018 WL 679381 at *12 (noting statutory limitations of DEP).

DEP from permitting air contaminants except when those contaminants are of minor significance; and (2) the Pennsylvania Constitution's *Environmental Rights Amendment* (ERA), which protects each citizen's right to a clean environment.[51] The DEP must act within these requirements if its actions are to be considered legal.[52]

There has been significant upheaval in the scope of the Pennsylvania Constitution's ERA.[53] This upheaval occurred with a recent series of cases from the Pennsylvania Supreme Court placing the amendment at the forefront of environmental litigation and agency adjudication.[54] Despite sweeping language in recent cases, interpreting the ERA to be much stronger than in older cases would suggest that the extent of the DEP's authority in making regulatory determinations is ripe for possibilities given the broad scope from these protections.[55]

Entrusting states with the ability to protect their citizens' individual rights originates from Justice Brennan's jurisprudence calling for less reliance on federal courts to defend individual rights.[56] While legal scholars debate the influence of Justice Brennan's idea with respect to Pennsylvania's ERA, its central thesis—that states are better suited to protect individual rights than federal courts—has led, in part, to the creation of Pennsylvania's ERA.[57] This surge in using state constitutions to protect greater rights has led the United States Supreme Court and the Pennsylvania Supreme Court to provide authoritative, interpretive guidance on state constitu-

51. *Id.* (describing limitations on DEP's permitting actions).

52. *Id.* at *11 (limiting range in which DEP actions are legal).

53. John C. Dernbach, *The Abandonment and Restoration of Pennsylvania's Constitutional Public Trust*, ABA (Nov. 9, 2017) (discussing recent trend in application of *PEDF* and its impact).

54. *See* Cusack *supra* note 2, at 184 (discussing implications of constitutional interpretation of ERA and individual rights).

55. *See* Kenneth T. Kristl, *The Devil is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment*, 28 GEO. ENVTL. L. REV. 589, 615-16 (2016) (discussing conflicting duties of agencies between statutory and constitutional compliance).

56. *See* Fried & Van Damme, *supra* note 4, at 1370 (noting outcry for state constitutional protections of individual rights).

57. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 712-13 (1999) (explaining role of *Payne* test in competing rights and analyses).

tional questions.[58] Questions of environmental law arising in Pennsylvania essentially become constitutional questions.[59]

Pennsylvania adopted the ERA pursuant to the Pennsylvania Constitution, Article Eleven, Section One.[60] The ERA's passage occurred during a period of growing political concern for environmental protections.[61] The ERA reads:

> 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.[62]

On the federal level, the Nixon administration's passage of the Environmental Protection Act sparked a movement within states to enact similar provisions.[63] It was in this vein of environmental protection and Justice Brennan's view of state protections of individual rights that states enacted constitutional provisions similar to Pennsylvania's to create and protect a11 citizens' environmental rights.[64] While other states have had differing interpretations of their ERA (or equivalently named amendment), the Pennsylvania ERA afforded constitutional environmental protection and a grounds for litigation to protect citizens' environmental rights.[65] This amendment advanced an understanding of the "environment" as a public good that belonged collectively to Pennsylvania citizens, with the Commonwealth holding it in trust.[66] The second clause of the pro-

58. Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991) (noting Pennsylvania Supreme Court as the final authority in interpreting Pennsylvania Constitution).

59. *See* Fried & Van Demme, *supra* note 4, at 1381 (describing interplay between Pennsylvania's ERA and environmental litigation).

60. PA. CONST. Art. XI § 1 (detailing amendment process through legislative referral). Pennsylvania's constitutional amendment procedure begins with legislative action. *Id.* It requires that a proposed amendment be voted upon in both houses of the Pennsylvania legislature before being put to a referendum. *Id.*

61. Pa Envtl. Def. Found. v. Commonwealth (PEDF), A.3d 911, 917 (Pa. Commw. Ct. 1973) (giving history of political forces that led to EPA passage).

62. PA. CONST. Art. I § 27 (providing full text of ERA).

63. Fried & Van Damme, *supra* note 4, at 1381-82 (describing rights protected under ERA).

64. *Id.* at 1387 (detailing trust law understandings of ERA).

65. *Id.* at 1388 (describing interplay between Pennsylvania's ERA and environmental litigation).

66. John C. Dernbach, James R. May & Kenneth T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV.

vision, which mandates that funds gained from the state's allowance of environmentally damaging activity would go into the corpus of the public trust, reinforced this trust model.[67]

Passed in 1971, the ERA guarantees citizens the right to clean air and water.[68] Only since the Pennsylvania Supreme Court's ruling in *PEDF* has the ERA gained significant traction as the basis for challenging government actions that damage the environment—including government permitting.[69] Before *PEDF,* the ERA was a "forgotten amendment" of Pennsylvania's Constitution in the sense that legal scholars considered the amendment to be "self-executing."[70] *Payne v. Kassab* created a long-standing balancing test that served as the only guidance issued by Pennsylvania Courts, and the case offset environmental protections with the need for the state to allow economic development.[71] The three inquiries of the *Payne* balancing test are as follows:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[72]

This test allowed the Commonwealth to issue permits for activity with potentially harmful environmental consequences so long as the benefit from the project outweighed the environmental damage.[73] Empirical evidence of ERA protections under *Payne* shows

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1169, 1171 (2015) (explaining holding of *Robinson* in relation to ERA's original intention).

67. Richard Rinaldi, *Dormant for Decades, the Environmental Rights Amendment of Pennsylvania's Constitution Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L. J. 435, 447-48 (2015) (describing new holding of *PEDF* and ERA).

68. *Id.* at 439-40 (describing original intention of ERA and subsequent weakening).

69. Lammendola, *supra* note 1, at 28 (highlighting new understanding of ERA in *Robinson* and *PEDF*).

70. Rinaldi, *supra* note 67, at 439-40 (describing legal history of ERA and subsequent *Payne* decision).

71. *See* Payne v. Kassab, 312 A.2d 86, 96 (Pa. Commw. Ct. 1973) (creating three-prong balancing test for environmental litigation under ERA).

72. *Id.* at 94 (reiterating three-pronged test).

73. *See id.* (noting cost-benefit analysis inherent in all policy-making).

that an "overwhelming majority" of individuals asserting their ERA lost their claims.[74]

B. Pennsylvania Courts Interpreting and Applying the ERA: *Payne* to *PEDF*.

The cases leading to the court's creation of the *Payne* balancing test provide some logic for the test's creation.[75] The core problem that the court grappled with was how to determine what a clean environment meant for the purposes of deciding which government actions to allow.[76] The first major interpretative guidance on the true meaning of the ERA was in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[77] where the court declared that the ERA mandated the environment to be held in trust for the public, with the government as a trustee.[78] The dissent, written by Judge Mencer, disagreed with the finding of a trustee/trustor relationship.[79] Judge Mencer found the ERA to be nothing more than a broad policy statement that offered no standing for individual litigants to sue.[80] This meant the ERA, then, was a not self-executing statute because it contained no method for enforcing individual rights to a clean environment.[81] Later, it was Judge Mencer who would write the majority opinion in *Payne*.[82]

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74. *See* John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 344 (2015) (reviewing application of ERA in reported cases and adjudications); *see also* Lamendola, *supra* note 1, at 58 (discussing new applications of ERA after Dernbach's work).

75. *See Cusak*, *supra* note 2, at 184 (describing history of litigation leading to *Payne*). Viewing the ERA as a self-executing provision gives it no special weight when compared to the duties of government. *Id.* Offsetting this is the government's responsibility to reasonably develop the land within its sovereign power.

76. *Id.* (noting dueling interpretations of ERA after its initial passage).

77. 302 A.2d 886 (Pa. Commw. Ct. 1973).

78. *Id.* at 892 (attacking nebulous constitutional protections). Nebulous constitutional rights, in the eyes of Justice Rogers, writing for the majority, have been under attack from courts because of their lack of detailed protections within their constitutional language. *Id.* Justice Rogers rejects these judicial attacks on individual rights and asserts that the trustee/trustor relationship is sufficient to guarantee the environmental rights of individual Pennsylvanians. *Id.*

79. *Id.* at 896 (weighing principles of constitutional interpretation in determining extent of their protections).

80. *See* Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (holding ERA as self-executing and offering no standing).

81. *Id.* (considering lack of protections in constitutional text renders them self-executing).

82. Cusack, *supra* note 2, at 193 (observing reversal of ERA protections from *Gettysburg* to *Payne*).

The logic underlying this test was a cost-benefit analysis:[83] the largely economic benefit against the revenue the state would generate that would go into the public trust, directly benefiting the Commonwealth's people and supplanting any environmental damage done.[84] While the balancing test in *Payne* is facially neutral, not necessarily favoring environmentally harmful development over environmental concerns, in practice it has been disproportionately favorable to the former.[85] This is in part due to the framing of the balancing test itself.[86] The benefits of a project in question are analyzed economically; its benefits are understood in growth, job creation, and financials.[87] A static environmental preserve can only offer an opportunity cost in comparison.[88] This opportunity cost that goes with environmental protection is difficult to overcome in the balancing test.[89] In applying this test, it becomes challenging to give adequate weight to environmental concerns.[90]

This interpretation of the ERA was first seriously questioned by the Pennsylvania Supreme Court in 2015.[91] *Robinson Township v.*

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83. Michelle Bryan Mudd, *A 'Constant and Difficult Task': Making Local Land Use Decisions in States with a Constitutional Right to A Healthful Environment*, 38 ECOLOGY L. Q. 1, 25-26 (2011) (describing impact of economic benefits in *Payne* analysis).

84. Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L. J. 1169, 1181 (1997) (describing self-executing public trust in Pennsylvania environmental law under *Payne*).

85. *See, e.g.*, Pa. Envtl. Def. Found. v. Commonwealth (*PEDF*), A.3d 911, 934-35 (Pa. 2017) (noting incorrect interpretations under *Payne*); *see also Payne*, 312 A.2d at 90 (describing three-pronged test for determining ERA compliance).

86. Rinaldi, *supra* note 67, at 442 (explaining reasoning of *Payne*). Quoting the language of the Court in describing the balancing test, "[t]he Commonwealth Court of Pennsylvania concluded that Article I, Section 27 required a 'realistic and not merely [a] legalistic' test." *Id.* (quoting *Payne*, 312 A.2d at 94).

87. *Id.* 442-43 (analyzing economic benefits in balancing test).

88. Mudd, *supra* note 90, at 25-26 (describing impact of economic benefits in cost-benefit analyses). Embedded within the critique of *Payne* is that "the test is too deferential to state agency regulations." *Id.* This casts the DEP and other agencies as the gatekeepers to the ERA and is the same critique that is levied by the subsequent holding in *PEDF*. *See supra* notes 75-109 and accompanying text.

89. Erin Daly & James R. May, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151, 158 (2014) (arguing incorrect applications of the ERA under *Payne* gave undue weight to this economic analysis).

90. Mudd, *supra* note 90, at 51 (noting inadequacy of environment concerns under *Payne* and similar balancing tests).

91. Robinson Township v. Commonwealth, 83 A.3d 901, 957-58 (Pa. 2013) (emphasizing trustee/trustor relationship in ERA). *See also* 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, 360 (2015) (noting majority's opinion in *Robinson* implicated substantive due process in revitalizing ERA protections).

Commonwealth was the first blow to the *Payne* regime.[92] In this case, the court issued its first opinion that ran contrary to sections of *Payne*; particularly, the state's power to bar a subdivision's ability to protect its resident's ERA rights.[93] In *Robinson* the Pennsylvania General Assembly pre-empted subdivisions from barring shale drilling in their assigned territories.[94] The Pennsylvania Supreme Court found that this was a violation of a subdivision's "implicitly necessary authority to carry into effect its constitutional duties."[95] While this might not seem as severe of a rebuke to *Payne*, *Robinson* has important implications for the trustee/trustor framework for state environmental actions.[96] In reframing the ERA as a duty for subdivisions to enforce, the Pennsylvania Supreme Court reaffirmed the trustee/trustor relationship.[97] This reaffirmation reestablished the principle from the initial ratification of the ERA—the environment is a public good that the state has been entrusted with preserving.[98]

The second and final blow to the *Payne* regime was dealt by *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF*),[99] which signaled the end of *Payne*'s long-standing dominance in Pennsylvania environmental law.[100] In *PEDF*, the Pennsylvania Supreme Court explicitly rejected *Payne*'s balancing test and interpreted the amendment as granting each citizen a positive right to environmental protection, a right the state cannot infringe upon by allowing environmentally harmful projects.[101] This end was heralded by environmental activists and legal commentators,

92. *Id.* at 966 (noting new interpretation of *Payne*).

93. *Dernbach*, *supra* note 53, at 1180 (explaining Pennsylvania Supreme Court's finding of ERA violation). *See also* Daly & May *supra* note 89, at 161-62 (arguing for more nuanced understanding of environmental trust under ERA).

94. Kristl, *supra* note 55, at 589 (applying trust law principles to Pennsylvania environmental law).

95. Dernbach, *supra* note 53, at 1180 (summarizing plurality's holding in *Robinson*).

96. *Id.* at 1179 (noting impact that trustee/trustor relationship has on the state's role in environmental protection).

97. Robinson Twp. v. Commonwealth, 83 A.3d 901, 957-58 (Pa. 2013) (recasting ERA as creating public-trust with state as trustor).

98. *See PEDF*, 161 A.3d at 934 (imposing duty to "conserve and maintain" natural resources on Commonwealth); *see also* Kirsch, *supra* note 84, at 1181-82 (framing ERA as creating self-executing public trust framework for environmental protection).

99. 161 A.3d 911 (Pa. 2017) (rejecting *Payne*'s balancing test).

100. *PEDF*, 161 A.3d at 930 (directly overruling *Payne*).

101. *Id.* at 934 (reiterating trust law principles to bind state action in protecting environmental rights).

who saw it as the end of Pennsylvania's neglect of its ERA.[102] Many viewed it as "breathing new life" into the amendment, reviving the vision of Justice Brennan and others who saw states as the best protector of individual rights.[103]

The court in *PEDF* re-interpreted the ERA as directly protecting the environment, but it left out how this protection would occur.[104] While the DEP is armed under the ERA with relevant statutes, technical skills, and expertise to make such determinations, and has been tasked by the Pennsylvania state legislature with doing so, the scope of its determinations has been challenged under this new environmental regime.[105] Specifically, commentators have questioned how the DEP's authority is best understood in the context of this new understanding of the ERA.[106] While the DEP has been granted the statutory authority to issue permits for projects that would damage the environment, this authority's extent is limited by the ERA.[107] The key issue is whether the DEP's authority is co-terminus with a citizen's rights under the ERA.[108] In other words, it is unclear whether the protections afforded to citizens under the ERA are at the DEP's discretion, or whether some actions of the DEP are outside the ERA's protections and unconstitutional.[109]

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102. *See* Rinaldi, *supra* note 67, at 447 (claiming *Robinson* revitalized Pennsylvania's ERA through reaffirmation of public trust).

103. Dernbach & Prokopchak, *supra* note 74, at 347 (2015) (noting new weight of ERA under *Robinson*); *see also* Fried & Van Damme, *supra* note 4, at 1169 (framing Pennsylvania's ERA as part of Justice Brennan's calling for states to protect individual liberties).

104. *PEDF*, 161 A.3d at 939 (lacking suggestions for administrative adjudications).

105. Duncan, *supra* note 16 (noting the role of the EHB in environmental adjudications).

106. Caleb J. Holmes, *Can the Environmental Rights Amendment Protect Pennsylvanians from EPA Cuts?*, THE LEGAL INTELLIGENCER (Mar. 8, 2018), https://www.law.com/thelegalintelligencer/2018/03/08/can-environmental-rights-amendment-protect-pennsylvanians-from-epa-cuts/ (noting new protections afforded under *PEDF* considering recent EPA cuts).

107. 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, 256 (2018) (describing new ERA standards and impact on government action).

108. *See* Duncan, *supra* note 16 (describing recent adjudications that weaken ERA protections of citizens since *PEDF*).

109. *See id.* (illustrating problems with extent of ERA protections).

C. EHB's role in ERA Challenges

The EHB acts as Pennsylvania's first tribunal of review for DEP actions.[110] Its jurisdiction is limited to final actions of the DEP.[111] Unlike trial courts of general jurisdiction, the EHB has the technical expertise necessary to adjudicate complex cases of environmental law.[112] While the EHB reviews cases *de novo*, there is an appeals process for parties seeking a higher court to rule on their case.[113] EHB adjudications are appealed to the Pennsylvania Commonwealth Court and then the Pennsylvania Supreme Court.[114]

The EHB has maintained the extent of the protections afforded by the ERA are not co-terminus with the authority of the DEP.[115] Practically speaking, the ERA affords the DEP a zone where it can issue permits and decide whether to grant permits for industrial projects which are potentially harmful, so long as the project does not go beyond the proscribed environmental harms in the ERA.[116] Under this framework, when the DEP issues a permit or makes a regulation that would go beyond the zone allowed by the ERA, a citizen can challenge these actions under the amendment.[117]

Despite the EHB's acknowledgement that the statutory authority of the DEP is not co-terminus with the ERA, challenging DEP determinations is difficult in practice.[118] The EHB and other courts afford great deference to DEP determinations, as they lack

110. 35 PA.C.S. § 7514 (2019) (detailing review structure for final DEP actions).

111. *Id.* (noting differences between agency and final actions).

112. *See* § 7513(a) (describing purposes of EHB's creation).

113. *See* Logan v. Dep't. of Envtl. Prot., No. 2016-091-L, 2018 WL 679381, at *12 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (noting standard of review of EHB actions).

114. § 7514 (noting Pennsylvania courts' structure for review purposes).

115. Duncan, *supra* note 16 (noting EHB's hesitation to define extent of protections afforded via ERA).

116. *Id.* (pointing to permissible zone of environmental degradation). The ERA's environmental protection is not absolute. *Id.* Permits for environmentally harmful projects can still be granted. *Id.* There are actions of the DEP that are unconstitutional under the ERA, but it is unclear on what grounds the EHB determines this. *See infra* notes 160-180 and accompanying text.

117. *See* 25 PA. CODE § 3.24 (2019) (providing Environmental Quality Board Policy for processing public comments).

118. *See* Ctr. for Coalfield Justice v. Dep't. of Envtl. Prot., No. 2018-028-R, 2018 WL 2081738, at *10 (Pa. Envtl. Hearing Bd. Apr. 24, 2018) (distinguishing between requirements mandated by regulatory and statutory compliance and those mandated by ERA under previous rulings).

the technical ability to make such determinations themselves.[119] In recent years, the EHB has decided several cases applying the ERA in the context of DEP actions.[120] While these key cases find the DEP is not the sole delineator of the ERA, they do not offer a clear standard for how to determine when the DEP is acting in an unconstitutional manner.[121] The most notable discussion of this standard is *Friends of Lackawanna v. Department of Environmental Protection* (*Lackawanna*),[122] where the EHB found the landfill approval process was not performed in accordance with statute.[123] In that case, the EHB preserved its power to check other government branches for compliance with the ERA.[124]

Lackawanna is the exception rather than the rule, since the EHB has used its preserved power sparingly to decide ERA compliance.[125] *Center for Coalfield Justice v. Department of Environmental Protection*[126] shows the EHB's reluctance to issue guidance on how it will determine the ERA compliance before it.[127] Additionally, the scope of protections the ERA affords is essentially in the hands of the DEP and the EHB.[128]

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119. *See* Thomas M. Duncan, *EHB Finds Another Violation of PA's Environmental Rights Amendment, But Again, Only in the Presence of a Regulatory Violation*, MGKF LITIGATION BLOG (Nov. 22 2017), https://www.mgkflitigationblog.com/PA-Environmental-Rights-Permitting-Friends-Lackawanna (describing technical expertise of EHB).

120. *See* Friends of Lackawanna v. Dep't of Envtl. Prot., No. 2015-063-L, 2016 WL 5001388 at *6-7 (Pa. Envtl. Hearing Bd. Sep. 2, 2016) (asserting EHB's power to apply ERA); see also Ctr. for Coalfield Justice, 2018 WL 2081738, at *11 (explaining ERA standards after *Robinson*).

121. Duncan, *supra* note 16 (asserting that best way to comply with ERA is through statutory compliance, despite ERA's reach). One can comply with all statutes and be found to be violating the ERA. *See id.* The safest way to ensure ERA compliance is by statutory compliance. *See id.*

122. No. 2015-063-L, 2016 WL 5001388 (Pa. Envtl. Hearing Bd. Sept. 2, 2016) (discussing approval process for landfills).

123. *Id.* at *8 (finding lack of authority for permit).

124. Lee, *supra* note 13 at 262 (reciting *Friends of Lackawanna*'s holding).

125. *See id.* (noting petitioner's unsuccessful claims before EHB).

126. 2018 WL 2081738, at *11 (Pa. Envtl. Hearing Bd. Apr. 24, 2018) (finding no success on merits in ERA challenge because environmental damage was not sufficient).

127. *See* Duncan, *supra* note 119 (arguing EHB embraced nebulous standards for determining ERA compliance).

128. *See id.* (noting lack of clarity between DEP actions and ERA protections). If the extent of the DEP's authority is co-terminus with the ERA, then the protections afforded to Pennsylvanians are governed by DEP actions. *See id.*

IV. ANALYSIS

A. Narrative Analysis

The EHB divided *Logan* into three main arguments.[129] The appellants argued that the alternatives analysis by Perdue and the DEP were performed improperly, that the projected pollution was underestimated and did not account for other sources, and that granting the permit would violate the protections of the ERA.[130] The EHB reviews cases *de novo*; it is not bound by any findings by the DEP and is free to make its own factual findings pursuant to its statutory purview.[131] According to the EHB, a permit allowing an industrial operation must comply with all statutes, regulations, and case law, as well as be "in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution."[132] The EHB also noted the appellants, Longnecker and Logan, bore the burden of proving their claims in this adjudication because they are third parties.[133] The burden of proof on third parties in challenging DEP actions stems from 25 Pa. Code § 1-21.122(c)(3).[134] The EHB summarized the appellant's arguments as follows: (1) the DEP's alternatives analysis was inadequate, (2) the DEP's fact-finding on fugitive emissions was in error, and (3) a simple cost-benefit analysis would show that the environmental detriments would not be outweighed by the benefits of the Perdue project.[135]

In challenging the DEP's determination regarding the projected fugitive emissions under the proposed plan, the appellants alleged the determination was not in compliance with 25 Pa. Code § 123.1(a)(9).[136] This section of the Pennsylvania Code forbids permitting a project that would release fugitive emissions that are not of "minor significance."[137] In challenging this determination, the appellants argued that the process by which the DEP classified the projected emissions from the plant was inadequate to warrant

129. Logan v. Dep't. of Envtl. Prot., No. 2016-091-L, 2018 WL 679381, at *11 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (describing arguments on appeal).

130. *Id.* (recasting petitioner's claims).

131. *Id.* at *13 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (rejecting appellants' claim).

132. *Id.* at *11 (noting grounds for determining validity of DEP's actions).

133. *Id.* at *14 (describing third parties' burden of proof).

134. Duncan, *supra* note 16 (reciting statutorily prescribed burden of proof).

135. *Logan*, 2018 WL 679381, at *15 (summarizing appellants' arguments).

136. *See id.* (alleging permit was not issued in compliance with statutory framework).

137. *Id.* at *16 (describing Pennsylvania Code's demands for air pollution assessment).

the classification of minor significance.[138] The appellants based this argument on the failures of Perdue and the DEP to consider their application with adequate attention to Pa. Code § 123.1.[139] The only time this provision was considered by the DEP was in response to public comments that expressed concerns about the damage to air quality that would come from the site.[140] In its brief, the DEP gave two responsive arguments: (1) that the Pa. Code § 123.1 does not apply to fugitive emissions but rather applies to particulate matter pollution, and (2) even if it does apply to fugitive air emissions, the DEP's analysis of these emissions was appropriate under this provision.[141] The EHB refused to give a definitive interpretation of Pa. Code § 123.1 and concluded that the DEP's analysis was appropriate in its determination of the emission as one of minor significance.[142]

The appellants' second argument was based on the projected pollution emitted from the plant.[143] The appellants argued that the projected emission of 100 tons of pollution per year, in the aggregate, should not be considered to be of minor significance.[144] The EHB rejected this argument, using the projected environmental impact from the fugitive air emissions to make the determination of minor significance, not the amount of air pollution itself.[145] In the aggregate, the EHB noted the context of the pollution finding that "Perdue's fugitive emissions constitute[d] approximately two percent of ozone precursor emissions from other nearby sources."[146] With the EHB's classification of the fugitive emissions as being of minor significance was the health risk assessment.[147] Both Perdue and the DEP conducted their own health assessments of the proposed plant.[148] The appellants challenged these assessments based on "the assumption of steady-state operations at Per-

138. *Id.* (noting appellants' claim of inadequacies with DEP's determination of minor significance).

139. *Id.* (describing statutory scheme for issuing permits).

140. *Logan*, 2018 WL 679381, at *21 (describing public comments, which expressed concerns over hexane emissions and other harms).

141. *Id.* (noting DEP's counter-arguments).

142. *Id.* at *20 (concluding appropriateness of DEP permit issuance).

143. *Id.* at *16 (explaining appellants' argument for inadequate pollution analysis).

144. *Id.* at *14 (aggregating projected pollution amounts on a per-annum basis).

145. *Logan*, 2018 WL 679381, at *20 (rejecting arguments on projected aggregate pollution).

146. *See id.* at *14 (noting limited impact of Perdue's projected air pollution).

147. *Id.* at *21 (describing impact of health-risk assessment).

148. *Id.* at *22 (describing competing health-risk assessments).

due's facilities."[149] This assumption would not account for any additional emissions that would come from start-up and shut-down procedures and events such as malfunctions and other mechanical or technical failures.[150] Therefore, the EHB rejected this argument, also noting the conservative projections from the DEP that allowed for a margin of error, should these unforeseen events occur.[151]

Alternatives analysis is required under PA. CODE § 127.205(5).[152] This provision mandates that the appellant for the permit perform a cost-benefit analysis of alternative "sites, sizes, production process, and environmental control techniques, and demonstrate that the benefits of a proposed facility significantly outweigh the environmental and social costs."[153] In advancing this argument, the appellants argued what the EHB referred to as a "concoct[ion] [of] a litany of hypothetical harms."[154] These included harms that are far removed from the harms that would occur from the actual soybean production.[155] One indirect harm included Pennsylvania farmers growing more soybeans to meet increased demand and therefore causing a reduction in the amount of corn that is grown.[156] This would, in turn, mean more soybean feed for livestock animals, and these soybeans could contain excess hexane gas that would negatively affect the health of these animals.[157] These tangential harms that are linked together through various hypotheticals and conditions were rejected by the EHB, the costs portion of the cost-benefits analysis to only include costs that are directly foreseeable by the DEP or those directly brought to the DEP's attention through public comment.[158]

The EHB also reaffirmed in this case the principles of the alternatives analysis, which is to "reduce a facility's emission footprint to as low as practicable given the individual circumstances and objec-

149. *Id.* at *17 (detailing assumptions of steady-state production in health-risk assessments).

150. *Logan*, 2018 WL 679381, at *18 (noting the inadequacies of steady-state production assumptions).

151. *Id.* at *24 (rejecting appellants' argument).

152. *Id.* at *21 (describing alternatives analysis required by DEP).

153. *Id.* (discussing the requirements of alternatives analysis). *See* 25 PA. CODE § 127.205(5) (detailing alternatives analysis test).

154. *Logan*, 2018 WL 679381, at *21 (noting hypothetical nature of appellants' argument).

155. *Id.* (noting degree of separation between proposed plant and alleged harms).

156. *Id.* (discussing petitioner's claims for agricultural impacts).

157. *Id.* (noting health impacts of increased hexane in animal feed).

158. *Id.* (applying previous EHB rulings in limiting alternatives analysis).

tives of the proposed project[.]"[159] This type of analysis demands an individual analysis for each project, not general rules that can be applied abstractly to all projects.[160] In the abstract, the EHB found the appellants' contention that the size of the Perdue project was not given adequate consideration to be irrelevant to the alternatives analysis.[161]

The shortest section of the EHB's adjudication—and its most consequential for environmental rights—is its refutation of the appellants' contention that the DEP's permitting violated Article I, § 27 of the Pennsylvania Constitution, otherwise known as the Environmental Rights Amendment (ERA).[162] The EHB considered the appellants' argument that the permit granting was unconstitutional because it violated the Air Pollution Control Act and all applicable regulations that arise under the *Payne v. Kassab* test.[163] *Payne* created a three-part test for determining if the DEP's actions violate the ERA; the first part asks: "[w]as there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?"[164] Under the recent holding of *PEDF*, the EHB rejected arguments predicated on the assumption that DEP's violation of applicable statues also violates the ERA.[165] The EHB concluded that because there were no additional arguments nor evidence showing how this action was violative of the ERA, the action could not be considered unconstitutional.[166]

B. Critical Analysis

Although the first two issues are recitations of Pennsylvania environmental and administrative law, the third issue, regarding the correct scope of the ERA under the new interpretation pronounced by the Pennsylvania Supreme Court in *PEDF*, is most vulnerable to

159. *Logan*, 2018 WL 679381, at *23 (outlining challenges of alternatives analysis).

160. *Id.* at *24 (noting lack of abstract principals in alternatives analysis). The point of the alternatives analysis is to propose individual alternatives for each project. *Id.* This type of analysis demands an individual assessment of each project, not an abstract one. *Id.* The alternatives proposed are not the "lowest" possible alternatives; they are the lowest alternatives for the specific project. *Id.*

161. *Id.* at *23 (noting irrelevance of appellants' proposed alternatives analysis).

162. *Id.* at *24 (rejecting appellants' claim as arising under *Payne* test).

163. Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (framing compliance with statutory requirements as part of Payne test).

164. *Id.* (explaining Payne's understanding of ERA).

165. *Logan*, 2018 WL 679381, at *24 (rejecting Payne test considering *PEDF*).

166. *Id.* (finding DEP's permit issuance constitutional).

criticism.[167] These critiques are twofold: *PEDF* was an explicit rejection of the old *Payne* regime and created fertile ground for litigants to challenge state actions as being unconstitutional because of the ERA's own weight.[168] Additionally, it has grave policy implications for environmental litigation in the future.[169]

1. Standards for ERA Violations

After *PEDF*, there were many gaps to be filled by lower courts regarding the exact contours of ERA protections.[170] There is a gap between constitutionality under the ERA and compliance with all statutory and regulatory demands, compounded by the lack of guidance in the overlap between constitutionality and compliance.[171] This opinion also notes the apparent emptiness of *PEDF* as a replacement for *Payne* insofar as the sole criterion for deciding constitutionality in statutory and regulatory compliance.[172] If this is the case, the importance of the ERA as offering its own environmental protections aside from these regulations is moot.[173] These criticisms, if followed to their end, lead to the conclusion that the ERA under *PEDF* is only as effective as the EHB and DEP want it to be.[174]

The utility of the EHB's recitation of the principles underlying the DEP's power to determine "minor significance" of emissions and "alternatives analysis" is an important reiteration of basic principles of Pennsylvania administrative and environmental law.[175] General principles of Pennsylvania administrative law give deference to agency decision making, like administrative law on the federal level.[176] The EHB was created to be a specialized court with

167. *Id.* (isolating ERA interpretation as its own issue).

168. *Id.* (reciting history of environmental litigation and its impact on this adjudication).

169. *See* Casey Murphy, *When a Bright Line Rule Cannot be Found; Final Appealable Action of the Pennsylvania Environmental Hearing Board*, 19 VILL. ENVTL. L.J. 227, 229 (2008) (describing previous impact of EHB adjudications without clear precedents).

170. *See* Lammendola, *supra* note 1, at 70 (projecting ERA's impact on future environmental protection).

171. *See* Duncan, *supra* note 119 (noting challenges with environmental litigation appeals under vague standards).

172. *Id.* (analyzing EHB adjudications under mandates of ERA).

173. *See id.* (noting competing interpretations of ERA).

174. *See* Duncan, *supra* note 16 (criticizing hollowed ERA protections in *Logan*)

175. *See id.* (noting traditional government's technical inability to govern effectively).

176. *See* Dernbach & Prokopchak, *supra* note 74, at 349 (2015) (noting deference to administrative agencies); *see also* Fried & Van Damme, *supra* note 4, at 1391 (noting role of administrative agencies in environmental protection).

the competence to decide cases involving environmental and scientific components.[177]

This deference becomes important when decisions are within the acceptable menu of options available to agencies under their statutory grant of authority.[178] Accordingly, the DEP's ability to competently and accurately label what level of emissions constitutes emissions of minor significance as well as what factors determine costs in alternative analysis are within the DEP's statutory grant of authority and purpose.[179] At a certain point, challenging and demanding justification for agency actions and proposing additional hypotheticals beyond what the DEP could reasonably contemplate would take away that competency and would disallow the DEP from fulfilling its intended legislative actions, such as issuing permits and drafting rules and regulations.[180] This need for agency functioning must be tempered with the ERA, and cannot go so far as to allow for the amendment to become hollowed by agency determinations.[181] While there are the practical effects of allowing the DEP to do their job, the holding of *PEDF* remains and must be applied to ensure that Pennsylvanians can protect their environmental rights and that the ERA does not become self-executing once again.[182] The importance of allowing agencies to do what they were created to do becomes especially pronounced as the populace demands more specialized public goods from their governments, which requires competency that only exists within agencies.[183] The legislature, a generalist body as a whole, lacks the competency and capacity to promulgate rules and issue permits that take into ac-

177. 35 PA.C.S. § 7513(a) (2019) (noting EHB's legislative purpose).

178. *See* PA. CODE 231.1(5) (2019) (understanding DEP's role in government functioning).

179. *See generally* Dernbach & Prokopchak, *supra* note 74, at 349-50 (explaining difficulties in winning ERAchallenges under EHB). To effectively govern in the face of modern technical complexities, government needs technical expertise. *See id.* Part of government's response to this need is the creation of agencies that can develop technical expertise and operate in their respective zones. *See id.*

180. *See* Cabrera, *supra* note 107 at 246 (respecting importance of judicial review while arguing for agency's need to operate).

181. *See* Duncan, *supra* note 16 (expressing concern for administrative actions and constitutional protections).

182. *See id.* (urging greater protections under EHB).

183. *See* Payne v. Kassab, 312 A.2d 86, 90 (Pa. Commw. Ct. 1973) (viewing ERA as self-executing). If the ERA is self-executing, it is from the Court's lack of power to issue affirmative legislation that would protect the environment. *See id.* If that is to be true, the Court enforcing this constitutional provision would be effectively making legislation. *See id.* Under this view, the court is powerless to enforce a constitutional right, and therefore, its enforcement becomes a matter of policymaking. *See id.*

count both the needs of industry and environmental impact.[184] This failure of the legislature and the demands of the populace that they represent led to the creation of the DEP and other agencies in the first place—to fill in the law where legislature cannot do so.[185]

There is room for disagreement with the substantive determinations the DEP uses to decide what counts as an emission of minor significance or when exactly the costs outweigh the benefits in an alternatives analysis.[186] Individuals affected might wish for a different result, but challenging that result for purely substantive reasons does not warrant striking it down unless the substance is so egregious as to violate constitutional or statutory rights.[187]

2. Guidance from Higher Courts

The second point of criticism emphasizes the concern over lack of guidance on the proper role that *PEDF* has in these adjudications.[188] Pennsylvania is unique among states in preserving environmental rights for its citizens.[189] If the ERA stands on its own to protect the rights of Pennsylvanians to their environment, it must supersede actions by state actors when their actions degrade the environment.[190] This is the logic behind the rejection of the *Payne* test, particularly its first prong, which mandated compliance with all applicable statutes and regulations.[191]

In practice, statutory compliance is still an important feature for challenging DEP permits, despite this rejection.[192] Non-compliance with the statutes and regulations is enough to win an adjudication, but compliance with statutes and regulations is not itself

184. *Id.* at 206 (pointing to lack of expertise in legislatures).

185. Logan v. Dep't. of Envtl. Prot., 2018 WL 679381 2016-091-L at *24 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (acknowledging purpose of DEP).

186. Duncan, supra note 119 (describing conflicting views of *Robinson* and *PEDF* and its constitutional framework). This is not the first time that courts and commentators have grappled with the correct analysis of what counts for determining what is enough for constitutional protections. *See* Cusack, *supra* note 2, at 192-93 (discussing conflicting cases interpreting ERA). These precedents strike at the very heart of how the ERA is affected through government powers. *Id.*

187. 25 PA. CODE § 535.1 (2019) (listing DEP's powers to issue permits).

188. *See supra* notes 180-200 and accompanying text.

189. *See* Fried & Van Damme, *supra* note 4, at 1387 (noting constitutional provisions protecting environmental rights).

190. *See* Kristl, *supra* note 55, at 624-25 (applying constitutional law principles to ERA).

191. *See* Duncan, *supra* note 16 (explaining rejection of *Payne* considering *PEDF*).

192. *See* Pa. Envtl. Def. Found. v. Commonwealth (PEDF), 161 A.3d 911, 927 (Pa. 2017) (noting importance of statutory compliance).

enough to show compliance with the ERA.[193] This stems from the new model of environmental law imposed by the Pennsylvania Supreme Court in *PEDF*.[194] The Commonwealth has a duty to protect the environment as a trust and ensure its actions are not presumed to be in furtherance of that trust.[195] Therefore, there exists a theoretical plane where state action is not constitutional regarding environmental protection, but the feasibility of challenging state action in courts along this plane of unconstitutionality has remained unclear.[196]

The problem of statutory compliance and constitutionality is compounded by the lack of guidance on how to accurately gauge when state actions are violative of the trust imposed by the ERA and are therefore unconstitutional.[197] This lack of guidance is especially frustrating when the EHB rejects appellants' arguments that they have not violated the ERA because they have complied with all relevant statutes and regulations, and there is no other evidence to show a violation of the ERA.[198] The concern is what evidence would be sufficient to show an ERA violation.[199] Without this guidance, *PEDF* becomes *Payne* by another name, as the only effective way to win an adjudication is to show statutory and regulatory noncompliance.[200] This case is not the first adjudication where the EHB refused give a definitive answer on the determination of an ERA violation, and given this trend, the EHB is unlikely to give one in the future.[201] Until such a case is decided, any grand pro-

193. *See id.* (discussing co-terminity between statutes and ERA).

194. *See id.* at 932-33 (explaining new ERA interpretation); *see also* Robinson Township v. Commonwealth, 83 A.3d 901, 956-58 (Pa. 2013) (establishing trust framework for environmental protection).

195. *See PEDF*, 161 A.3d at 932 (explaining practical effects of trust framework from *Robinson Township*).

196. *See* Logan v. Dep't of Envtl. Prot., No. 2016-091-L, 2018 WL 679381, at *25 (Pa. Envtl. Hearing Bd. Jan. 29, 2018) (rejecting co-terminus extent between ERA and DEP's grant of statutory authority).

197. *See* Duncan, *supra* note 16 (noting lack of guidance on extent of ERA protections).

198. *See id.* (pointing to lack of clarity on extent of ERA's protection considering *PEDF*).

199. *See id.* (noting lack of enough clarity for showing ERA violations).

200. *See* Duncan, *supra* note 119 (noting EHB has tackled issue of ERA's protection in conjunction with DEP permitting procedures); *see also* Kristl, *supra* note 55, at 622 (noting role of statutory compliance with constitutional compliance). Kristl's argument pre-dates the Pennsylvania Supreme Court Ruling in *PEDF* and applied the reasoning from *Robinson Township*. *See id.* Despite this, his reasoning is prescient and foresees the problems that Pennsylvania courts currently face regarding the ERA's protections. *See id.*

201. *See* Duncan, *supra* note 16 (noting other EHB adjudications that weakened ERA protections). *See also* Ctr. for Coalfield Justice v. Dep't of Envtl. Prot.,

nouncements of the ERA's new bite are largely premature, and its expanded protections exist in name only.[202]

V. IMPACT

Logan's impact is twofold: First, it weakens the new protections under the ERA, as expressed in *PEDF*.[203] Second, in giving deference to agency decisions and presuming that they are constitutional, the ruling limits the potential successes of citizen-initiated challenges under the ERA.[204] These impacts, and the existence of the shadowy area where an agency's decision can be considered violative of the ERA, cry out for resolution in subsequent decisions.[205]

The EHB has acknowledged the potential for a regulatory body's decision to be violative of the ERA and therefore invalid, but it has issued little guidance on how this phenomenon can manifest itself, and courts have been silent on such issues arising on appeal.[206] Relying on agency decisions to determine the scope of the ERA essentially is meaningless.[207] If the point of the ERA, as stated under *PEDF*, is to ensure Pennsylvanians' access to clean air and water, then that right is outside the scope of debate and state action.[208] There would be reasonable restrictions on the right, but a

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Nos. 2014-072-B, 2014,083-B, 2015-051-B, 2017 WL 3842580, at *37 (Pa. Envtl. Hearing Bd. Aug. 15, 2017) (finding DEP permits violated ERA). The EHB found a government action to be in violation of the ERA because the environmental harm was egregious, and the DEP failed to take appropriate steps to perform an alternatives analysis to mitigate potential environmental harms. *See id.* Despite this, after the DEP performed the alternatives analysis, the EHB found no ERA violation. *See* Ctr. for Coalfield Justice v. Dep't of Envtl. Prot., No. 2018-028-R, 2018 WL 2081738, at *11 (Pa. Envtl. Hearing Bd. Apr. 24, 2018) (finding grouting in stream flow not covered under ERA); *see also* Friends of Lackawanna v. Dep't of Envtl. Prot., No. 2015-063-L, 2016 WL 5001388, at *7 (Pa. Envtl. Hearing Bd. Sept. 2, 2016) (asserting EHB's ability to determine ERA compliance).

202. *See Lackawanna*, 2016 WL 5001388, at *8 (noting similar standard in all ERA cases).

203. *See* Duncan, *supra* note 16 (locating *Logan* in series of EHB cases).

204. *See id.* (pointing to challenges future environmental activist litigants will face).

205. For further discussion of the ambiguity regarding *Payne* jurisprudence, see *supra* notes 189-196 and accompanying text.

206. *See* Cabrera, *supra* note 107, at 256-57 (pointing to holes in *PEDF*).

207. *See* Fried & Van Damme, *supra* note 4, at 1369, 1400 (noting outcry for state constitutional protections of individual rights). The initial call for such protections occurred in a more general sense. *See id.* Justice Brennan urged states to be the main protector of individual liberties as states can set a higher floor for individual rights, a floor the federal government cannot lower under the U.S. Constitution. *See id.*

208. *See* Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 939 (2017) (concluding that Commonwealth is not "proprietor" of resources).

state agency's interpretation of the right is not the only valid interpretation.[209]

In the ERA's present interpretation, the determination of the limits of the right is made solely by the administrative agency that regulates such activities.[210] Due to the recent trends in this field, there is a lack of case law that can guide administrative adjudications; therefore, the extent of the right exists within agency determinations.[211] It is a right that exists insofar as the government agency allows it to exist, but when the DEP does not continue to allow this right to exist, the ERA becomes self-executing once again.[212]

This essentially leaves the law, in the EHB's own words, like the decades-long regime that came before it.[213] This change is premature because of a lack of clear guidance even though *PEDF* was thought to be a new era for the ERA and environmental rights.[214] The extent to which the ERA protects the environmental rights of all Pennsylvanians under *PEDF* is in flux.[215] Despite the EHB's admittance that some actions of the DEP are theoretically outside the scope of the ERA, there has yet to be an adjudication that points to how one can determine the constitutional validity of certain actions.[216] The lack of a clear judicial test of constitutionality for DEP actions under the ERA render the agency's actions de facto consti-

209. *See* Cabrera, *supra* note 107, at 256 (predicting role of lower courts filling gaps from *PEDF*).

210. *See* Friends of Lackawanna v. Dep't of Envtl. Prot., No. 2015-063-L, 2016 WL 5001388, at *8 (Pa. Envtl. Hearing Bd. Sept. 2, 2016) (asserting EHB's ability to interpret ERA as part of government function).

211. *See* Duncan, *supra* note 16 (re-iterating EHB's ability to decide ERA violations without statutory violations).

212. *See* Dernback & Propachek, *supra* note 74, at 344-45 (criticizing older ERA framework in *Payne*); *see also* Murphy, *supra* note 169, at 230 (arguing importance of EHB decisions).

213. *See* Lackawanna, 2016 WL 5001388, at *8 (asserting EHB's fuzzy standard is precedent for ERA).

214. *See* Duncan, *supra* note 119 (explaining *Lackawanna* and EHB's ERA application).

215. For further discussion on this flux, see *supra* notes 189-200 and accompanying text.

216. For further discussion on ERA litigation and its protections, see *supra* notes 75-128 and accompanying text.

tutional interpretations, such that the extent of protections given by the ERA must fall in line with the DEP's determinations.[217]

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217. For further discussion on the unclear standards in determining an ERA violation, see *supra* notes 189-200 and accompanying text.

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