Intervention and the Environmental Rights Amendment

By David G. Mandelbaum | August 2, 2024 | The Legal Intelligencer

Last month, the Pennsylvania Supreme Court held that environmental groups could intervene in litigation to use the Environmental Rights Amendment of the Pennsylvania Constitution to support a regulation even though the Department of Environmental Protection had declined to make that argument. See *Shirley v. Pennsylvania Legislation Reference Bureau*, No. 85 MAP 2022 (Pa. July 18, 2024). Because the courts have not fleshed out all the nuances of what the Environmental Rights Amendment means, this superficially procedural decision may have important implications for how that constitutional jurisprudence develops.

The issue arose in litigation over the adoption in the last administration of a regulation by the Environmental Quality Board to establish a system of tradable carbon dioxide emission allowances for large electric powerplants that would have supported participation by Pennsylvania in the Regional Greenhouse Gas Initiative. 52 Pa. Bull. 2471 (Apr. 23, 2022), codified at 25 Pa. Code Sections 145.301 to .409. RGGI is a "cap-and-trade" agreement among several northeastern states intended to reduce the climate impact of their electricity sector. Under RGGI, powerplants require allowances to emit carbon dioxide; one allowance allows the emission of one ton in a year. Powerplant operators may purchase allowances at an auction from the state and may trade those allowances on a secondary market. In that way, the system creates a price for carbon emissions and, if the market works efficiently, that price should be set at the marginal cost of avoiding a ton of carbon emission by the emitter who can avoid that marginal emission at the lowest cost. Emissions reductions should therefore be achieved by the electricity sector at the lowest total cost.

That initial auction of rights creates revenue for the RGGI states. Most RGGI states earmark that revenue, or part of it, for further measures to mitigate or to adapt to climate change, or to protect the environment generally. Even so, money is, of course, fungible. Funds raised by the auction fee general revenues to be appropriated elsewhere.

Both houses of the Pennsylvania General Assembly passed a concurrent resolution disapproving the regulation. Gov. Tom Wolf vetoed that resolution on the ground that the House adopted the resolution after the statutory deadline. See 52 Pa. Bull. 678 (Jan. 29, 2022). Even so and despite the Department of Environmental Protection's request, the Legislative Reference Bureau declined to publish the regulation in the Pennsylvania Bulletin. The Secretary of Environmental Protection and others then sued the LRB to require the publication. Opponents of the regulation filed a separate action to challenge the rule. See *Bowfin Keycon Holdings v. Department of Environmental Protection*. The Commonwealth Court held a consolidated hearing and addressed both cases together.

Various parties sought to intervene on both sides of each case. Among them were environmental groups who sought to intervene on the DEP's behalf, but to assert a position not asserted by the DEP.

Opponents of the regulation argued that the imposition of the allowance system would amount to a tax on generating electricity using fossil fuel. Taxes can only be levied by the General Assembly under Article II, Section 1, of the Pennsylvania Constitution.

The environmental group intervenors sought to defend the regulation by asserting that the allowance system was not a tax because the Environmental Rights Amendment—Article I, section 27 of the Constitution—would require all of the proceeds of the allowance auction to be used to improve air quality. In effect, the auction would convey a right to use the air to receive powerplant emissions. The air is a public natural resource, they would argue. And therefore, it is impressed with the public trust established by the second and third sentences of the ERA: "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 Supreme Court has already held in the Pennsylvania Environmental Defense Foundation series of cases that when the commonwealth sells a public trust asset it must use the proceeds to replenish the trust corpus. Viewed in that way, the allowance auction is not a tax, but a sale of some sort of use right and can be done by regulation.

The Commonwealth Court denied the environmental group's petition to intervene, along with others. It also preliminarily and then permanently enjoined the regulation as an unconstitutional tax.

The environmental groups appealed the denial of their petition to intervene. Obviously, proceedings in the Commonwealth Court had concluded, but if the Supreme Court reversed denial of the environmental groups' petition to intervene, then they could appeal the injunction. That is, they could participate in the Supreme Court on the same side as the DEP, but could, among other things, raise the Environmental Rights Amendment argument.

The seven Supreme Court justices issued four separate opinions on the intervention petition addressing both standing and the various elements of intervention. Perhaps the issue that will have the most uncertain future implications is the court's treatment of Pennsylvania Rule of Civil Procedure 2329(2). Rule 2329(2) allows a court to refuse an otherwise proper petition to intervene if "the interest of the petitioner is already adequately represented … ."

The environmental groups' interest is in overturning the holding that the RGGI regulation is infirm in order to allow Pennsylvania to reduce greenhouse gas emissions and, collaterally, conventional emissions, from powerplants. The DEP seeks the same result. Gov. Josh Shapiro may not seek to join RGGI, but he does seek to impose similar sorts of obligations to execute a Pennsylvania-only climate change mitigation strategy.

The court, however, found that the DEP did not adequately represent the environmental groups' interest because the DEP was not making the ERA argument. The court was careful to observe that not every novel position asserted by a prospective intervenor would get past Rule 2329(2).

However, the issue raised by these intervenors in this case was sufficiently significant that their interest was not adequately represented by the DEP. It reversed the order denying intervention and allowed the environmental groups to participate in the appeal from the merits decision in *Shirley v. LRB* and *Bowfin Keycon Holdings*.

The DEP did not explain why it did not make the ERA argument. But the ERA argument carries important policy implications. We usually do not consider permits to be conveyances of rights to use a public trust

asset. If we did, then there would have to be compensation to the trust for that use. Instead, we ordinarily think of regulatory approvals as mechanisms to allow parties to create general economic and other benefits using public resources in a reasonable way. The economy and the regulatory environment would look quite different if there were a constitutional obligation to charge a pollution fee for every permit.

If that is what the constitution means, then if would have significant implications. The DEP can make a reasonable policy choice not to litigate that issue, or not to litigate it in a particular case or context. If the DEP (or any other government agency) were to take an action that an environmental group contended violated the constitution, that private party could bring its own suit to challenge that action, assuming it had standing. But that is not the same as allowing an intervenor to align with the government agency on the result, but to litigate the broader vision of the ERA (or any other constitutional provision) in that posture.

The ERA creates rights against the government. It makes development of that law less straightforward if the contours of those rights can be litigated from the government's side of a lawsuit, but without the government's concurrence. Whether that is a feature or a bug remains to be seen.

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