

Straight TALK

by John A. Arway

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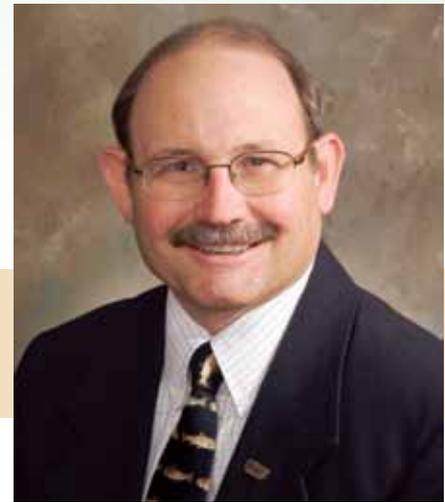


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Article 1, Section 27

On December 19, 2013, the Supreme Court of Pennsylvania issued an opinion that held certain parts of our new Oil and Gas Act (Act 13 of 2012) unconstitutional. Although I am a biologist and not a lawyer, I have spent many hours in court and on the witness stand as an expert witness defending the rights of our aquatic resources; however, I will not try to explain the implications of the decision to the law. My primary interest in studying the decision focused on the opinion of the three justices who explained their concerns about how the law was inconsistent with Article 1, Section 27 of our state constitution. Now, although the joint opinion of three justices out of seven doesn't qualify for a majority opinion, I am told that it does meet the definition of a plurality, which is significant especially when the Chief Justice agrees. The people in public referendum ratified Article 1, Section 27, also known as the Environmental Rights Amendment, on May 18, 1971 by a four to one margin. I was in undergraduate school at the time, still trying to figure out what I wanted to do in life and can clearly remember voting for this amendment. In the voting booth, it resonated with my personal philosophy about public rights and trust in government and still does today.

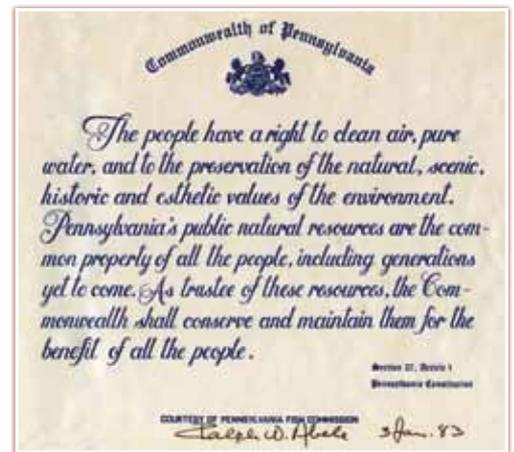
After that 1971 vote, I didn't think much more about the amendment until I began my career with the Pennsylvania Fish Commission in 1980. Although I started fresh out of graduate school as a semi-skilled laborer working on stream habitat improvement projects, I soon became involved in the review of mine drainage permit applications as a rookie fisheries biologist and discovered that our Executive Director Ralph Abele had a passion for clean water. He started his career in state government as the executive secretary of the Joint Legislative Air and Water Pollution

Control and Conservation Committee of the House and Senate in 1969. During his tenure, he worked with legislative champions like legislators Franklin Kury and John Laudadio in writing Article 1, Section 27.

The early 1980s were days when a coal operator could travel to Harrisburg and be back home mining coal in the very same day. However, under Abele's leadership, we were told to do our duty and fear no one when we applied the new science to risk analysis with every permit we reviewed. He would personally sign each permit application review and include a copy of Article 1, Section 27 in our agency submission to Department of Environmental Resources (DER). I had Abele sign and date one of the original copies, put it in a frame and have had it as a reminder to duty above my desk ever since. As a result of Abele's diligence, Dr. Maurice Goddard called us the environmental conscience of his DER.

Let's now fast forward to the present and reflect upon some of the things that the plurality of justices said in their opinion (www.pacourts.us/news-and-statistics/cases-of-public-interest/marcellus-shale-act-13) that provides new meaning and relevance to the amendment. The plurality spoke about certain constitutional guarantees in Article 1 and conclude that the people knew what they voted for in 1971, and it isn't up to any court, legislature or administration to conclude otherwise. It is a "social contract between government and the people" and the first section affirms the inherent rights of the people of Pennsylvania.

The first clause of Section 27 deals with individual environmental rights and requires all branches of government to consider the "effect of any proposed action on the constitutionally protected features." Furthermore, "The right to "clean air" and "pure water" sets plain conditions by



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which government must abide.” Here they cite Professor John Dernbach who wrote “the measure of our progress is not just what we have but how we live, that it is not man who must adapt himself to technology but technology which must be adapted to man.”¹

The second and third clauses of Section 27 involve the public trust and reserves the public’s right to the common ownership of Pennsylvania’s public natural resources, including generations yet to come. These resources generally include resources of public interest such as “ambient air, surface and ground water, wild flora, and fauna (including fish)” since the drafters wanted “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 consistent with the public trust doctrine and “designates “the Commonwealth” as trustee and the people as the named beneficiaries.” This is our insurance policy, so-to-speak, to insure that our air stays safe to breathe, our water remains safe to drink and our natural resources continue to be protected for future generations and ourselves. The court reminded us that those “duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania’s government.” When I became Executive Director of the Pennsylvania Fish & Boat Commission in 2010 and took my Constitutional Oath of Office, I remembered that day in the voting booth in 1971 and am now very proud to be able to be part of the government that upholds this constitutional obligation.

The court’s plurality opinion goes on to remind us about various environmental events that led to our decision to

place our environmental rights on par with our political rights. Deforestation of our landscape in the late 1800s and early 1900s filled our streams with sediment and left behind “thousands of acres of devastated treeless acres” devoid of game and wildlife. Next, came the “industrial exploitation of Pennsylvania’s coalfields,” which fueled our steel mills along our major rivers. This industrial revolution left us with over 2,500 miles of streams polluted by acid mine drainage and rivers that would not freeze over in the winter because of a mixture of chemical antifreeze and thermal pollution. Our generation began the clean up of our air and water, which led to the partial recovery of our natural resources. We can thank a variety of state and federal laws and regulations that placed necessary controls on industries that posed risk to our environment.

When I and 1,021,341 other common owners of the Commonwealth’s public resources voted for this constitutional amendment in 1971, we believed that it would make a difference. Up until now, we have placed our trust and confidence in primarily two branches of government to fulfill the duty that is required by Article 1, Section 27. Although this recent court opinion is from a plurality of justices, which could change to a majority or a minority with just one vote, we should regard this opinion as a shot across our proverbial bow and listen closely to the sound advice provided to us by this decision as we face the challenges of our future.



Your Director,
><(John{°>



The mission of the Pennsylvania Fish & Boat Commission is to protect, conserve and enhance the Commonwealth’s aquatic resources and provide fishing and boating opportunities.

¹See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I – An Interpretive Framework for Article I, Section 27*, 103 Dickinson L. Rev. 693, 718-20 (1999); accord 1970 Pa. Legislative Journal-House at 2270.

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