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1990]

THE ENVIRONMENTAL AMENDMENT TO THE  
PENNSYLVANIA CONSTITUTION: TWENTY  
YEARS LATER AND LARGELY  
UNTESTED

FRANKLIN L. KURY†

I. INTRODUCTION: AN EARTH DAY BIRTHDAY

**A**PRIL 14, 1990 marked the twentieth anniversary of the first "Earth Day" observance in the United States. It also marked the twentieth anniversary of the first legislative passage of the environmental amendment to the Pennsylvania Constitution.<sup>1</sup>

As part of the Earth Day ceremonies in the Pennsylvania House of Representatives in 1970, I moved that the House concur in the Senate amendments to House Bill 958, the proposed environmental amendment. As approved by the House and Senate, the amendment read:

Sec. 27. Natural Resources and the Public Estate. 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.

In that form the proposed amendment was re-introduced in the 1971-72 legislative session, quickly approved by both houses unanimously, and placed on the ballot for a referendum at the May 18, 1971 primary election. The public approved the amendment by a vote of 1,021,342 to 259,979,<sup>2</sup> and the amendment

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† A.B. Trinity College, 1958; LL.B. University of Pennsylvania Law School, 1961. Attorney in the Harrisburg office of Reed Smith Shaw & McClay. As a member of the Pennsylvania House of Representatives (1966-1972), Kury originated and introduced the Amendment which became Article I, Section 27 of the state Constitution.

The author acknowledges the able assistance of Julie C. Hoskins, Dickinson School of Law, in researching this article.

1. Amendments to Pennsylvania's Constitution must be approved by a majority vote in both houses of the General Assembly in two successive sessions and then approved by the voters in a referendum. PA. CONST. art. XI.

2. This four-to-one approval significantly exceeded the votes given four

thereby became Article I, Section 27 of the Pennsylvania Constitution.

In the nineteen years since enactment, Article I, Section 27 (the Amendment) has been widely quoted and frequently used in litigation to block environmental incursions. Efforts to use the Amendment in such a manner have, however, been unsuccessful. Nonetheless, the Amendment has had impact in the realm of state agency decision-making and in the state legislature. The Amendment has provided a firm policy basis that is widely applied by the agencies responsible for protecting the environment in Pennsylvania: the Department of Environmental Resources, the Historical and Museum Commission, the Fish Commission, and the Game Commission. In addition, the state legislature has passed a number of laws to implement the Amendment. It has also been used in environmental magazines and by environmental organizations.

Now is a good time to evaluate the impact of the Amendment on the state of Pennsylvania. What effect has it had to date? What effect can it have in the future?

## II. THE AMENDMENT AND ITS APPLICATION

The Amendment has two parts. The first sentence establishes a legal right in the people of Pennsylvania to a decent environment. The other two sentences explicitly adopt a Public Trust Doctrine for Pennsylvania's "public natural resources" and name the Commonwealth as trustee, with a duty to "conserve and maintain them."

In offering the Amendment to the legislature, it was my hope that the declaration of environmental rights would be used by the courts on a case-by-case basis to develop a body of environmental rights law comparable to that developed by courts interpreting the Bill of Rights to the United States Constitution. By giving individual citizens the legal right to a decent environment, their ability to challenge environmental incursions would force those who would adversely affect the environment to consider the impact of their actions before acting. The Amendment would thereby promote citizen standing, which had previously been conspicuously absent in Pennsylvania.

The trust and trusteeship provisions were also necessary, be-

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other proposed constitutional amendments that day. Two other proposals were approved two-to-one and two others were defeated.

cause they placed a duty on Pennsylvania government, as trustee of the public natural resources, that was rarely, if ever, perceived before then. As Dr. Robert Broughton observed in commenting on the Amendment prior to its enactment,<sup>3</sup>

[t]he second two sentences [of the Amendment] seem to rather clearly have the purpose of placing Pennsylvania among the jurisdictions which adhere to the public trust theory of public natural resource management, in contradiction to the proprietary theory. As one novelty, future generations are included in H.B. 958, among the beneficiaries of the public trust.<sup>4</sup>

Taken together, the declaration of rights and the trust doctrine form a policy statement that is a sound basis for dealing with the environment. The Amendment, however, is silent on procedural issues that had to be addressed before the Amendment could be effective, such as: whether the Amendment is self-executing, what standards to apply to enforce the Amendment, and who would be responsible for enforcing it.

#### A. IS THE AMENDMENT SELF-EXECUTING?

The first procedural question is whether the Amendment is self-executing. Must the legislature pass implementing legislation before the Amendment can be effective? In litigation, that became Governor Shapp's "Battle of Gettysburg," the courts answered that the Amendment is self-executing and that no implementing legislation is necessary.

Governor Shapp and his Attorney General, J. Shane Creamer, gave the Amendment its first test by filing an equity action to block construction of a commercial observation tower at the Gettysburg battlefield.<sup>5</sup> The trial court denied the Governor and Attorney General's request for an injunction, but ruled that the Amendment was self-executing and that the Attorney General was a proper office to enforce it.<sup>6</sup> Shapp appealed to the Commonwealth Court with the same results. The injunction was not

3. See Broughton, *Analysis of H.B. 958, The Proposed Environmental Declaration of Rights*, 41 PA. B.A.Q. 421 (June 1970). Dr. Broughton, then Associate Professor of Law at Duquesne Law School, wrote the analysis that was put into the House Record on April 14, 1970.

4. Broughton, *supra* note 3, at 423.

5. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County Legal Journal 75 (1971).

6. *Id.*

granted, but the court held that the Amendment was self-executing.

Judge Rodgers of the Commonwealth Court analyzed the self-executing question in this way:

Section 27 is, we conceive, more than a declaration of rights not to be denied by government . . . the standard of Section 27 seems to us not to require legislative definition, however desirable such might be. Courts, which have attacked with gusto such indistinct concepts as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment, will surely not hesitate before such comparatively certain measures as clean air, pure water and natural, scenic, historic and esthetic values. The most uncertain of these, esthetic values, has been the subject of instant judicial recognition in the fields of planning and zoning.<sup>7</sup>

The Pennsylvania Supreme Court split on the case, and, in effect, let stand the Commonwealth Court ruling on the self-executing issue.<sup>8</sup>

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7. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 243, 302 A.2d 886, 892, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973).

8. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973).

The Pennsylvania Supreme Court was split with two justices signing onto the plurality opinion, two justices concurring specially, one justice concurring only in the result, and two justices dissenting. The plurality opinion of Justices O'Brien and Pomeroy actually rejected the idea that Article I, Section 27 is self-executing. However, Justices Roberts and Manderino, concurring specially, stated that the Commonwealth has always had the power to preserve the natural and historic resources enumerated in Article I, Section 27. Justice Nix concurred in the result but wrote no separate opinion, while Chief Justice Jones and Justice Eagen dissented, stating that Article I, Section 27 is self-executing. There was no majority on the self-executing issue, thereby leaving the Commonwealth Court's ruling on the issue intact. For a discussion supporting this position, see Pearson & Hutton, *Land Use in Pennsylvania: Any Change Since the Environmental Rights Amendment?*, 14 DUQ. L. REV. 165, 188 (1976).

Subsequent case law treats the *Gettysburg Tower* case as standing for the proposition that Article I, Section 27 is self-executing. See *Borough of Moosic v. PUC*, 59 Pa. Commw. 338, 341, 429 A.2d 1237, 1239 (1981). The Pennsylvania Supreme Court itself looked at the self-executing issue again in 1976 and stated that, with regard to *public* property,

[t]here can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all people . . . . No implementing legislation is needed to enunciate these broad purposes and establish these relationships; *Payne v. Kassab*, 468 Pa. 226, 245, 361 A.2d 263, 272 (1976).

*Id.*

The court, however, reserved judgment regarding whether Article I, Sec-

Thus, Governor Shapp lost his battle at Gettysburg to block the tower but, perhaps unknowingly, won the war for the environmental movement by obtaining a ruling that the Amendment is self-executing. If the courts had ruled the other way on the self-execution issue, the Amendment would not have been effective until implementing legislation was adopted. Implementing legislation of the kind contemplated— a specific statement of standards— may have been difficult, if not impossible, to obtain agreement upon and therefore might never have passed. As a result of the disposition of this case, the Amendment can now be used as the basis of a legal challenge to an environmental incursion without further legislative action.

#### B. WHAT STANDARDS TO APPLY?

Like other declarations of rights, the Amendment is broadly stated and has no explicit standards. This lack of specificity raises the question whether rights under the Amendment are absolute.

This question was resolved in *Payne v. Kassab*,<sup>9</sup> now the leading case interpreting the Amendment. Marion Woodward Payne and her fellow plaintiffs sought an injunction to block the Department of Transportation from taking .59 acres of land from the River Commons in Wilkes-Barre for a bridge realignment. The Commonwealth Court rejected the argument that the Amendment was to be read in absolute terms:

We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.<sup>10</sup>

In responding to the plaintiffs' argument that the Amendment was to be read absolutely, the defendant, Pennsylvania Department of Transportation, argued that a threefold standard should be adopted, a standard borrowed from the environmental impact statements required by the National Environmental Policy

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tion 27 was self-executing when used to control or curtail use of *private* property. *Id.*

9. 11 Pa. Commw. 14, 312 A.2d 86 (1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

10. *Id.* at 29, 312 A.2d at 94.

Act and Act 120 of the 1970 Pennsylvania legislature. The court adopted this suggestion and set forth a three-point standard to determine Article I, Section 27 cases:<sup>11</sup>

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?
- (3) 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?

The Pennsylvania Supreme Court affirmed the *Payne v. Kassab* test and it has been the standard consistently applied to cases like this ever since.<sup>12</sup>

#### C. WHO ARE THE TRUSTEES?

The Amendment states only that the "Commonwealth" is the trustee, and does not specify which agencies or officers of the Commonwealth have the trusteeship duties. The courts have determined that the entire state government and its municipal subdivisions share trusteeship responsibilities under the Amendment.<sup>13</sup>

Although Governor Shapp's *Gettysburg Tower* case<sup>14</sup> held that the Governor and Attorney General have trusteeship powers and duties, the Department of Environmental Resources (DER) appears to be the obvious state agency for enforcing the Amendment, however, in *Bruhin v. Commonwealth*<sup>15</sup> the Commonwealth Court ruled that the Secretary of DER did not have the primary responsibility for the Amendment's enforcement.<sup>16</sup>

In this case, the plaintiffs sought an order requiring the Secretary of DER to enforce the Amendment against another state agency, the Department of Transportation. The court held that the Amendment cannot be used to enlarge the powers of an

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11. *Id.*

12. 468 Pa. 226, 361 A.2d 263 (1976). A discussion of the application of the *Payne v. Kassab* test follows in section III of this paper.

13. See text and accompanying notes *infra*.

14. *Supra* note 7.

15. 14 Pa. Commw. 300, 320 A.2d 907 (1974).

16. *Id.* at 307, 320 A.2d at 911.

agency and declined to issue the requested injunction.<sup>17</sup>

In *Community College of Delaware County v. Fox*,<sup>18</sup> the Commonwealth Court observed that many state and local agencies share the responsibility of enforcing the Amendment. In this case, the court declared that the various boroughs, townships, counties, and cities have the responsibility for maintaining certain lands as open spaces pursuant to a series of legislative enactments.<sup>19</sup> The court stated,

[t]hese municipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well, just as certainly as is the DER.<sup>20</sup>

No single Commonwealth agency thus has exclusive authority to enforce the Amendment. All branches and agencies of the state government, as well as municipalities, share the responsibility. This outcome should not be surprising because *every* elected official of the state and local government takes an oath to uphold the state Constitution.

### III. WHAT IMPACT HAS THE AMENDMENT HAD?

#### A. JUDICIAL APPLICATION

A review of the cases in which plaintiffs asserted a violation of rights declared in the Amendment shows a consistent reluctance by the courts to enforce the Amendment.<sup>21</sup> Actions brought to

17. See also *Borough of Moosic v. PUC*, 59 Pa. Commw. 338, 429 A.2d 1237 (1981); *Del-Aware Unlimited, Inc. v. PUC*, 99 Pa. Commw. 634, 513 A.2d 593 (1986), *appeal denied*, 515 Pa. 587, 527 A.2d 547 (1987).

18. 20 Pa. Commw. 335, 342 A.2d 468 (1975).

19. The main legal tools available to municipalities to enforce the Amendment are the Eminent Domain Act, 26 PA. CONS. STAT. ANN. §§ 1-101 to 1-903 (Purdon Supp. 1989) and the Municipalities Planning Code, 53 PA. CONS. STAT. ANN. §§ 10101-11006 (Purdon 1972 & Supp. 1989).

20. *Fox*, 20 Pa. Commw. at 358, 342 A.2d at 482.

21. *Del-Aware Unlimited, Inc. v. PUC*, 99 Pa. Commw. 634, 513 A.2d 593 (1986) (pump house to provide cooling water from Delaware River for Limerick nuclear electric generating project which had received PUC approval); *Keim v. DER*, No. 82-254-M (EHB, 1985) (enlarged sewerage facilities for single-family dwelling development on 141 acre tract in Salisbury Township, done with DER approval); *Smartwood v. DER*, 56 Pa. Commw. 298, 424 A.2d 993 (1981) (enlarged sewerage facilities for turnkey housing project in Wyoming County, done under municipal permit with DER approval); *Mignatti v. Environmental Hearing Bd.*, 49 Pa. Commw. 497, 411 A.2d 860 (1980) (79.4 acre stone quarry in Bucks County, under DER surface mining permit); *Concerned Citizens for Orderly*



block alleged environmental incursions have generally failed, because the courts have found that the defendant has satisfied the *Payne v. Kassab* test. It is not enough simply to demonstrate that environmental harm will occur as the result of a project; rather, there is a weighing of the perceived need for development against the environmental values involved. Although the *Payne v. Kassab* test is currently interpreted by the courts in a way that makes it difficult to successfully challenge environmental incursions, the test nonetheless is an important vehicle for implementing the Amendment.

## B. THE STATE LEGISLATURE

Since 1971, the Pennsylvania General Assembly has passed a number of environmental protection laws with the stated purpose of implementing the Amendment, either explicitly or implicitly. Because implementation of Article I, Section 27 is a stated purpose of each of these laws, the agencies administering them have a solid basis for applying the concepts of the Amendment, including the *Payne v. Kassab* test, to cases before them.

The Dam Safety and Encroachments Act<sup>22</sup> was passed in 1978 to regulate any improvements or construction that affect the waters of Pennsylvania. The third of four stated purposes of this Act is to “[p]rotect the natural resources, environmental rights and values secured by the Pennsylvania Constitution . . . .”<sup>23</sup>

The Solid Waste Management Act of 1980,<sup>24</sup> Act 97, was passed so that Pennsylvania could take primacy in administering the national solid waste law.<sup>25</sup> The tenth of eleven stated purposes of Act 97 is to “implement Article I, Section 27 of the Penn-

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Progress v. DER, 36 Pa. Commw. 192, 387 A.2d 989 (1978) (sewerage system for trailer park under DER water quality management permit); DER v. PUC, 18 Pa. Commw. 558, 335 A.2d 860 (1975), *aff'd*, 473 Pa. 378, 374 A.2d 693 (1977) (electric transmission line 18.94 miles long in Fulton and Franklin counties, constructed under PUC certificate of public necessity); Snelling v. Department of Transp., 27 Pa. Commw. 276, 366 A.2d 1298 (1976) (opening medial barrier at shopping mall in Allentown under PennDOT highway occupancy permit); DER v. Precision Tube Co., Inc., 24 Pa. Commw. 647, 358 A.2d 137 (1976) (culverts for highway project over Wissahickon Creek along with DER water obstruction permits); Bucks County Bd. of Comm'rs v. PUC, 11 Pa. Commw. 487, 313 A.2d 185 (1973) (pipeline to transport oil to Pennsylvania Power & Light Company power plant at Martin's Creek, constructed with PUC approval).

22. Dam Safety and Encroachments Act, 32 PA. CONS. STAT. ANN. §§ 693.1-693.27 (Purdon Supp. 1989).

23. *Id.* § 693.2(3).

24. Solid Waste Management Act of 1980, 35 PA. CONS. STAT. ANN. §§ 6018.101-6018.1003 (Purdon Supp. 1989).

25. According to the federal Resource Conservation and Recovery Act of

sylvania Constitution.”<sup>26</sup>

The Wild Resource Conservation Act of 1982<sup>27</sup> provides for the protection of endangered animals and plants. The first of eight stated purposes is to “further provide for such (rare or endangered) species so as to enhance the Constitutional rights guaranteed in Section 27, Article I of the Constitution of the Commonwealth of Pennsylvania.”<sup>28</sup>

The Pennsylvania Safe Drinking Water Act of 1984<sup>29</sup> was passed to ensure safe drinking water. This Act declares that its purpose “is to further the intent of Section 27 of Article I . . . .”<sup>30</sup>

The Oil and Gas Act of 1984<sup>31</sup> regulates the opening, operation, and closing of petroleum wells. The fourth of its stated purposes is to “protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.”<sup>32</sup>

The Pennsylvania Municipal Waste Planning and Recycling Act of 1988<sup>33</sup> regulates the planning and disposal of municipal waste, including mandatory recycling. The thirteenth of its stated purposes is to “implement Article I, section 27 of the Constitution of Pennsylvania.”<sup>34</sup>

The Hazardous Sites Cleanup Act of 1988<sup>35</sup> creates a Pennsylvania “Superfund” program to reclaim sites polluted by hazardous substances. According to Section 103, “natural resources” are defined to include “resources protected by Section 27, Article I . . . .” In addition, Section 301 entitled “Powers and Duties of the Department” includes implementation of Section 27, Article I of the Constitution as one of the powers.<sup>36</sup>

Because implementation of Article I, Section 27 is a stated

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1976, 42 U.S.C. §§ 6901–6991 (1982 & Supp. 1987), the federal government program would govern unless the states passed their own comparable laws.

26. *Id.* § 6018.102(10).

27. Wild Resource Conservation Act of 1982, 32 PA. CONS. STAT. ANN. §§ 5301–5314 (Purdon Supp. 1989).

28. *Id.* § 5302.

29. Pennsylvania Safe Drinking Water Act of 1984, 35 PA. CONS. STAT. ANN. §§ 721.1–721.17 (Purdon Supp. 1989).

30. *Id.* § 721.2(b).

31. Oil and Gas Act of 1984, 58 PA. CONS. STAT. ANN. §§ 601.101–601.605 (Purdon Supp. 1989).

32. *Id.* § 601.102(d).

33. Municipal Waste Planning, Recycling and Waste Reduction Act, 53 PA. CONS. STAT. ANN. §§ 4000.101–4000.1904 (Purdon Supp. 1989).

34. *Id.* § 4000.102(b)(13).

35. Hazardous Sites Cleanup Act, 35 PA. CONS. STAT. ANN. §§ 6020.101–6020.1305 (Purdon Supp. 1989).

36. *Id.* § 6020.301(16).

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purpose of each of these statutes, the administering agencies have authority for applying the concepts of the Amendment, including the *Payne v. Kassab* test, to cases before them.

C. STATE AGENCIES

1. *The Department of Environmental Resources*

The Department of Environmental Resources (DER) has become the main state agency in Pennsylvania for enforcing environmental laws. In doing so, DER has not hesitated to implement Article I, Section 27, particularly where implementing the Amendment is a stated legislative objective. For example, to implement the Dam Safety and Encroachments Act,<sup>37</sup> DER has promulgated regulations requiring an "environmental evaluation" and an "environmental, social and economic balancing" in appropriate cases.<sup>38</sup> These regulations, in effect, incorporate the *Payne v. Kassab* test into the Dam Safety and Encroachments Act.

Under the Solid Waste Management Act,<sup>39</sup> all permits issued for landfills, municipal incinerators, residual waste landfills, and hazardous waste treatment and disposal facilities are subject to an Environmental Assessment Process (EAP), which applies the *Payne v. Kassab* three-part test. Permit applications must include a completely executed Module 9<sup>40</sup> form which elicits from the applicant the information necessary for DER to conduct the EAP.

DER also has the authority to administer laws passed *prior* to the Amendment with the provisions of the Amendment as guiding principles.<sup>41</sup> This is done under a provision of the Pennsylvania Code which gives DER the authority to "adopt and revise and conduct periodic reviews of such standards as it deems necessary to prevent nuisances and pollution of the air, land, or waters of this Commonwealth . . ."<sup>42</sup> Further, DER orders are also subjected to review by the Environmental Quality Board,<sup>43</sup> which adopted six pages of criteria for evaluating the impact of a haz-

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37. *Supra* note 22.

38. 25 PA. ADMIN. CODE § 105.16 (Shepard's 1987).

39. *Supra* note 24.

40. Module 9 is a form developed by DER for evaluating the impact of proposed permits per Article I, Section 27 considerations, and contains the *Payne v. Kassab* three-part test.

41. 25 PA. ADMIN. CODE § 75.21(f) (Shepard's 1988).

42. *Id.*

43. The Environmental Quality Board (EQB) meets each month to either approve or reject proposed regulations of DER. The EQB ruling is only one part of the process of adopting administrative regulations in Pennsylvania.

ardous waste disposal facility based on values protected by Article I, Section 27.<sup>44</sup>

DER regulations also implement the Amendment. Under the Clean Streams Act,<sup>45</sup> regulations governing discharges into streams of "high quality" require a justification showing an "economic or social development which is of significant public value."<sup>46</sup> Under the All Surface Mining Act,<sup>47</sup> DER has the power to designate areas unsuitable for surface mining when the operations could "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and aesthetic values and natural systems."<sup>48</sup> These designations incorporate the *Payne v. Kassab* test.

In three major environmental areas regulated by DER—water protection, solid waste management, and mining—DER has incorporated the principles of Article I, Section 27 into the permitting process. The *Payne v. Kassab* test has been institutionalized and has become a standard test in departmental decision-making on permit applications in these areas.

## 2. *The Department of Transportation*

The Department of Transportation (Transportation) requires a special commentary. In contrast to the state agencies already discussed, Transportation is not a regulator of those who use the environment. Transportation, itself, is a major user of the environment, because it builds and maintains highway and other transportation facilities. Yet Transportation has made a major contribution to implementing Article I, Section 27 by providing the basis for the *Payne v. Kassab* test.

Transportation is highly regulated in environmental matters under both federal and state law. Virtually all of Transportation's projects are at least partially funded by federal tax dollars. Because it receives federal funding, Transportation's projects are fully regulated by the National Environmental Policy Act of 1970 (NEPA).<sup>49</sup> NEPA requires an environmental impact assessment

44. 25 PA. ADMIN. CODE § 75.450 (Shepard's 1986).

45. Clean Streams Act, 35 PA. CONS. STAT. ANN. §§ 691.1-691.1001 (Purdon Supp. 1989).

46. Wastewater Treatment Requirements, 25 PA. ADMIN. CODE § 95.1(b)(1) (Shepard's 1985).

47. All Surface Mining Act, 52 PA. CONS. STAT. ANN. § 1396.1-1410(d) (Purdon 1966 & Supp. 1989) (repealed in part in 1984).

48. *Id.* § 1396.4e(b)(2).

49. National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1983).

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before any federally funded project can proceed.<sup>50</sup>

The process of complying with NEPA for a highway project can take as long as two to three years. This process requires notice to all possibly affected parties, a "scoping" meeting to identify areas of concern, a first environmental analysis, a determination of significant impact, an impact statement, a notice and opportunity to comment on the impact statement, and a response to the public comments. Finally, the Federal Highway Administration must approve the project.

Part of this process involves a consideration of the impact, if any, of each of the federal government's many environmental statutes on the project. In addition, whether the project is funded partially by federal tax dollars or is completely state financed, Transportation must comply with Pennsylvania Act 120 of the 1970 legislature.<sup>51</sup> This Act requires the Pennsylvania Department of Transportation:

To consult with appropriate officials as designated by the chief administrative officer of the . . . Department of Environmental Resources . . . and the Fish Commission regarding the environmental hazards . . . conservation . . . recreation and social considerations that may arise by reason of the location, design, construction or reconstruction of any transportation or air facility.

No highway, transit line, highway interchange, airport, or other transportation corridor or facility, shall be built or expanded in such a way as to use any land from any recreation area, wildlife and/or waterfowl refuge, historic site, State forest land, State game land, wilderness area or public park unless: (i) there is no feasible and prudent alternative to the use of such land, and (ii) such corridor or facility is planned and constructed so as to minimize harm to such recreation area, wildlife and/or waterfowl refuge, historic site, State forest land, State game land, wilderness area, or public park. <sup>52</sup>

Pennsylvania Act 120 also requires Transportation to follow the federal hearing procedure in acquiring new rights-of-way even if no federal funds are involved. At these hearings, Transportation must consider the impact of the proposed project on

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50. *Id.* § 4332.

51. 71 PA. CONS. STAT. ANN. § 512 (Purdon Supp. 1989).

52. 71 PA. CONS. STAT. ANN. § 512(a)(15) (Purdon Supp. 1989).

air, erosion, wildlife, the general ecology, noise, water pollution, and historic landmarks. Transportation may not proceed with the project until the Secretary publishes findings that there is no significant impact on these listed environmental elements or that there is no prudent alternative to the project.

Both NEPA and Act 120 were passed before Article I, Section 27. When the Amendment took effect, Transportation already was administering NEPA and Act 120. When Transportation was brought into court in *Payne v. Kassab*, the Transportation lawyers argued that by carrying out the requirements of Act 120, Transportation already was complying with the Amendment. The Commonwealth Court adopted Transportation's suggestions, and the provision of Act 120 became the basis of the three-part *Payne v. Kassab* test. Transportation's lawyers thus succeeded in getting the Commonwealth Court to adopt the principles of Act 120 as the test for carrying out Article I, Section 27.

Transportation merely continued to apply a standard that it had already developed pursuant to NEPA and Pennsylvania Act 120. Transportation, however, made a significant contribution to the implementation of the Amendment by providing the three-part test which is applied in all challenges based on the Amendment, regardless of which agency is involved.

Because NEPA and Act 120 are so comprehensive in forcing Transportation's consideration of environmental factors, Transportation's projects are very difficult to challenge under the Amendment. I have yet to find a case in which an Article I, Section 27 challenge to a Transportation project has succeeded.

### 3. *The Public Utility Commission*

The Public Utility Commission (PUC) has a significant relationship to the environment because it must approve applications for the use of eminent domain to construct gas and electric transmission lines. PUC has responded to Article I, Section 27 in two ways. First, in promulgating regulations for high voltage transmission lines, PUC has adopted requirements implementing the spirit of the *Payne v. Kassab* test. Before approving a high voltage transmission line, PUC is required to find:

- [1] That . . . [the proposed high voltage line] is in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth.

- [2] That . . . [the proposed high voltage line] will have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the available alternatives.<sup>53</sup>

The second response of PUC has been to apply the *Payne v. Kassab* test when an environmental issue is raised in any proceeding before it. In *DER v. PUC*,<sup>54</sup> PUC had granted a utility's request for the right to proceed in eminent domain to construct an 18.94 mile electric transmission line through Franklin and Fulton Counties, and the landowners along with DER as intervenors appealed. The landowners and DER argued that PUC had an affirmative burden to represent the public's interest by investigating every aspect of Article I, Section 27 as it applied to the case.<sup>55</sup>

The Commonwealth Court rejected the plaintiffs' arguments. The court declared that in all applications for certificates from PUC, the burden was on the applicant to show compliance with all relevant laws. The adoption of Article I, Section 27 had not shifted the burden, said the court, but it had intensified the applicant's burden.<sup>56</sup> In other words, the applicant had to prove that it passed the *Payne v. Kassab* test. Here the court found that the applicant had met its burden and had considered germane factors in choosing an electric transmission line.<sup>57</sup>

Applying these principles, PUC later approved an application for a reservoir tank and pumping station in Chester County and rejected Article I, Section 27 claims raised by intervenors in *In re Philadelphia Suburban Water Company*.<sup>58</sup> Intervenors contended that the location of the reservoir would disturb the historic value of a nearby area, would deplete water supplies in nearby areas, and that less costly alternative sites existed and were not considered by the applicants.<sup>59</sup> PUC found that the Philadelphia Suburban Water Company had "minimally" met the *Payne v. Kassab* test. PUC found the threatened impact on the environment "specula-

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53. 52 PA. ADMIN. CODE § 57.76 (Shepard's 1989).

54. 18 Pa. Commw. 558, 335 A.2d 860 (1975), *aff'd*, 473 Pa. 378, 374 A.2d 693 (1977).

55. *Id.* at 565, 335 A.2d at 864.

56. *Id.* at 567, 335 A.2d at 865.

57. *Id.*

58. 54 PUC 127, Docket No. A-99126 (1980).

59. *Id.* at 129.

tive or at best remote in time and place from the instant proceeding." Finally, PUC found that control of the impact of the project was outside of its authority.<sup>60</sup>

PUC, however, has shown a willingness to deny applications for transmission lines under the *Payne v. Kassab* test. In *In re Application of Carnegie Natural Gas Company*,<sup>61</sup> Carnegie proposed to construct a twenty-two mile long, twelve-inch diameter natural gas pipeline from U.S. Steel's Fairless Works in Bucks County to the Texas Eastern Transmission Corporation's pipeline in Solebury Township. PUC found as a matter of law that "Carnegie ha[d] not proven its proposed pipeline route satisfie[d] the environmental protection requirements of Article I, Section 27."<sup>62</sup> In applying the *Payne v. Kassab* test, the PUC found, among other things, that Carnegie was unaware of a detailed study of two mountains it intended to cross; that Carnegie intended to "clear cut" 14.4 forested acres on Jericho Mountain, even though a local ordinance prohibited clear cutting there for environmental reasons; that the proposed stream crossings were not designed to minimize environmental damage; and that Carnegie believed it did not have to address environmental issues until it made the final design. Based on the foregoing, Administrative Law Judge Martin R. Fountain concluded, "the proposed route of the pipeline d[id] not pass muster,"<sup>63</sup> and rejected the application. The full PUC upheld his adjudication.<sup>64</sup>

While PUC does not hesitate to apply the *Payne v. Kassab* test to applications before it, it has been careful not to go beyond its authority. In *In re Pennsylvania Gas & Water Co.*,<sup>65</sup> the Pennsylvania Gas and Water Company sought PUC approval to transfer 425.56 acres of unimproved watershed land in Lackawanna County to the Scranton-Lackawanna Industrial Building Company. The purpose of the conveyance was to allow development of a skiing and recreation facility known as "Montage." The intervenors raised Article I, Section 27. PUC recognized that it had

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60. *Id.* at 135.

61. Docket No. A-140150, F022 (PUC, Feb. 27, 1985).

62. *Id.* at 77.

63. *Id.* at 65-67.

64. Order adopting initial decision of Admin. Law. Judge, Docket No. A-140150, F022 (PUC, June 27, 1985).

65. 54 PUC 344, Docket Nos. A-00101378, 1-79040309 (June 19, 1980), *aff'd sub nom*, Borough of Moosic v. PUC, 59 Pa. Commw. 338, 429 A.2d 1237 (1981).



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to consider the Amendment when an environmental issue was raised, but said:

Any possible adverse environmental effect of the subject proposed transfer, is an appropriate consideration for this commission *only where it directly and substantially affects the ability of PG&W to provide safe, efficient and reasonable water service to the public at reasonable rates.* (Emphasis added.)<sup>66</sup>

PUC found that the proposed transfer would have no such adverse effect. PUC also rejected the contention that it was required to establish environmental controls, and declared that land use regulations were for imposition by municipalities, DER, and EPA, and not for PUC.<sup>67</sup>

PUC's decision was unanimously affirmed by the Commonwealth Court.<sup>68</sup> The court noted that the actual subject of the case was a proposed transfer of real estate titles "devoid of any environmental impact."<sup>69</sup> PUC has no duty to inquire into the environmental impact of a proposed land used by a grantee not under PUC's jurisdiction.<sup>70</sup>

The *Pennsylvania Gas & Water* case was followed four years later in *Del-Aware Unlimited, Inc. v. PUC*<sup>71</sup> in which suit was brought to block the Limerick pump house. The plaintiffs argued that when PUC approved the pump house it had failed to apply the *Payne v. Kassab* test, but the court said that PUC ha[d] no jurisdiction to evaluate the environmental aspects of the project and was bound by DER's determination on the issue.<sup>72</sup>

In summary, PUC has acted upon Article I, Section 27. In addition to building the *Payne v. Kassab* test into high voltage transmission line regulations, PUC applies the test in all cases where environmental issues are raised. The burden of showing compliance rests with the applicant. PUC, however, cannot apply the test to parties or environmental uses that fall outside of its administrative jurisdiction.

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66. *Id.* at 347-48.

67. *Id.* at 348.

68. *Borough of Moosic v. PUC*, 59 Pa. Commw. 338, 429 A.2d 1237 (1981).

69. *Id.* at 342, 429 A.2d at 1240.

70. *Id.* at 343, 429 A.2d at 1240.

71. 99 Pa. Commw. 634, 513 A.2d 593 (1986), *appeal denied*, 515 Pa. 587, 527 A.2d 547 (1987).

72. *Id.*

#### 4. *The Fish and Game Commissions*

The Fish and Game Commissions also have substantial relationships with the environment. The Fish Commission administers the laws and regulations concerning the taking of fish and other aquatic life. It enforces anti-pollution provisions of the Fish Code<sup>73</sup> and cooperates with DER in administering laws primarily enforced by DER. For example, the Fish Commission reviews and comments on all applications for discharge permits under the Clean Streams Law,<sup>74</sup> a law administered by DER. The Game Commission administers the laws regulating the taking of wildlife other than aquatic life pursuant to the Game Code.<sup>75</sup> In addition, the Game Commission owns and manages 1.3 million acres of land for hunting and other public purposes.

Implementing Article I, Section 27 has not required a direct change in the administration of either the Fish or Game Commission. Both Commissions continue now, as before the enactment, to function as defenders of the environment under their respective codes, and both Commissions implement the Amendment by using its philosophy and policy in their work. The Fish Commission, for example, sends a copy of the Amendment to every discharge permit applicant after reviewing the application. The Fish Commission has also given wide publicity to the Amendment in its publications and frequently uses the Amendment in formulating its policies.<sup>76</sup>

The Game Commission has posted the text of the Amendment throughout its offices and uses it to support its policies as well. Because of the Amendment, the Game Commission takes a closer look at applications for mining permits on the 1.3 million acres it manages.<sup>77</sup>

#### 5. *The Historical and Museum Commission*

The Amendment establishes a right to the preservation of the historic values of the environment. Implementation of this element rests with the Pennsylvania Historical and Museum Com-

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73. Fish Code, 58 PA. ADMIN. CODE §§ 51.1-107.7 (Shepard's 1987).

74. Clean Streams Law, 35 PA. CONS. STAT. ANN. §§ 691.1-691.1001 (Purdon Supp. 1989).

75. Game Code, 58 PA. ADMIN. CODE §§ 131.1-147.287 (Shepard's 1987).

76. According to former Executive Director of the Fish Commission, Ralph Abele.

77. According to the Executive Director of the Pennsylvania Game Commission, Peter Duncan.

mission, under the History Code.<sup>78</sup>

The History Code's declaration of policy specifically cites Article I, Section 27 as making the Commonwealth trustee for the preservation of historic values of the environment.<sup>79</sup> The declaration of policy further declares it to be in the public interest to engage in a comprehensive program of historic preservation.<sup>80</sup>

The Act mandates that the Commission has the power and duty to "serve as the official agency of the Commonwealth for the conservation of Pennsylvania's cultural heritage."<sup>81</sup> The Act gives the Commission broad powers to identify, mark, and protect historical properties, creates an Historic Preservation Board, and gives the state exclusive right to do archeological work on public lands.<sup>82</sup> Finally, no state agency may affect an historical property without consulting the Commission. For example, all Pennsylvania Department of Transportation projects requiring new or expanded rights-of-way go to the Commission's Bureau of Historic Preservation for comments.<sup>83</sup>

#### D. MUNICIPALITIES

As indicated above, municipal government in Pennsylvania shares with state government the responsibilities for enforcing the Amendment. Several legislative enactments reinforce municipal government's role as co-trustee of the Amendment. In 1973, the Municipal Code was amended to authorize governing bodies of any municipality to create Environmental Advisory Councils to advise local governments or their agencies on matters "dealing with protection, conservation, management, promotion and use of natural resources, including air, land and water resources . . . ." <sup>84</sup>

The Municipal Code also provides that all invitations for proposals for municipal construction projects require a list of all statutes, rules, and regulations dealing with prevention of environmental pollution and the preservation of public natural resources that affect the project.<sup>85</sup> Further, in the Pennsylvania

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78. History Code, 37 PA. CONS. STAT. ANN. §§ 101-307 (Purdon 1989).

79. *Id.* § 102(1).

80. *Id.* § 102(6).

81. *Id.* § 301.

82. *Id.* § 303.

83. *Id.* § 510.

84. 53 PA. CONS. STAT. ANN. § 11501 (Purdon Supp. 1989).

85. 53 PA. CONS. STAT. ANN. § 1611 (Purdon 1974).

Appalachian Trail Act,<sup>86</sup> the legislature declares that planning and zoning by a municipality to implement Article I, Section 27 is a valid exercise of the police power under the Pennsylvania Municipalities Planning Code.<sup>87</sup>

Although municipalities share the Amendment's trusteeship responsibilities with the state government, some municipalities have attempted to use the Amendment to block state action. In *Butler Township v. DER*,<sup>88</sup> two municipalities tried to block a DER order requiring several municipalities to form a regional authority to construct a sewage treatment plant at a specific site. The petitioner alleged that the DER decision failed the *Payne v. Kassab* test. The Commonwealth Court applied the test and rejected the argument.<sup>89</sup>

#### IV. PUBLIC TRUST DOCTRINE

In spite of the cases cited in this article, the Amendment remains largely untested as an environmental protection tool, particularly in the potential application of the Public Trust Doctrine. Before the enactment of the Amendment, Pennsylvania jurisprudence was devoid of any reference to the Public Trust Doctrine. The Public Trust Doctrine is a potentially powerful tool for protecting our environment. As one leading scholar has stated:

Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.<sup>90</sup>

Virtually all the cases brought to date have involved environmental incursion for which a state permit is required, but there are many other situations to which the Public Trust Doctrine might be applicable. Consider the following possibilities:

— The legislature passes a bill to allow private condominiums and other commercial activities in a state park;

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86. Pennsylvania Appalachian Trail Act, 64 PA. CONS. STAT. ANN. §§ 801-805 (Purdon 1989).

87. *Id.* § 802. See also *supra* note 18.

88. 99 Pa. Commw. 239, 513 A.2d 508 (1986), *appeal denied sub. nom.*, Borough of Ashland v. DER, 515 Pa. 586, 527 A.2d 545 (1987).

89. *Id.* at 248-50, 513 A.2d at 512-13.

90. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

- A municipal government fails to provide for open spaces;
- A city located on a major river proposes to construct a hydroelectric dam for power and recreational purposes;
- Power plants in a state emit discharges that cause acid rain to fall in a neighboring state, and the state government of the state responsible for the pollution does nothing to stop it;
- A state agency leases portions of state parks or scenic areas to commercial interests for development;
- A governor seeks to close a state park and sell it;
- The legislature authorizes the disposal of hazardous waste in a landfill in a state forest or gameland.

This list just begins to suggest the judicially unexplored applications of the Amendment. We can only speculate as to how a court would apply the Amendment and its Public Trust Doctrine to any of these possible cases.

Most recently, Pennsylvania's Governor Casey relied in part on the Public Trust Doctrine aspect of Article I, Section 27 in issuing Executive Order 1989-8 on October 17, 1989.<sup>91</sup> The Order declares a moratorium on issuance of permits for new municipal waste landfill and resource recovery facilities and places restrictions on the importation of waste from other states for disposal in Pennsylvania. This Order has the effect of suspending the Municipal Waste Planning Act of 1988 by adding to it additional requirements. On January 5, 1990, the National Solid Waste Management Association filed a petition in the Commonwealth Court to challenge the order.<sup>92</sup> This case may well provide the court with a unique opportunity to consider the strength and scope of the Amendment.

It has been written that three criteria must be met in order for the Public Trust Doctrine to provide a satisfactory environmental protection tool:

It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality.<sup>93</sup>

Article I, Section 27 meets the first two criteria. It contains an

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91. 19 Pa. Bull. 4598 (Oct. 28, 1989).

92. National Solid Waste Mgmt. Ass'n v. Governor of Pa. and Comm'r. of DER, 5 Misc. Docket 1990.

93. B. Sax, *supra* note 90.

explicit concept of legal right in the general public and it is enforceable against the government. It cannot be said, however, how well the Amendment meets the final criterion of capability of an interpretation consistent with contemporary concerns for environmental quality. This determination will be made as we see how imaginatively and adroitly environmental lawyers and judges apply the Amendment to future cases that come before them.

## V. SUMMARY AND CONCLUSIONS

Pennsylvania's environmental amendment ranks with the amendments of Illinois, Massachusetts, and New York in providing a constitutional basis of broad scope for protecting the environment.<sup>94</sup> Twelve other states have environmental amendments, but each is much more restricted or narrow in its range of support for the environment.<sup>95</sup> Pennsylvania's amendment not only declares rights (which the courts have declared to be self-executing, thereby authorizing citizens' suits) but also establishes the Public Trust Doctrine with a declared statement of duty. This broad scope places Pennsylvania virtually alone among the fifty states and the federal government in providing a firm constitutional basis for protection of the environment.

There are no environmental provisions in the United States Constitution. A number of proposals to add an environmental amendment have been offered,<sup>96</sup> but none has received significant congressional support and the prospects for enactment seem remote. It has also been suggested that a right to a decent environment could be found in the ninth amendment,<sup>97</sup> but in view of the conservative philosophies of federal judicial appointments since 1980, the likelihood of this happening is equally remote.

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94. See Appendix at end of this article.

95. *Id.*

96. See Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 194 n.2 (1972).

At the time this article was written, the National Wildlife Federation had recently proposed an Amendment to the United States Constitution modelled after the Pennsylvania Environmental Amendment, the text of which is:

Each person has the right to clean air, pure water, productive soil and to the conservation of the natural, scenic, historic, recreational, aesthetic and economic values of America's environmental resources. There shall be no entitlement, public or private, competent to impair these rights. It is the responsibility of the United States and of the several states or public trustees to safeguard them for the present and for the benefit of posterity.

97. Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, UTAH L. REV. 388 (June 1970).

It can be argued that Pennsylvania's Amendment is a disappointment because efforts to use it to block environmental incursions are almost always unsuccessful. If this is so, what good is the Amendment?

A complete answer to this question has several parts. First, success in litigation is only one basis for "testing" the Amendment. Besides its use in judicial forums, the Amendment has been used by the agencies responsible for protecting the environment in Pennsylvania—DER, the Historical and Museum Commission, the Fish Commission and the Game Commission. Of these, DER is the most important, because it regulates the most serious environmental incursions: mining, waste disposal, and water protection. In Pennsylvania today no one gains a permit of significance in these areas without DER approval of an environmental analysis that flows from the test set forth in the *Payne v. Kassab* case. Prior to 1971 there was no such requirement, and for most of Pennsylvania's history environmental incursions took place with little or no consideration of environmental impact. The Amendment, therefore, has filled one of the major gaps in the legal structure for protecting the environment.

The lack of litigation success in stopping environmental incursions is therefore not a basis for a negative evaluation of the Amendment. As indicated, most of the cases arise when the alleged incursion has already undergone an environmental analysis, particularly the cases involving the Department of Transportation. Unless the Amendment is to be read as an absolute prohibition, blocking such projects after they have received a valid *Payne v. Kassab* analysis will always be difficult. The legislative sponsors of the Amendment never intended that it create absolute rights. The intent was to insure that environmental impact is assessed before any environmental incursion takes place. This has been accomplished through the *Payne v. Kassab* test, as failure to do the *Payne v. Kassab* analysis can result in an injunction.

## APPENDIX: CONSTITUTIONAL PROVISIONS IN OTHER STATES

Sixteen states other than Pennsylvania have enacted environmental amendments to their constitutions. A comparison of Pennsylvania's Amendment to the amendments in other state constitutions provides a better perspective from which to evaluate the Pennsylvania Amendment.

Space limitations preclude a state-by-state analysis comparable to the analysis of Pennsylvania's Article I, Section 27, but it has been suggested that several basic characteristics can be found in varying combinations in each of the states' constitutions.<sup>98</sup> These characteristics are:

- 1) Statement of public policy;
- 2) Directive to legislature to enact environmental legislation;
- 3) Directive to legislature to acquire natural resources;
- 4) Giving authority to legislature to act;
- 5) Restraints on disposition of public trust;
- 6) Environmental rights in individuals or in the people;
- 7) Citizens lawsuits to enforce environmental laws; and,
- 8) Tax advantages to encourage conservation.

A summary of the environmental provisions found in each state's constitution follows. Also included after each state's name are numbers corresponding to those of the eight characteristics listed above. For each state there is a short description and the characteristics of the provisions.

*California*: 5, 6; The people of the state are guaranteed protection of water rights, water quality, fish, and wildlife resources through restraining what action the legislature may take concerning those resources.<sup>99</sup>

*Florida*: 1, 2; The policy of the state is to conserve and protect natural resources. Adequate provisions shall be made by law to abate air, water, and noise pollution.<sup>100</sup>

*Georgia*: Does not fit any of the classifications. The constitution sets up a Board of Natural Resources which shall have the powers and duties as provided by law.<sup>101</sup>

*Illinois*: 1, 2, 6, 7; Every person in the state has a right to a

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98. See Howard, *supra* note 96, at 193.

99. CAL. CONST. art. X(A), §§ 1, 4.

100. FLA. CONST. art. II, § 7.

101. GA. CONST. art. IV, § 6.



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healthful environment. The public policy of the state and duty of its citizens is to provide a healthful environment. The general assembly shall provide law implementing this amendment.<sup>102</sup>

*Louisiana*: 2; Natural resources shall be protected and conserved insofar as is possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement the above.<sup>103</sup>

*Massachusetts*: 1, 4, 5, 6, 8; The people shall have the right to a clean environment. Conservation is declared to be a public purpose. Land taken for conservation purposes cannot be used for other purposes except when the legislature passes laws enacted by two-thirds vote.<sup>104</sup>

*Minnesota*: Does not fit any of the classifications. An environmental and natural resources trust fund is established to protect, conserve, preserve and enhance air, water, land, fish, wildlife, and other natural resources.<sup>105</sup>

*Missouri*: 4, 8; The constitution creates a Department of Natural Resources which shall administer programs of the state relating to environmental control and the conservation of natural resources. The constitution also allows the state to issue bonds which would be used for protecting the environment. Also, a one-tenth of one percent sales tax increase is provided. This amendment is explicitly self-enforcing.<sup>106</sup>

*Montana*: 2, 6; All persons have the right to a clean and healthful environment. The legislature shall provide adequate remedies for the protection of the environment.<sup>107</sup>

*New York*: 1, 2, 3, 5, 7; The policy of the state shall be to conserve and protect its natural resources. The legislature shall implement this policy. Property dedicated to this goal shall not be taken or otherwise disposed except by law enacted by two successive regular sessions of the legislature.<sup>108</sup>

*North Carolina*: 1, 2, 5; It shall be the policy of the state to conserve lands and waters. It is the function of the state to acquire and preserve parks and other areas in order to control pollution. The land acquired for the above purposes cannot be used

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102. ILL. CONST. art. XI, §§ 1, 2.

103. LA. CONST. art. IX, § 1.

104. MASS. CONST. art. XCVII.

105. MINN. CONST. art. XI, § 14.

106. MO. CONST. art. IV, §§ 47, 47(a) and art. III, § 37(b).

107. MONT. CONST. art. II, § 3 and art. IX, § 1.

108. N.Y. CONST. art. XIV, §§ 1, 4.

for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the general assembly.<sup>109</sup>

*Ohio*: 4, 8; Laws may be passed to encourage forestry and agriculture. Areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation.<sup>110</sup>

*Pennsylvania*: 1, 4, 5, 6, 7; The people have a right to clean air, pure water, and to the preservation of the environment. The Commonwealth is the trustee of these resources and shall conserve and maintain them.<sup>111</sup>

*Rhode Island*: 6; The people shall *continue* to enjoy and be secure in their environmental rights. This amendment preserves rather than creates rights.<sup>112</sup>

*Texas*: 4, 6; Conservation of all natural resources of the state is a declared public right and duty. The legislature shall pass appropriate laws. The state may issue bonds for the purpose of achieving the goals set forth in this amendment.<sup>113</sup>

*Virginia*: 1, 4; To the end that people have clean air, pure water and the use and enjoyment of natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources.<sup>114</sup>

*Wisconsin*: Does not fit any of the classifications. The constitution gives the state concurrent jurisdiction on all rivers and lakes within the state. The people are declared to possess the ultimate ownership in all lands within the state.<sup>115</sup>

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109. N.C. CONST. art. XIV, § 5.

110. OHIO CONST. art. II, § 36.

111. PA. CONST. art. I, § 27.

112. R.I. CONST. art. I, § 17.

113. TEX. CONST. art. XVI, § 59.

114. VA. CONST. art. XI, § 1.

115. WIS. CONST. art. IX, §§ 1, 3.

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CHART

#	CA	FL	GA	IL	LA	MA	MN	MO	MT	NY	NC	OH	PA	RI	TX	VA	WI
1		X		X		X				X	X		X			X	
2		X		X	X				X	X	X						
3										X							
4						X		X				X	X			X	X
5	X					X				X	X		X				
6	X			X		X			X				X	X	X		
7				X						X			X				
8						X		X				X					