

Barley Snyder

STATE CONSTITUTIONS AND THE ENVIRONMENT:  
A WATERSHED COMPARISON

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Chesapeake Legal Alliance

Chesapeake Bay Commission

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LANCASTER · YORK · READING · HARRISBURG · HANOVER · GETTYSBURG · MALVERN · SCHUYLKILL HAVEN · HUNT VALLEY, MD · COLUMBIA, MD

# What is an Environmental Rights Amendment?

- State constitutional provision that provides certain rights, duties, or policy statements related to managing or protecting quality of the environment or addressing environmental concerns in the state
- 33 states have constitutional provisions mentioning the environment
- Many existing provisions were added in the 1960s and 1970s



# Types of Environmental Provisions

Provide citizens with benefits of a healthy human or natural environment or guide state to protect the environment (policy directives)

- Virginia

Provide citizens with a right to a healthy environment as a basic civil right (substantive rights)

- Pennsylvania



# Existing Environmental Rights Amendments

## Bay Jurisdictions with Environmental Amendments

Pennsylvania

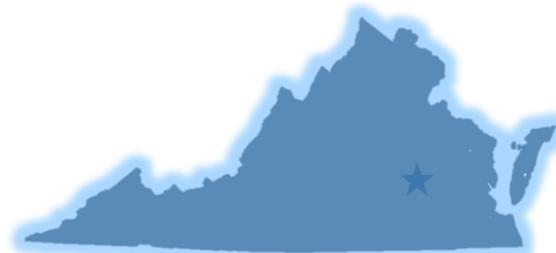
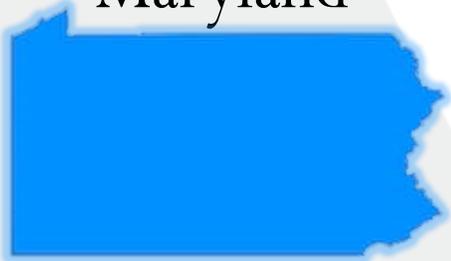
- Article I, Section 27

Virginia

- Article XI, Section 1 & 2

## Jurisdiction without Environmental Amendment

Maryland



# Virginia - Article XI, Section 1

## § 1. Natural resources and historical sites of the Commonwealth

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.



# Article XI, Section 2

## § 2. Conservation and development of natural resources and historical sites

In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states.



# Article I, Section 27 of the Pennsylvania Constitution

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



# PA Environmental Rights Amendment Facts

- Contained in the “Declaration of Rights” section of the Constitution, along with religious freedom, freedom of speech, trial by jury, and the right to bear arms
- Truly bi-partisan. Approved unanimously by two sessions of the General Assembly and a by 4-1 margin of voters in 1971.
- Until 2014, courts rarely struck down government actions or statutes under the Environmental Rights Amendment



# Key Features to Consider

## Is the amendment self-executing?

- Does the provision provide an explicit guarantee of environmental rights or a policy directive that requires the state legislature to pass laws to further define the provision?

## Standing

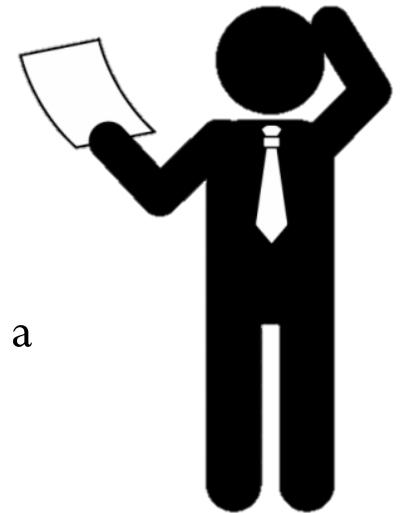
- Who can enforce the provision – the state, citizens?

## Scope of rights provided

- Does the provision protect the human or natural environment?
- Does the provision protect a specific priority resource or all public natural resources?

## Standard of review

- Does the provision indicate what standard of review should be applied when a case is brought to enforce the provision?



# Pre-2013 Standard

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- Does the environmental harm which will result from the challenged decision or action clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?
- *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973)



# *Robinson Township v. Commonwealth*

83 A.3d 901 (Pa. 2013)

- Challenge to certain provisions of Act 13, repealing and amending the Oil and Gas Act
- Challenged provisions included significant restrictions on local municipalities' ability to regulate fracking, empowering PUC to review local zoning ordinances, and limiting release of information to medical professionals
- Plurality of the Court relied on Article I, Section 27 to strike down several provisions of Act 13.
- Plurality criticized *Payne v. Kassab*, expressed a more expansive view of Article 1, Section 27



# *Pa. Environmental Defense Fund v. Commonwealth*

161 A.3d 911 (Pa. 2017)

- Challenge to the diversion of funds from the leasing of public lands from DCNR to General Fund
- Elections have consequences
- Majority of the Court (adopted reasoning from *Robinson Township*).



# *Pa. Environmental Defense Fund v. Commonwealth*

- Court threw out *Payne v. Kassab* test as “unrelated to the text of Section 27 and the trust principles animating it” and “strips the constitutional provision of its meaning.”
- “The proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of enactment.”



# *Pa. Environmental Defense Fund v. Commonwealth*

## Two separate rights:

- First sentence is prohibitory clause that created individual right and “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amendable to regulation, any laws that unreasonably impair the right are unconstitutional.”
- Public trust, common ownership by the people of PA’s public natural resources, with Commonwealth as trustee.



# *Pa. Environmental Defense Fund v. Commonwealth*

## Commonwealth's trustee obligations:

- “**duty to prohibit** the degradation, diminution, and depletion of our natural resources, whether these harms might result from direct state action or from the actions of private parties.”
- “**must act affirmatively** via legislative action to protect the environment.” See *Wm. Penn School District v. Pa. Dept. of Education*, 170 A.3d 414 (Pa. 2017) – constitutionality of General Assembly’s funding of schools is justiciable issue.



# Questions

- Are local governmental units trustees under Article 1, Section 27?
- What responsibilities do local governmental units have under Article 1, Section 27?
- Do agencies have to do more than what is required by statutes or regulations?
- How do governmental units evaluate compliance with Article 1, Section 27?
- Does Article 1, Section 27 apply to both publically owned and privately owned resources?



# Questions?

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