

## **Robinson Township. v. Commonwealth of Pennsylvania (PA Supreme Court), 83 A.3d 901 (2013)**

[Note: The Pennsylvania Supreme Court has 7 members; Justice Castille wrote on behalf of a 3-person plurality. Justice Baer concurred. Justice Saylor dissented, and was joined by 2 other justices. This is a highly redacted version of a 120 page opinion. Internal references and text are omitted without notation.]

Chief Justice CASTILLE.

In this matter, multiple issues of constitutional import arise in cross-appeals taken from the decision of the Commonwealth Court ruling upon expedited challenges to Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act (“Act 13”). Act 13 comprises sweeping legislation affecting Pennsylvania’s environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale. The litigation proceeded below in an accelerated fashion, in part because the legislation itself was designed to take effect quickly and imposed obligations which required the challengers to formulate their legal positions swiftly; and in part in recognition of the obvious economic importance of the legislation to the Commonwealth and its citizens.

The litigation implicates, among many other sources of law, a provision of this Commonwealth’s organic charter, specifically Section 27 of the Declaration of Rights in the Pennsylvania Constitution, which 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.”

PA. CONST. art. I, § 27 (the “Environmental Rights Amendment”).

Following careful deliberation, this Court holds that several challenged provisions of Act 13 are unconstitutional, albeit the Court majority affirming the finding of unconstitutionality is not of one mind concerning the ground for decision. This Opinion, representing the views of this author, Madame Justice Todd, and Mr. Justice McCaffery, finds that several core provisions of Act 13 violate the Commonwealth’s duties as trustee of Pennsylvania’s public natural resources under the Environmental Rights Amendment; other challenges lack merit; and still further issues require additional examination in the Commonwealth Court. Mr. Justice Baer, in concurrence, concurs in the mandate, and joins the Majority Opinion in all parts except Parts III and VI(C); briefly stated, rather than grounding merits affirmance in the Environmental Rights Amendment, Justice Baer would find that the core constitutional infirmity sounds in substantive due process. Accordingly, we affirm in part and reverse in part the Commonwealth Court’s decision, and remand for further proceedings consistent with specific directives later set forth in this Opinion. *See* Part VI (Conclusion and Mandate).

### **I. Background**

The Marcellus Shale Formation has been a known natural gas reservoir (containing primarily methane) for more than 75 years. Particularly in northeastern Pennsylvania, the shale rock is organic-rich and thick. Early drilling efforts revealed that the gas occurred in “pockets”

within the rock formations, and that the flow of natural gas from wells was not continuous. Nonetheless, geological surveys in the 1970s showed that the Marcellus Shale Formation had “excellent potential to fill the needs of users” if expected technological development continued and natural gas prices increased. Those developments materialized and they permitted shale drilling in the Marcellus Formation to start in 2003; production began in 2005.

In shale formations, organic matter in the soil generates gas molecules that absorb onto the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock and natural gas (*e.g.*, methane) migrates to fill the fractures or pockets. In the Marcellus Shale Formation, fractures in the rock and naturally-occurring gas pockets are insufficient in size and number to sustain consistent industrial production of natural gas. The industry uses two techniques that enhance recovery of natural gas from these “unconventional” gas wells: hydraulic fracturing or “fracking” (usually slick-water fracking) and horizontal drilling. Both techniques inevitably do violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical hole to 5,500 to 6,500 feet—several hundred feet above the target natural gas pocket or reservoir—and then directing the drill bit through an arc until the drilling proceeds sideways or horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of water. The development of the natural gas industry in the Marcellus Shale Formation prompted enactment of Act 13.

In February 2012, the Governor of Pennsylvania, Thomas W. Corbett, signed Act 13 into law. Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and added provisions re-codified into six new chapters in Title 58 of the Pennsylvania Consolidated Statutes. The new chapters of the Oil and Gas Act are:

- Chapter 23, which establishes a fee schedule for the unconventional gas well industry, and provides for the collection and distribution of these fees;
- Chapter 25, which provides for appropriation and allocation of funds from the Oil and Gas Lease Fund;
- Chapter 27, which creates a natural gas energy development program to fund public or private projects for converting vehicles to utilize natural gas fuel;
- Chapter 32, which describes the well permitting process and defines statewide limitations on oil and gas development;
- Chapter 33, which prohibits any local regulation of oil and gas operations, including via environmental legislation, and requires statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources;
- Chapter 35, which provides that producers, rather than landowners, are responsible for payment of the unconventional gas well fees authorized under Chapter 23.

*See* 58 Pa.C.S. §§ 2301–3504. Chapter 23’s fee schedule became effective immediately upon Act 13 being signed into law, on February 14, 2012, while the remaining chapters were to take effect sixty days later, on April 16, 2012.

### **III. The Constitutionality of Act 13**

As noted, on the merits, the Commonwealth Court held that certain specific provisions of Act 13 were unconstitutional. The *en banc* panel enjoined enforcement of Sections 3215(b)(4) and 3304 of Act 13, and of those provisions of Chapter 33 which enforce Section 3304. The effect of the injunction was to prohibit the Department of Environmental Protection from granting waivers of mandatory setbacks from certain types of waters of the Commonwealth, and to permit local government to enforce existing zoning ordinances, and adopt new ordinances, that diverge from the Act 13 legal regime, without concern for the legal or financial consequences that would otherwise attend non-compliance with Act 13.

The Commonwealth Court rejected the citizens' remaining claims. Specifically, the panel sustained the Commonwealth's preliminary objections to claims: (1) that provisions of Act 13 violate the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution ...

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By any measure, the citizens argue, Act 13 works a remarkable revolution in zoning in this Commonwealth. The Act introduces heavy-duty industrial uses—natural gas development and processing, including permission to store wastewater (a drilling by-product)—into all existing zoning districts as of right, including residential, agricultural, and commercial. The intrusion is made, according to the citizens, regardless of whether the district is suitable for industrial use, whether the industrial use is compatible with existing uses and expectations, and whether dictated accompanying setbacks are sufficient to protect the environmental health, safety, and welfare of residents in particular affected communities. The citizens describe the development process of shale drilling for natural gas.

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For example, one affidavit of record recounts the experience of a homeowner in a previously rural, non-industrialized area of Amwell Township, Washington County. The homeowner, a nurse, leased her mineral rights and drilling operations (three wells, a fracking fluid impoundment, and a drill cuttings pit) began approximately 1,500 feet from her home. Access to the drilling site occurred mainly via a dirt road running approximately fifteen feet from her residence. The homeowner describes that, during the initial construction process, the access road was used daily and continuously by heavy truck traffic, causing structural damage to her home's foundation, road collapse, as well as large amounts of dust and deterioration to the air quality; the gas company subsequently repaired the damage to her home, and widened and paved the access road to accommodate additional traffic. Moreover, and unsurprisingly, the 24-hour-a-day traffic caused significant noise pollution, which affected the homeowner's ability to enjoy her property.

Once drilling and fracking operations began, and over the next several years, the homeowner noticed significant degradation in the quality of the well water which had supplied her homestead and those of several neighbors with fresh and clean water during the century in which her family had owned the property. In the homeowner's words: "my well water began to stink like rotten eggs and garbage with a sulfur chemical smell[,] ... when running water to take a bath, my bathtub filled with black sediment and again smelled like rotten eggs." The gas company gave the homeowner a "water buffalo" as a replacement water source. Air quality also became degraded, beginning "to smell of rotten eggs, sulfur, and chemicals" and seeping into the home and the owner's belongings. Several pets died as a result of their exposure to

contaminated water. Finally, upon her physician's advice, the homeowner abandoned her family home because the exposure to the toxic water and air caused her and her children severe health problems such as constant and debilitating headaches, nosebleeds, nausea, difficulty and shortness of breath, skin rashes and lesions, bone and muscle pain, inability to concentrate, and severe fatigue.

Moreover, the citizens state, communities "have a reasonable concern over the impact on property values due to the perceived or real risk associated with living near industrial activity." Property values, according to the citizens, will decrease with the prospect of storing drilling wastewater "less than a football field's distance from ... homes," and the prospect of contamination of the soil, air, and water supply. The citizens state that they "relied on the zoning ordinances in their respective municipalities to protect their investments in their homes and businesses, and to provide safe, healthy, and desirable places in which to live, work, raise families, and engage in recreational activities." Act 13's blunt "one size-fits-all" accommodation of the oil and gas industry, the citizens argue, will change the character of existing residential neighborhoods and affect planning for future orderly growth in municipalities with significant shale gas reserves, the very neighborhoods which zoning laws encouraged and currently protect. One aspect of the new law, for example, provides for setbacks of 300 feet from "existing structures," which does not account for currently undeveloped properties or large parcels, much less roads and property lines. In more sparsely-populated rural communities, the effect of Act 13 will be, according to the citizens, "unlimited drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipeline; installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours of operation, all of which may take place in residentially zoned areas." The citizens conclude that, as a zoning regulation, Act 13 fails to meet the standards of Article I, Section 1 of the Pennsylvania Constitution, the Fourteenth Amendment of the U.S. Constitution, and the caselaw that interprets those respective constitutional provisions.

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According to the citizens, the Commonwealth Court erred in failing to recognize that the municipalities' fiduciary obligation under Section 27 to evaluate short-term and long-term discrete and cumulative effects on public resources continues to exist even though the General Assembly bluntly sought to occupy the field of environmental regulation insofar as the oil and gas industry is concerned. These oil and gas operations, according to the citizens, present risks and "will cause degradation and diminution of trust resources" protected by the Environmental Rights Amendment. The citizens claim that Act 13 removes the municipalities' capacity to evaluate and react appropriately and meaningfully to the potential impact of oil and gas operations and, as a result, impedes the municipalities' ability to comply with their constitutional duties. The basic error, the citizens state, derives from the conclusion that the Municipalities Planning Code is the source of the municipalities' obligations rather than the Constitution. A statutory enactment such as Act 13 simply cannot eliminate organic constitutional obligations.

The Commonwealth responds that Act 13 does not violate the Environmental Rights Amendment, found in Section 27 of Article I of our charter. According to the Commonwealth, municipalities have no powers outside those granted by the General Assembly, and the General Assembly has acted via Act 13 to preempt the field and excuse any obligation that municipalities may have had previously "to plan for environmental concerns for oil and gas operations." Section 27, the Commonwealth states, is not a basis to expand the trustee role or the powers of

governmental entities, such as municipalities, beyond those granted by the General Assembly. The Commonwealth argues that, “[t]hrough the legislative process,” the General Assembly balanced Section 27 concerns, and the constitutional provision does not confer a right upon the municipalities to challenge the General Assembly’s policy judgments or for citizens to oppose actions of the General Assembly with which they disagree.

The Commonwealth adds that Section 27 “provides specific constitutional authority for the [General Assembly] to enact laws like Act 13 which serve to manage and protect the environment while allowing for the development of Pennsylvania’s valuable natural resources.” Moreover, while the Commonwealth agrees that municipalities have some duties and responsibilities under Section 27, the Commonwealth disputes that Section 27 grants municipalities any power to protect public natural resources beyond that granted by the General Assembly. The Commonwealth claims that, as named trustee, the sovereign is “plainly” given “the authority and the obligation to control Pennsylvania’s natural resources.” The municipalities have no power to assert authority under Section 27 “as against the Legislature.” In short, the Commonwealth’s position is that the Environmental Rights Amendment recognizes or confers no right upon citizens and no right or inherent obligation upon municipalities; rather, the constitutional provision exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania. The Commonwealth thus requests that we affirm the decision of the Commonwealth Court in this respect.

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Article I is the Commonwealth’s Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such “general, great and essential” quality as to be ensconced as “inviolable.” PA. CONST. art. I, Preamble & § 25; *see also* PA. CONST. art. I, § 2 (“All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness.”); *accord Edmunds*, 586 A.2d at 896 (since 1776, Declaration of Rights has been “organic part” of Constitution, and “appear[s] (not coincidentally) first in that document”). The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution—*vis-à-vis* the government created by the people—are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution. ... *accord Edmunds*, 586 A.2d at 896 (Pennsylvania’s original constitution of 1776 “reduce[d] to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter in 1681.”). This concept is illustrated in the basic two-part scheme of our Constitution, which has persisted since the original post-colonial document: one part establishes a government and another part limits that government’s powers. ... The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, “particular sections of the Declaration of Rights represent specific limits on governmental power.”

The first section of Article I “affirms, among other things, that all citizens ‘have certain inherent and inalienable rights.’ ” ... Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27, the Environmental Rights Amendment:

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

PA. CONST. art. I, § 27 (Natural resources and the public estate).

Before examining the application of Section 27 to the controversy before us, it is necessary to identify and appreciate the rights protected by this provision of the Constitution. ... Much as is the case with other Declaration of Rights provisions, Article I, Section 27 articulates principles of relatively broad application, whose development in practice often is left primarily to the judicial and legislative branches. ... Articulating judicial standards in the realm of constitutional rights may be a difficult task, as our developing jurisprudence vis-à-vis rights affirmed in the Pennsylvania Constitution well before environmental rights amply shows. ...

The actions brought under Section 27 since its ratification, which we will describe further below, have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and, as we explain below, as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment. ... The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters. ...

#### ***4. Plain language***

Initially, we note that the Environmental Rights Amendment accomplishes two primary goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights. Section 27 is structured into three mandatory clauses that define rights and obligations to accomplish these twin purposes; and each clause mentions “the people.”

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens’ rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree. *Accord* 1970 Pa. Legislative Journal—House 2269, 2272 (April 14, 1970) (Section 27 “can be viewed almost as two separate bills—albeit there is considerable interaction between them, and the legal doctrines invoked by each should tend mutually to support and reinforce the other because of their inclusion in a single amendment.”). Facing a claim premised upon Section 27 rights and obligations, the courts must conduct a principled analysis of whether the Environmental Rights Amendment has been violated. *See Payne*, 361 A.2d at 273.

To determine the merits of a claim that the General Assembly’s exercise of its police power is unconstitutional, we inquire into more than the intent of the legislative body and focus upon the effect of the law on the right allegedly violated. The General Assembly’s declaration of policy does not control the judicial inquiry into constitutionality. Indeed, “for this Court to accept the notion that legislative pronouncements of benign intent can control a constitutional inquiry ... would be tantamount to ceding our constitutional duty, and our independence, to the legislative branch.”

### **I. First Clause of Section 27—Individual Environmental Rights**

According to the plain language of Section 27, the provision establishes two separate rights in the people of the Commonwealth. The first—in the initial, prohibitory clause of Section 27—is the declared “right” of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.<sup>39</sup> This clause affirms a limitation on the state’s power to act contrary to this right. While the subject of the right certainly may be regulated by the Commonwealth, any regulation is “subordinate to the enjoyment of the right ... [and] must be regulation purely, not destruction”; laws of the Commonwealth that unreasonably impair the right are unconstitutional.

The terms “clean air” and “pure water” leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters. Moreover, the constitutional provision directs the “preservation” of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.

Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently.

Also apparent from the language of the constitutional provision are the substantive standards by which we decide a claim for violation of a right protected by the first clause of Section 27. The right to “clean air” and “pure water” sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern “clean air” and “pure water” standards and, as with any other technical standards, the courts generally defer to agency expertise in making a factual determination whether the benchmarks were met. *Accord* 35 P.S. § 6026.102(4) (recognizing that General Assembly “has a duty” to implement Section 27 and devise environmental remediation standards). That is not to say, however, that courts can play no role in enforcing the substantive requirements articulated by the Environmental Rights Amendment in the context of an appropriate challenge. Courts are equipped and obliged to weigh parties’ competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.

Section 27 also separately requires the preservation of “natural, scenic, historic and esthetic values of the environment.” PA. CONST. art. I, § 27. By calling for the “preservation” of

these broad environmental values, the Constitution again protects the people from governmental action that unreasonably causes actual or likely deterioration of these features. The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster.

The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I. *See* PA. CONST. art. I, § 25 (“everything” in Article I is excepted from government’s general powers and is to remain inviolate); *accord* 1970 Pa. Legislative Journal–House at 2272 (“If we are to save our natural environment we must therefore give it the same Constitutional protection we give to our political environment.”); This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights as guaranteed in Sections 1, 9, and 10. PA. CONST. art. I, §§ 1, 9, 10, 27.

Relatedly, while economic interests of the people are not a specific subject of the Pennsylvania Declaration of Rights, we recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest. In this respect, and relevant here, it is important to note that we do not perceive Section 27 as expressing the intent of either the unanimous legislative sponsors or the ratifying voters to deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people. But, to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.

## **II. The Second and Third Clauses of Section 27—The Public Trust**

The second right reserved by Section 27 is the common ownership of the people, including future generations, of Pennsylvania’s public natural resources. On its terms, the second clause of Section 27 applies to a narrower category of “public” natural resources than the first clause of the provision. The drafters, however, left unqualified the phrase public natural resources, suggesting that the term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns. *Accord* 1970 Pa. Legislative Journal–House at 2274. At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.

The legislative history of the amendment supports this plain interpretation. In its original draft, the second clause of the proposed Environmental Rights Amendment included an enumeration of the public natural resources to be protected. The resources named were “the air, waters, fish, wildlife, and the public lands and property of the Commonwealth....” But, after members of the General Assembly expressed disquietude that the enumeration of resources would be interpreted “to limit, rather than expand, [the] basic concept” of public natural resources, Section 27 was amended and subsequently adopted in its existing, unrestricted, form.

The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law.

The third clause of Section 27 establishes the Commonwealth's duties with respect to Pennsylvania's commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations). The provision establishes the public trust doctrine with respect to these natural resources (the corpus of the trust), and designates "the Commonwealth" as trustee and the people as the named beneficiaries. *Payne*, 361 A.2d at 272. The terms of the trust are construed according to the intent of the settlor which, in this instance, is "the people."

"Trust" and "trustee" are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted. ... The statement offered in the General Assembly in support of the amendment explained the distinction between the roles of proprietor and trustee in these terms:

Under the proprietary theory, government deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.

It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."). The trust relationship does not contemplate a settlor placing blind faith in the uncontrolled discretion of a trustee; the settlor is entitled to maintain some control and flexibility, exercised by granting the trustee considerable discretion to accomplish the purposes of the trust. An exposition here is not necessary on all the ramifications that the term trustee may have in the context of Section 27. As in our discussion of the Environmental Rights Amendment generally, we merely outline foundational principles relevant to our disposition of this matter.

This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust. The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania's government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government.

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. *See* PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

As the parties here illustrate, two separate Commonwealth obligations are implicit in the nature of the trustee-beneficiary relationship. The first obligation arises from the prohibitory nature of the constitutional clause creating the trust, and is similar to other negative rights articulated in the Declaration of Rights. Stated otherwise, the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties. In this sense, the third clause of the Environmental Rights Amendment is complete because it establishes broad but concrete substantive parameters within which the Commonwealth may act. *Compare* PA. CONST. art. I, § 27 *with, e.g.*, PA. CONST. art. I, § 28. This Court perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review....

The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action. The General Assembly has not shied from this duty; it has enacted environmental statutes, most notably the Clean Streams Act, see 35 P.S. § 691.1 *et seq.*; the Air Pollution Control Act, see 35 P.S. § 4001 *et seq.*; and the Solid Waste Management Act, see 35 P.S. § 6018.101 *et seq.* As these statutes (and related regulations) illustrate, legislative enactments serve to define regulatory powers and duties, to describe prohibited conduct of private individuals and entities, to provide procedural safeguards, and to enunciate technical standards of environmental protection. These administrative details are appropriately addressed by legislation because, like other “great ordinances” in our Declaration of Rights, the generalized terms comprising the Environmental Rights Amendment do not articulate them. The call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people.

Of course, the trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development.

Within the public trust paradigm of Section 27, the beneficiaries of the trust are “all the people” of Pennsylvania, including generations yet to come. The trust's beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests of present and future beneficiaries. Moreover, this aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.

Section 27 is explicit regarding the respective rights of the people and obligations of the Commonwealth, and considerations upon which we typically rely in statutory construction confirm our development of the basic principles enunciated by its drafters. Among the relevant considerations are the occasion and necessity for the constitutional provision, the legislative

history and circumstances of enactment and ratification, the mischief to be remedied and the object to be attained.

That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life. Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

### **C. Article I, Section 27 Rights in Application**

We underscore that the citizens raise claims which implicate primarily the Commonwealth's duties as trustee under the Environmental Rights Amendment. The Commonwealth's position on the municipalities' role following Act 13's land use revolution respecting oil and gas operations is similar to its stance regarding the authority of the judiciary to entertain and decide this dispute: in the Commonwealth's view, there is no role. According to the Commonwealth, the question here is strictly one of policy, which only the General Assembly may formulate pursuant to its police powers and authority as trustee of Pennsylvania's public natural resources. By the Commonwealth's reasoning, municipalities have no authority to articulate or implement a different policy, and they have no authority even to claim that the General Assembly's policy violates the Commonwealth's organic charter. The Commonwealth suggests that Act 13 is an enactment based on valid legislative objectives and, therefore, falls properly within its exclusive discretionary policy judgment.

In contrast, the citizens construe the Environmental Rights Amendment as protecting individual rights and devolving duties upon various actors within the political system; and they claim that breaches of those duties or encroachments upon those rights is, at a minimum, actionable. According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with constitutional duties. Unless the Declaration of Rights is to have no meaning, the citizens are correct.

In relevant part, as we have explained previously, the Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly.

The Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations.

We recognize that, along with articulating the people's rights as beneficiaries of the public trust, the Environmental Rights Amendment also encourages the General Assembly to exercise its trustee powers to enact environmental legislation that serves the purposes of the trust. But, in this litigation, the citizens' constitutional challenge is not to the General Assembly's power to enact such legislation; that is a power the General Assembly unquestionably possesses. The question arising from the Commonwealth's litigation stance is whether the General Assembly can perform the legislative function in a manner inconsistent with the constitutional mandate.

Act 13 is not generalized environmental legislation, but is instead a statute that regulates a single, important industry—oil and gas extraction and development. Oil and gas resources are both privately owned and partly public, *i.e.*, insofar as they are on public lands. Act 13 does not remotely purport to regulate simply those oil and gas resources that are part of the public trust corpus, but rather, it addresses the exploitation of all oil and gas resources throughout Pennsylvania. Act 13's primary stated purpose is not to effectuate the constitutional obligation to protect and preserve Pennsylvania's natural environment. Rather, the purpose of the statute is to provide a maximally favorable environment for industry operators to exploit Pennsylvania's oil and natural gas resources, including those in the Marcellus Shale Formation. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania's environment, which are part of the public trust.

As we have explained, Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike. When coal was "King," there was no Environmental Rights Amendment to constrain exploitation of the resource, to protect the people and the environment, or to impose the sort of specific duty as trustee upon the Commonwealth as is found in the Amendment. Pennsylvania's very real and mixed past is visible today to anyone travelling across Pennsylvania's spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania's natural assets. Pennsylvania's past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

The type of constitutional challenge presented today is as unprecedented in Pennsylvania as is the legislation that engendered it. But, the challenge is in response to history seeming to repeat itself: an industry, offering the very real prospect of jobs and other important economic benefits, seeks to exploit a Pennsylvania resource, to supply an energy source much in demand. The political branches have responded with a comprehensive scheme that accommodates the recovery of the resource. By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children,

and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth century, since there was no Environmental Rights Amendment. The response is available now.

The challenge here is premised upon that part of our organic charter that now explicitly guarantees the people’s right to an environment of quality and the concomitant expressed reservation of a right to benefit from the Commonwealth’s duty of management of our public natural resources. The challengers here are citizens—just like the citizenry that reserved the right in our charter. They are residents or members of local legislative and executive bodies, and several localities directly affected by natural gas development and extraction in the Marcellus Shale Formation. Contrary to the Commonwealth’s characterization of the dispute, the citizens seek not to expand the authority of local government but to vindicate fundamental constitutional rights that, they say, have been compromised by a legislative determination that violates a public trust. The Commonwealth’s efforts to minimize the import of this litigation by suggesting it is simply a dispute over public policy voiced by a disappointed minority requires a blindness to the reality here and to Pennsylvania history, including Pennsylvania constitutional history; and, the position ignores the reality that Act 13 has the potential to affect the reserved rights of every citizen of this Commonwealth now, and in the future. We will proceed now to the merits.

**VI. Conclusion and Mandate**

For these reasons, the Commonwealth Court’s decision is affirmed in part and reversed in part. We hold that:

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C. Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment. We do not reach other constitutional issues raised by the parties with respect to these provisions. As a result, the Commonwealth Court’s decision is affirmed with respect to Sections 3215(b)(4) and 3304 (on different grounds), and reversed with respect to Sections 3215(d) and 3303. Accordingly, application and enforcement of Sections 3215(b)(4), 3215(d), 3303, and 3304 is hereby enjoined.

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E. The Commonwealth Court erred in sustaining the Commonwealth’s preliminary objections to Counts IV and V of the citizens’ petition for review. The lower court’s decision in these respects is reversed and the citizens’ claims are remanded for decision on the merits.

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Jurisdiction relinquished.

[Concurring and dissenting opinions omitted.]