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## Environmental Rights Amendment to the Pa. Constitution: A Force for 'Yes'?

In July, the Commonwealth Court decided a case under the Environmental Rights Amendment to the Pennsylvania Constitution. *Energy Conservation Council of Pennsylvania v. Public Utility Commission* upheld the Public Utility Commission's decision to allow an electric utility to construct a transmission line over challenges raised by environmental groups and the Office of Consumer Advocate under, among other things, Article I, Section 27, of the state constitution.

David Mandelbaum

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The Environmental Rights Amendment recognizes a public right to certain kinds of environmental quality. Ordinarily, that right would tend to impede development. However, sometimes change, even change with significant local environmental impact, would promote environmental or other values generally. In those situations, perhaps the right to environmental quality might imply that permits ought to be granted more readily.

For a variety of reasons, one might reasonably argue that Pennsylvania, along with the rest of the United States and the world, has the wrong infrastructure from an environmental, energy, economic, or political perspective. Some would say our economy is too energy- and resource-intensive to be sustainable or to have an acceptable environmental impact.

Others would say that the resources on which we depend — foreign oil, for example — are the wrong resources and should be replaced by others — like domestic natural gas. Yet others would argue that our infrastructure of various sorts is too old and too outmoded to allow Pennsylvania to compete in the global market. Each of these arguments might be at least partially correct.

If our current inventory of roads, bridges, ports, power lines, pipelines, housing, industrial facilities, farms, power plants, and so forth, is not right for environmental or other reasons, then we will have to replace old things with new things. Doing so will have environmental impacts. It will also require governmental approvals of various sorts, and not just from the environmental regulators.

Article I, section 27, of the Pennsylvania Constitution provides:

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

The second and third sentences of this provision apply to public natural resources, that is, natural resources owned by the state. However, the first sentence establishes a right of "the people" to "clean air and pure water" as well as to "preservation of the natural, scenic, historic and esthetic values of the environment." Those rights ostensibly affect all governmental decision making, including decisions concerning uses of private property.

The recent *ECC* opinion reaffirms a test first set out by the Commonwealth Court in 1973 and affirmed by the Supreme Court in *Payne v. Kassab* .

In *Payne* , opponents to a road project argued that the road's placement would adversely affect certain trees. The courts affirmed PennDOT's approval of the road under a three-part inquiry.

First, PennDOT asked, was there compliance with all applicable statutes and regulations relevant to the protection of Pennsylvania's public natural resources? Then, does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? And finally, 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?

Courts in the intervening four decades have made clear that this test applies to all government decisions, ranging from local land use approvals to sewer extension permits to, in the case of *ECC* , PUC approvals for electricity transmission lines. The *Payne* test applies to approvals for private projects as well as public projects, provided that the private project requires a governmental approval.

Notice that the environmental rights protected by the first sentence of Article I, section 27, extend beyond chemical quality of air and water.

The amendment requires governments to consider a broader spectrum of "natural, scenic, historic and esthetic" features of any project, but only to the extent that they are "values of the environment." Thus, many of the cases under Article I, Section 27, address what one might consider to be more scenic or esthetic issues than hard-core environmental concerns.

For example, in 1973 the first case reached the state Supreme Court under Article I, Section 27, *Commonwealth v. National Gettysburg Battlefield Tower* , and addressed approvals to construct a tower overlooking the Gettysburg battlefield on private property.

Those more familiar with federal than Pennsylvania administrative practice will see a similarity between what *Payne* sets out as the three-fold test and the environmental impact statement required for major federal actions significantly affecting the environment under Section 102 of the National Environmental Policy Act. *Payne* and NEPA differ in two important respects.

NEPA imposes a procedural requirement; the Environmental Rights Amendment includes a substantive standard. So long as a federal agency considers all environmental impacts of a proposed action in a non-arbitrary way, the agency may make any decision it chooses. In Pennsylvania, an agency may not proceed if environmental harm outweighs other benefits.

But NEPA does impose relatively onerous procedural requirements. An agency must either prepare an environmental impact statement, or it must go through several decision making steps to justify a decision not to do so. Under Article I, Section 27, an agency need not prepare a separate statement. It must merely embed the consideration of the *Payne* criteria into its decision.

As is true under NEPA, many of the state agencies that regularly regulate projects with significant environmental impacts have adopted regulations to address the Article I, Section 27, analysis within conventional permitting or decision making.

To cite the most obvious example, new solid waste disposal facilities must satisfy a structured harms/benefit analysis established under the applicable regulations before the Department of Environmental Protection may issue the required permit under the Solid Waste Management Act. Similarly, as the *ECC* court observed, the PUC incorporates the *Payne* criteria into its approval regulations.

The same may not be true for municipal ordinances or for decisions by state agencies further from the environmental field. It may be that an agency satisfies its obligation to assess environmental harms and benefits by assuring that an environmental regulator has applied its rules to the project and issued required permits. Anything else might allow endless challenges on the same issues for any one project as the project obtains successive approvals.

The first prong of the *Payne* test presents some practical problems if read too literally. Each permitting agency must determine whether the project complies "with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources[.]" Many projects require more than one approval. One of those approvals has to come first. Thus, at the time that the first permitting agency considers whether the project has complied with all environmental protection laws, it cannot know whether any later permits will be issued.

The *ECC* court reaffirmed the conclusion that not all permits have to be obtained before the first permit is obtained. In that case, the transmission line required approval from the National Park Service that awaited completion of an environmental impact statement. The PUC nevertheless approved the portion of the project outside the jurisdiction of the Park Service and allowed construction to begin on that portion of the project before the Park Service granted its approval.

The second prong of the *Payne* test requires that environmental incursion be kept to a minimum, but that cannot mean an absolute minimum. Some activity somewhere has to be assumed, or *Payne* would require nothing to be built anywhere, the opposite of what that court said it was trying to do.

The *ECC* court reaffirmed the general rule that the governmental approval has to be considered within its own bounds. The need for additional transmission capacity was determined by the rules of the PUC, the PJM Interconnection (that is, "the grid"), and the other energy regulators. Given that determination, and the constraints of having to make a decision at some time without entering into what we have called the "Mobius loop," the *ECC* court found the PUC to have chosen the minimally intrusive alternative.

But what if the environmentally preferable alternative is to allow development? Can Article I, Section 27, be read to require the decision-maker to approve a project? So, for example, suppose that allowing a new gas-fired power plant would improve air quality over current conditions because it would result in the retirement of older, dirtier capacity. Alternatively, suppose that a new light rail line would reduce air pollution because it would reduce automobile traffic, or a new real estate development would reduce travel distances by promoting a more compact urban form. Can proof of those facts make disapproval of the project constitutionally problematic?

A project has environmental impacts. So do the existing alternatives that the project would replace or supplement. A decision to approve a project has environmental impacts, but so does a decision not to approve it.

If the people have a right to consideration of those impacts in any permitting decision, then perhaps they have the right to consideration of the impacts of a "no" as well as a "yes." New infrastructure projects will have environmental impacts.

However, the impacts of not going forward might be said to be more significant. If we cannot take the harms of not proceeding into account, then we are stuck with old stuff. Read in the way I suggest, Article I, Section 27, becomes a force for a more competitive and at the same time more sustainable Pennsylvania. •

**David Mandelbaum** is national co-chair of the environmental practice group of [Greenberg Traurig](#); his principal office is in Philadelphia. He teaches "Oil and Gas Law," "Environmental Litigation: Superfund," and "Global Climate Change" in rotation at Temple Law School, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. He was educated at Harvard College and Harvard Law School.



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