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The Devil Is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment

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The Devil is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment

KENNETH T. KRISTL*

ABSTRACT

The 1971 Environmental Rights Amendment to the Pennsylvania Constitution at Article I, Section 27 created individual rights to clean air, pure water, and other environmental features as well as a public trust in the Commonwealth's public natural resources. Judicial interpretation significantly narrowed Section 27's reach until the Pennsylvania Supreme Court's Robinson Township decision in 2013 reinvigorated the Amendment. In the aftermath of Robinson Township, government officials and courts will need guidelines for how to comply with Section 27 in making and reviewing government actions and decisions. This Article develops a set of concrete, practical principles for applying Section 27. Part I explores the meaning of Section 27 based on the text, Robinson Township's analysis, and principles from private and public trust law. Part II articulates three concrete principles for the process of applying Section 27 revolving around the need for Pre-Action Assessment of environmental effects, whether direct or indirect and immediate, short- or long-term. Part III then articulates three concrete principles to guide the substance of Section 27 application. The Article concludes that commitment to the use of these procedural and substantive principles can provide a road map for the application of Section 27 that is true to the meaning and import of the Environmental Rights Amendment.

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The author also wishes to disclose that he is lead counsel for the plaintiffs in *Funk v. Wolf*, originally filed in the Commonwealth Court of Pennsylvania, and currently on appeal to the Supreme Court of Pennsylvania. *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016), *appeal docketed*, No. 88 MAP 2016 (Pa. Aug. 24, 2016). Plaintiffs in that case seek mandamus to force named state officials and agencies to develop a comprehensive strategy to combat climate change via the regulation of CO₂ and Greenhouse Gases based on legal duties arising out of Article I, Section 27 of the Pennsylvania Constitution. The legal strategy and arguments in that case draw upon and utilize the analysis set forth in this article, and do not drive or influence the content and conclusions set forth herein.

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INTRODUCTION

In 1971, the citizens of Pennsylvania amended the Commonwealth’s constitution to create specific rights and responsibilities in public natural resources.¹ This amendment—sometimes referred to as the “Environmental Rights Amendment”²—added Section 27 to the Declaration of Rights as set forth in Article I of the Pennsylvania Constitution. Section 27 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.³

For over forty years, judicial interpretations lost the original meaning of Article I, Section 27 in a manner that “had the effect of demonstrably and significantly limiting” the public rights set forth in the section.⁴

1. For the details of how the amendment came about, see John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015); *Environmental Law Distinguished Speaker Series: Franklin Kury*, WIDENER UNIV. COMMONWEALTH L. SCH. (October 29, 2015), <https://widenerenvironment.wordpress.com/speakers-and-conferences/speakerseries/>.

2. See, e.g., *Robinson Twp v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013).

3. PA. CONST. art. I, § 27.

4. See John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania*

In December 2013, Chief Justice Ronald Castille, writing for a three justice plurality of the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth of Pennsylvania*,⁵ essentially corrected the previous interpretations⁶ by providing a new interpretation of Article I, Section 27 based on the text and purpose of the section itself.⁷ Of particular importance, the plurality identified as “inherent” in the people two sets of fundamental environmental rights.⁸ The first set, found in the first sentence of Section 27, contains the rights to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” and the related right to “a limitation on the state’s power to act contrary to this right.”⁹ The second set, found in the second and third sentences of the section, arises out of the status of citizens as beneficiaries of a public trust over public natural resources.¹⁰ Further, the plurality found that the obligations of Section 27 apply to *all* levels of government in the Commonwealth¹¹—making clear perhaps for the first time that local as well as state agents are subject to Section 27’s demands. Although it did not command a majority of the court, Justice Castille’s opinion has been described as a “landmark decision”¹² such that, as a result, “Pennsylvanians will almost certainly be able to count on

Citizens: A Tribute to Chief Justice Castille, 53 DUQUESNE L. REV. 335, 338 (2015). This article provides an exhaustive analysis of Pennsylvania court and administrative agency decisions in support of its conclusion.

5. 83 A.3d 901 (Pa. 2013). For a thorough explication of the case’s history and its holdings concerning the legislation at issue, see John C. Dernbach, James R. May, Kenneth T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS L. REV. 1169 (2015).

6.

The actions brought under Section 27 since its ratification . . . 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 a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment.

Robinson Twp., 83 A.3d at 950.

7. See Dernbach & Prokopchak, *supra* note 5, at 352.

8. 83 A.3d at 948–49.

9. *Id.* at 951.

10. *Id.* at 954–55.

11. The *Robinson Township* plurality made this clear numerous times. See 83 A.3d at 952 (“Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently. *Franklin Twp.*, 452 A.2d at 722 & n.8 (citing Section 27, Court stated that protection and enhancement of citizens’ quality of life ‘is a constitutional charge which must be respected by all levels of government in the Commonwealth’)); *id.* at 956–57 (“The plain intent of the [third clause of Article I, Section 27] 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.”); *id.* at 977 (“With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but ‘the Commonwealth’ as trustee. We have explained that, as a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people.”); *id.* at 978 (“Act 13 thus commands municipalities to ignore their obligations under Article I, Section 27 . . .”).

12. See *ION Geophysical Corp. v. Hempfield Twp.*, Civ. No. 14-410, 2014 WL 1405397, at *7 (W.D. Pa. Apr. 10, 2014).

reinvigorated judicial protection of their environmental rights for generations to come.”¹³ *Robinson Township* has been the subject of an ever-expanding body of articles and commentaries.¹⁴

Article I, Section 27’s creation of rights and corresponding duties highlights the need to articulate guiding principles for the application of Section 27 in two important areas. First, Justice Castille envisioned that claims could be brought against Commonwealth agents for the failure to carry out the section’s obligations.¹⁵ Indeed, *Robinson Township* was the result of just such a claim. Franklin Kury, the legislative author of the constitutional amendment, had hoped 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.”¹⁶ Second, prior to a claim even being brought, agents of the Commonwealth subject to Section 27 need to be able to determine how they can fulfill their responsibilities under the section. Thus, what logically follows from *Robinson Township*’s reinvigoration of Article I, Section 27 is that there needs to be a set of concrete, practical principles that can guide Commonwealth agents and judges in determining what Section 27 requires in a post-*Robinson Township* world.

This article is designed to begin to address this need. It draws upon insights gleaned from *Robinson Township* itself, the literature discussing it and public trust issues in general, and private and public trust law. From those insights, it articulates principles that can begin to develop a roadmap by which Commonwealth agents, attorneys, and the courts can apply the text and concepts underlying Section 27 to the myriad of situations which will arise post-*Robinson Township*. It seeks to serve as the starting point for what will likely be the long process of developing the robust case law and understanding that helps Section 27 do what it was intended to do.

This article has three parts. In Part I, it examines the general parameters of both the rights and obligations created by Section 27. Consistent with the text, it finds two distinct sets of rights and obligations: those created in the first sentence and

13. See Dernbach & Prokopchak, *supra* note 4, at 359.

14. See, e.g., Dernbach, May & Kristl, *supra* note 5; Dernbach & Prokopchak, *supra* note 4; Erin Daly & James R. May, *Robinson Township: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151 (2015); John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463 (2015) [hereinafter Dernbach, *Constitutional Trust*]; Elizabeth F. Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 PACE ENVTL. L. REV. 56 (2015); Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 819 (2014).

15. 83 A.3d at 950 (“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”); *id.* at 957 (“This Court perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review.”).

16. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 124 (1990).

those based on the public trust enumerated in the second and third sentences.¹⁷ For each of these sets of rights and obligations, it outlines general contours of what those rights and obligations entail in order to set the stage for the more detailed, practical analyses that follow.

In Part II, the article identifies three concrete, practical principles of a procedural nature that should govern application of Section 27. First, it is essential to assess the environmental effects of a government action *before* Commonwealth agents act—for example, the need to conduct a Pre-Action Assessment. Second, the Pre-Action Assessment must consider *all* environmental effects that might result from the proposed action. Third, the Pre-Action Assessment must be memorialized.

In Part III, the article identifies three concrete, practical principles for the substantive assessment of Section 27 compliance. First, statutory compliance does not always equal Section 27 compliance. Second, compliance with the rights and duties articulated in Section 27's first sentence must be measured by reference to the reasonableness of the action in light of the Amendment's objectives. Third, compliance with the rights and duties created by the public trust must be measured by principles of sustainability. The article concludes by calling for application of these principles by Commonwealth agents and judges in order to assure that Section 27 can play a vital role in helping to protect and preserve Pennsylvania's environment.

I. DETERMINING THE GENERAL PARAMETERS OF THE RIGHTS AND DUTIES IN ARTICLE I, SECTION 27

The text of Article I, Section 27 identifies two distinct yet related sets of fundamental rights and corresponding duties. The first sentence expressly provides that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”¹⁸ These express rights are referred to herein as “First Sentence Rights.” The second set of rights arises out of the public trust created by the second and

17. Precisely because Section 27 expressly recognizes a public trust, there is no need to answer the interesting academic question of whether a public trust does or should exist. Starting with Joseph Sax's seminal law review article in 1970, Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970), many have argued that a public trust exists over natural resources. See, e.g., MARY C. WOOD, *NATURE'S TRUST* 125 (Cambridge University Press 2014) (arguing for a “Nature's Trust” that “presents the antithesis of the discretion model that has bred corruption and cover-up in many environmental agencies . . . [and] repositions all players in their relationship to ecology.”); Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984). For views expressing doubt in the existence or utility of the doctrine, see, for example, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986); Steven A. Jawetz, *The Public Trust Totem in Public Land Law: Ineffective—And Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 457 (1982).

18. PA. CONST. art. I, § 27.

third sentences of Article I, Section 27, and are referred to herein as “Public Trust Rights.” Of course, with these rights come corresponding duties arising out of both the expression of those rights and their nature as limits on governmental power.¹⁹ In order to articulate concrete, practical principles for applying Section 27, it is first imperative to have a general sense of what these two sets of rights and duties really mean.

A. FIRST SENTENCE RIGHTS AND DUTIES

The first sentence expressly creates three rights: the rights to “clean air,” “pure water,” and “the preservation of the natural, scenic, historic and esthetic values of the environment.” For the *Robinson Township* plurality, the construct of the first sentence means that there is also an implied correlative right in the people (and, therefore, a duty on the Commonwealth and its agents):

This clause [in the first sentence] 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.²⁰

As a result, even though:

[The first sentence] does not impose express duties on the political branches to enact specific affirmative measures 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.²¹

Thus, the first sentence of Section 27 creates the rights to clean air, pure water, preservation of natural, scenic, historic, and aesthetic values of the environment, and the right to be free from unreasonable governmental interference with those rights, as well as the Commonwealth’s duty to refrain from unduly infringing or violating those rights.

Given the recognition of these rights and corresponding duty, the practical question raised by this terminology relates to how far the adjectives go—for example, how clean is “clean,” how pure is “pure,” and what “preservation” means in the context of natural, scenic, historic, and aesthetic values of the environment. If, for example, “pure water” means that it must contain only H₂O

19. The *Robinson Township* plurality noted that Article I, Section 27 appears in Article I of the Pennsylvania Constitution which is titled “Declaration of Rights.” 83 A.3d at 948. Section 25 of that article states: “To guard against the transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” PA. CONST. art. I, § 25. In effect, “[t]hat means that the two environmental rights stated in section 27 expressly operate as limits on governmental authority.” Dernbach, *Constitutional Trust*, *supra* note 14, at 471.

20. 83 A.3d at 951 (quoting *Page v. Allen*, 58 Pa. 338 at *8 (1986)).

21. *Id.* at 951–52.

molecules so that the presence of any other molecules makes it impure, then the first sentence imposes a standard far higher than anything ever required before.

The *Robinson Township* plurality did not believe that “clean” and “pure” went quite so far: “We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes.”²² In fact, the plurality suggests that state and federal law and regulations—which recognize that some levels of “impurity” are allowed²³—can play a role in determining these relative attributes.²⁴ Instead, the *Robinson Township* plurality suggests that the animating principle of First Sentence Rights revolves around unreasonableness. In connection with the First Sentence Right of “preservation of natural, scenic, historic and esthetic values of the environment,” the plurality notes that this language “does not call for a stagnant landscape . . . the derailment of economic or social development . . . [or] a sacrifice of other fundamental values;” instead “[b]y 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.”²⁵

Thus, in general terms, the first sentence of Section 27 grants “the people” the rights to clean air, pure water, preservation of natural, scenic, historic and aesthetic values of the environment, and thus protection against government infringement and violation of those rights. In turn, the first sentence imposes a corresponding duty on the part of the Commonwealth to refrain from infringing or violating those rights through governmental actions that unreasonably cause actual or likely deterioration of those environmental features.

B. PUBLIC TRUST RIGHTS AND DUTIES

The *Robinson Township* plurality interpreted the second and third sentences of Article I, Section 27 as creating a public trust in the public natural resources.²⁶ Although the second and third clauses never use the term “public trust,” this conclusion is supported by the text²⁷ and prior

22. *Id.* at 953.

23. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1311(a) (2012) (allowing discharge of pollutants into waters of the United States that are done in compliance with 33 U.S.C. §§ 1311, 1312, 1316, 1328, 1342, and 1344).

24. 83 A.3d at 953.

25. *Id.*

26. *Id.* at 956.

27. The identification of “public natural resources” as the property (or corpus) of the trust, the designation of the Commonwealth as trustee, and the identification of “all the people” as beneficiaries are all consistent with what have been historically categorized as “public trusts.” *See, e.g.*, *Geer v. State of Connecticut*, 161 U.S. 519, 529 (1896) (power of state arising from the common ownership of wild game “is to be exercised, like all other powers of government, as a trust for the benefit of the people”); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (title to submerged lands off shore of Lake Michigan “is a title held in trust for the people of the state”). The *Robinson Township* plurality reaches this same conclusion. *See* 83 A.3d at 956.

precedent.²⁸ What, then, must the Commonwealth (through its agents) do to fulfill the obligations of a public trustee? There are three primary sources of information for identifying the public trustee's duties under the second and third clauses of Article I, Section 27. First, the text itself provides important guidance for identifying these duties. Second, general principles taken from private trust law help to further define these duties. Third, public trust law—that is, how courts deal with what are recognized as public trusts—can provide further insight. Thus, it makes sense to start with determining what these sources have to say in the context of Section 27.

1. Duties Set Forth in the Text of Section 27 Itself

The third sentence of Section 27—“[a]s trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people”—identifies two duties in its text. The first, and most obvious, is the express duty to “conserve and maintain” the public natural resources that make up the property of the trust. The second duty arises from the express purpose for which the clause requires public natural resources to be conserved and maintained: to “benefit all the people.”

a. The Duty to “Conserve and Maintain”

The most obvious statement of the Commonwealth's public trustee duty is in the third sentence of Article I, Section 27's command that the Commonwealth shall “conserve and maintain” the public natural resources that are the property (or corpus) of the trust. In attempting to determine general principles of what it means to “conserve and maintain” in the context of Section 27, two important issues can help to determine the concrete actions the public trustee must undertake: (1) what is/are the public natural resource(s) that make up the property of the trust at issue in the particular case? (2) What does it mean to “conserve and maintain” the public natural resources at issue in the particular case? The order of these issues is important because *what* needs to be conserved and maintained may well determine *how* it can and should be conserved and maintained.

i. The Public Natural Resources that Can Be the Property of the Public Trust

Section 27 refers to the “public natural resources” as the focus of the Commonwealth's public trustee duties. The phrase itself suggests a broad and flexible range of things that could qualify as public natural resources. Indeed, the

28. See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) (“There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own ipse dixit”).

legislative history of the amendment suggests such a broad interpretation. As originally introduced in the Pennsylvania House of Representatives, the second sentence of the amendment stated, "Pennsylvania's natural resources, *including the air, water, fish, wildlife, and the public lands and property of the Commonwealth*, are the common property of all the people, including generations yet to come."²⁹ In the final version, the italicized language setting forth a list of "public natural resources" was deleted.³⁰ The *Robinson Township* plurality opined that this change occurred because of "disquietude that the enumeration of resources would be interpreted 'to limit, rather than expand, [the] basic concept' of public natural resources"³¹ Thus, by changing the text to eliminate the enumerated list, "[t]he 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."³² The *Robinson Township* plurality therefore viewed the term "public natural resources" in this way:

The drafters . . . 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 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.³³

In short, the range of things that can be "public natural resources" that are subject to trustee obligations is quite large.³⁴

29. H.B. 958, Printers No. 1105 (April 21, 1969), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 187–88 (emphasis added).

30. It appears from the legislative history that the deletion occurred after the House had passed and sent H.B. 958 to the Pennsylvania Senate, and the Senate's Committee on Constitutional Changes and Federal Relations reviewed and reported the bill as amended out of Committee. *See* Senate Amended H.B. 958, Printers No. 2860 (March 10, 1970), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 211–12.

31. 83 A.3d at 955.

32. *Id.*

33. *Id.* The plurality found support for this interpretation in statutory provisions, legal scholarship, and in the legislative history of the amendment itself. *Id.*

34. As one example of this breadth, see *Pa. Env'tl. Mgmt. Servs., Inc. v. Commonwealth*, 503 A.2d 477, 480 (Pa. Commw. Ct. 1986). In that case, the Pennsylvania Department of Environmental Resources denied a solid waste management permit for a landfill on the basis of violating Article I, Section 27, and the applicant appealed a decision of the Environmental Hearing Board ("EHB") upholding the denial. Although the court vacated and remanded the EHB's decision, it held for purposes of remand that:

(1) the agricultural value of nearby lands to the mushroom farmers and fruit orchard owners is appropriately considered among the "natural . . . values of the environment" to which the "people have a right" under PA. CONST. art. I, § 27 and (2) the impact of the landfill's visibility upon the neighboring Innkeeper, as well as nearby residences and U.S. Route 1, is appropriately considered with respect to the "scenic . . . and esthetic values of the environment" under that provision. We

ii. *The General Meaning of “Conserve and Maintain”*

Any attempt to understand what “conserve and maintain” means in the context of Section 27 must start with the legislative history, which reveals two important modifications to the amendment as originally proposed.

The first such change relates to the word “conserve.” As originally proposed, the amendment would have required the Commonwealth, as trustee, to “*preserve* and maintain” the public natural resources.³⁵ The word “preserve” was changed to “conserve” when reported out of the Senate Committee considering the House Bill,³⁶ and “conserve” was ultimately the word in the adopted amendment. The second such change relates to the manner in which the Commonwealth was to preserve/conserve and maintain. As originally introduced, the amendment would have required the Commonwealth to protect public natural resources “in their natural state.”³⁷ However, this language was removed nine days later.³⁸

Together, this legislative history suggests that “conserve and maintain” is not about keeping the public natural resources in some unchanging, natural state, but rather allows for change and use—provided that such change or use is consistent with the public trust. Indeed, the *Robinson Township* plurality reached this very conclusion: “[T]he 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”³⁹

If “conserve and maintain” does not require preservation or a “freeze” of public natural resources, but rather permits some change and use of those resources, what general parameters of obligation does it impose? For the *Robinson Township* plurality, “[t]he 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”⁴⁰ grounded in “two separate Commonwealth obligations [that] are implicit” in the public trust:

further hold that the adequacy of public roads to the landfill must be considered at least to the extent necessary to “conserve and maintain” the existing “public natural resources” as mandated by our Constitution.

Id. at 480 n.9.

35. H.R. 958, Printers No. 1105 (April 21, 1969), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 187–88 (emphasis added).

36. *See* Senate Amended H.B. 958, Printers No. 2860 (March 10, 1970), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 211–212.

37. H.R. 958, Printers No. 1105 (April 21, 1969), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 187–88.

38. H.R. 958, Printers No. 1307 (April 29, 1969), *reprinted in* Dernbach & Sonnenberg, *supra* note 1, at 193–94.

39. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 958 (Pa. 2013).

40. *Id.* at 957.

The first obligation arises from the prohibitory nature of the constitutional clause creating the trust . . . 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

The second obligation peculiar to the trustee is . . . to act affirmatively to protect the environment, via legislative action.⁴¹

While it might be tempting to view “prevent” and “refrain from permitting or encouraging” the “degradation, diminution, or depletion” as mandating the prevention of all pollution or deleterious effects, there are several reasons to believe that the plurality did not believe the duty to conserve and maintain goes quite that far.

First, the plurality's recognition that “conserve and maintain” does not require a freeze of public natural resources, but rather is “tempered by legitimate development,” strongly suggests that Article I, Section 27 sets a threshold that is not crossed by every single act that might, in isolation, be viewed as having a deleterious effect. In other words, the “degradation, diminution, and depletion” of public natural resources is a standard which recognizes that something more than a mere *de minimis* deleterious effect on the public resource is necessary to trigger the need to “prevent and remedy.”

Second, common sense supports this conclusion. We allow people to drive their fossil-fueled cars even though the exhaust from those cars introduces some amount of pollution into the air. Federal emission regulations (through Corporate Average Fuel Economy (“CAFE”) standards and inspection regimes) seek to reduce the amount (and therefore impacts) of such emissions, but the net result is that some pollution still enters the air. Yet no one would seriously suggest that small amounts of pollution from any one car require a public trustee to completely ban the use of cars.

At the same time, this notion that *de minimis* deleterious impacts do not trigger the public trustee's duty to “prevent and remedy the degradation, diminution, or depletion of our public natural resources” cannot be viewed as creating an exception that swallows the rule and thereby relieves the public trustee of its Article I, Section 27 obligations. Instead, some standards must exist that create a threshold for when the need to “prevent and remedy” obligates the public trustee to act.

41. *Id.* at 957–58.

b. The Duties to Beneficiaries

The third sentence of Article I, Section 27 mandates that the public trustee conserve and maintain the public natural resources that are the property of the trust “for the benefit of all the people.” In describing the beneficiaries of the trust, the second sentence of Section 27 makes clear that they include “generations yet to come.” Thus, by its wording, the beneficiaries of the public trust recognized in Article I, Section 27 are both present and future generations of Pennsylvania citizens.⁴²

For the *Robinson Township* plurality, this multi-generational aspect of the beneficiaries of the Article I, Section 27 public trust creates two important obligations for the public trustee: “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.”⁴³ “Dealing impartially” requires the trustee to treat all beneficiaries “equitably in light of the purposes of the trust.”⁴⁴ The duty to balance the interests of present and future beneficiaries “reinforces” a “conservation imperative”: “future generations are among the beneficiaries entitled to equal access and distribution of the resources, thus, the trustee cannot be shortsighted.”⁴⁵ The *Robinson Township* plurality provided an important insight into how far this duty to balance interests must go:

[T]his 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.⁴⁶

Thus, in balancing the interests of present and future beneficiaries, the Article I, Section 27 public trustee must consider both present and future environmental impacts when acting as trustee.

As a result, one of the public trustee’s duties is to protect the beneficiaries’ rights and act in the public’s interest:

[U]niquely among the Sections of Article I, Section 27 confers upon the Commonwealth a definite status and imposes upon it an affirmative duty. The State is made trustee of the rights of the people in the enumerated values of the environment and of natural resources, and it is directed to con-

42. See *id.* at 959 (“Within the public trust paradigm of Section 27, the beneficiaries of the trust are ‘all the people’ of Pennsylvania, including generations yet to come.”).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

serve and maintain those values and resources. Section 27 is, we conceive, more than a declaration of rights not to be denied by government; it establishes rights to be protected by government. Indeed, the nature of those rights suggests the different role of government. Whereas restrictions upon speech, press and the practice of religion, invasions of the security of persons and their property and the imposition of arbitrary punishment, for examples, are activities that governments historically undertook, the despoliation of the environment is an act to be expected, in our private ownership society, from private persons. Therefore, government must act in the peoples' interest⁴⁷

2. Duties from Private Trust Law

Section 27 specifically refers to the Commonwealth acting as "trustee" of the public natural resources. Because the very name refers to a public "trust," the reference to and reliance on concepts from the more familiar areas of private and charitable trust law is a common approach taken in scholarly discussions of public trustee duties that apply.⁴⁸ Such an approach makes some sense for at least two reasons. First, courts have analogized directly or indirectly to private and charitable trust law when dealing with public trusts and thus drawing the analogy is simply following the courts' lead.⁴⁹ Second, the well-developed law of private and charitable trusts provides familiar guideposts that can make navigating the perhaps less-familiar waters of public trust doctrine easier for trustees, beneficiaries, and judges. Thus, important additional insights into the Section 27 public trustee's duties can be found by looking to private trust law.

The *Robinson Township* plurality supports the notion that a separate source of public trustee duty arises from the very nature of being a trustee. As the plurality put it:

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct As a

47. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973).

48. See, e.g., Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 93 (2009) ("While a sovereign trusteeship differs from a private one in significant ways, nevertheless, basic standards from the private realm apply with equal force," drawing upon case law recognizing a trust relationship over Indian lands); Courtney Lords, *Protection of Public Trust Assets: Trustee's Duty of Loyalty in the Context of Modern American Politics*, 23 J. ENVTL. L. & LITIG. 519, 525 (2008) ("several private trust elements and fiduciary duties are present in a public trust"); Robert L. Glicksman, *Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principal*, 44 TULSA L. REV. 147, 181 (2008) ("the same fiduciary obligations applicable to the trustees of private trusts also appear to apply to public trustees"); Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STANFORD ENVTL. L.J. 315, 324–25 (2000) (using analogy to private and charitable trust law).

49. See, e.g., *Geer v. State of Connecticut*, 161 U.S. 519, 529 (1896); *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927).

fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.⁵⁰

In effect, the *Robinson Township* plurality incorporates the principles of private trust law into the analysis of what the public trustee must do under Article I, Section 27.

As the *Robinson Township* plurality noted,⁵¹ Pennsylvania has adopted the Uniform Trust Act⁵² that helps define trust duties under state law. The statute identifies a number of duties of the trustee, including the duty to administer the trust in good faith,⁵³ a duty of loyalty (expressed as administering the trust “solely in the interests of the beneficiaries”),⁵⁴ a duty of impartiality to beneficiary interests when there are two or more beneficiaries,⁵⁵ a duty of prudent administration—meaning a duty to administer the trust as a prudent person would,⁵⁶ a duty to control and protect the trust property,⁵⁷ a duty to prohibit commingling trust property with the trustee’s own property,⁵⁸ and duties related to keeping beneficiaries informed.⁵⁹ Fundamentally, this means that the trustee acts as a fiduciary for the benefit of the beneficiaries.⁶⁰

A number of these duties have some potential application to Section 27 situations. The related duties of prudence and protection of trust property implies that the trustee must actively take “whatever steps are necessary . . . to protect and preserve the trust property from loss or damage”⁶¹ so that it does not “fall into ruin on his watch.”⁶² The private trust duties specifically pegged to

50. 83 A.3d at 957.

51. See *id.* at 959 n.45 (“[T]he Environmental Rights Amendment creates an express trust that is presumptively subject to the Uniform Trust Act, see [20] Pa.C.S.A. §§ 7702, 7731 . . .”).

52. 20 PA. CONS. STAT. §§ 7701–7799 (2010). The UTA is modeled after the Uniform Trust Code, approved and recommended by the National Conference of Commissioners on Uniform State Laws. See JOINT STATE GOVERNMENT COMMISSION, THE PROPOSED PENNSYLVANIA UNIFORM TRUST ACT AND AMENDMENTS TO THE PROBATE, ESTATES, AND FIDUCIARIES CODE 23 (2005), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2005-41-UTC%204%202005.pdf>. Those comments indicate, “[w]here the UTC provisions have been substantially retained in this chapter, the UTC comments are applicable to the extent of the similarity.” The Commission also said, “[t]he official comments may be used in determining the intent of the General Assembly. 1 Pa.C.S. § 1939.” *Id.* at 2.

53. 20 PA. CONS. STAT. § 7771 (2010) (“[T]he trustee shall administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law.”); *id.* at § 7780.4 (“The trustee shall exercise a discretionary power in good faith and in accordance with the provisions and purposes of the trust and the interests of the beneficiaries . . .”).

54. *Id.* at § 7772(a).

55. *Id.* at § 7773.

56. *Id.* at § 7774.

57. *Id.* at § 7779.

58. *Id.* at § 7780(b).

59. *Id.* at § 7780 (duty to maintain records); *id.* at § 7780.3 (duty to make records available to beneficiaries of irrevocable trusts).

60. See RESTATEMENT (THIRD) OF TRUSTS § 86 (2007).

61. GEORGE T. BOGERT, TRUSTS § 99 (West 6th ed. 1987).

62. U.S. v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2002) (United States as trustee had duty to

beneficiaries—particularly the duties of loyalty and impartiality⁶³—parallel the express duties found in Section 27.⁶⁴

These general concepts illustrate that the performance of a Section 27 public trustee must also be viewed through the lens of private trust law. The duties articulated in that law can provide markers to help identify concrete ways of defining and measuring compliance with Section 27's Public Trust Rights and its associated duties.

3. Duties from Public Trust Law

Public trust law can also provide important additional insights into how a public trustee should act. As Justice Reed of the United States Supreme Court noted in a case about federal trust obligations related to coastlines, “[t]he United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for a cestui que trust. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation.”⁶⁵ Public trustees are usually government agents subject to many other obligations besides those of the trust. Since the Supreme Court's seminal ruling in *Illinois Central Railroad Co. v. Illinois*⁶⁶ recognizing the public trust doctrine, a body of federal and state case law and scholarly analysis developed discussing the public trust and the trustee's duties thereunder.⁶⁷ Although a complete explication of this law is beyond the

preserve improvements to trust property “because elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch,” referencing duty to preserve and maintain trust assets).

63. Note that the statute itself finds that the duty mandates *equitable*, not equal, treatment: “The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust.” 20 PA. CONS. STAT. § 7773 (2010). Further, the Uniform Law Comments to the UTA's impartiality section recognize that different categories of beneficiaries may have differing interests that require the trustee to ensure that all interests are treated properly, stating: “The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law.” 20 PA. STAT. AND CONS. STAT. ANN. § 7773 cmt. (West 2016). This parallels the *Robinson Township* plurality's comments concerning the multi-generational aspects of the Article I, Section 27 beneficiaries.

64. As noted above, the *Robinson Township* plurality drew this connection. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013).

65. *Alabama v. Texas*, 347 U.S. 272, 277 (1954) (Reed, J. concurring). The case was decided by a per curiam decision, which noted that Congress had power to dispose of property without limitation, and thus the Court could not dictate how the trust would be administered in that situation. *Id.* at 273.

66. 146 U.S. 387 (1892).

67. There is a large volume of scholarship on the public trust doctrine. For a small sampling, see, for example, James Olson, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 VT. J. ENVTL. L. 361 (2014); Wood, *supra* note 17; Gerald Torres and Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281 (2014); *Symposium—The Public Trust Doctrine 30 Years*

scope of this article, at least one state public trust case merits discussion because of the insights it can provide in the context of Section 27.

*In re Water Use Permit Applications*⁶⁸—often referred to as the *Waiahole Ditch* case—was a Hawaii state Supreme Court case involving the interpretation of a state constitutional provision with elements very similar to Section 27. In 1976, the State of Hawaii amended its constitution to include the following provision:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.⁶⁹

Waiahole Ditch involved a number of appeals of decisions by the state Commission on Water Resource Management concerning a major water distribution in Oahu known as the Waiahole Ditch System. The decisions were made in response to petitions to amend the interim in-stream flow standards for windward streams affected by the ditch, water use permit applications for various leeward off-stream purposes, and water reservation petitions for both in-stream and off-stream uses.⁷⁰ In vacating and remanding the parts of the Commission's decision relating to certain in-stream flow standards, flow allocations, and mitigation efforts, the Hawaii Supreme Court discussed the implications of the public trust principles inherent in this constitutional provision.⁷¹ The court articulated several principles arising out of the public trust:

1. "Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state";⁷²
2. The state also bears an "affirmative *duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible";⁷³
3. The public trust does not protect exclusive use for private economic gain as that would "eviscerate[] the trust's basic purpose of reserving the resource

Later, 45 U.C. DAVIS L. REV. 665-1958 (2012); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 439 (2009); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849 (2001).

68. 9 P.3d 409 (Haw. 2000).

69. HAW. CONST. art. XI, § 1.

70. 9 P.3d at 422.

71. See *id.* at 501-02 (summarizing court's holdings).

72. *Id.* at 453.

73. *Id.* (emphasis in original) (citation omitted).

for use and access by the general public without preference or restriction.”⁷⁴ Instead, public trust rights are superior to prevailing private interests;⁷⁵

4. When dealing with competing uses and variability of resources availability, the trustee “inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law”⁷⁶—that is, apply a balancing test—which begins with “a presumption in favor of public use, access, and enjoyment”;⁷⁷ and
5. In discharging its duties, the public trustee “must not relegate itself to the role of a mere ‘umpire passively calling balls and strikes for adversaries appearing before it,’ but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process” because “the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources.”⁷⁸

Thus, given the similarity between Hawaii’s and Pennsylvania’s constitutional provisions, the public trust law in the *Waiahole Ditch* case provides markers that help identify concrete ways to define and measure compliance with Section 27’s Public Trust Rights and their associated duties.

II. DEVELOPING PRINCIPLES FOR CONCRETE PROCEDURAL ACTIONS TO ENSURE COMPLIANCE WITH ARTICLE I, SECTION 27 DUTIES

Given the general requirements of Article I, Section 27, the development of a set of principles to guide concrete action can provide meaningful guidance to both Commonwealth agents tasked with performing the requirements as well as judges reviewing Commonwealth actions for compliance. Some of these principles are procedural in nature—that is, they relate to the process by which the

74. *Id.* at 450.

75.

[W]hile the state water resources trust acknowledges that private use for “economic development” may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected “trust purpose.” . . . [I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time.

Id.

76. *Id.* at 454.

77.

[T]he constitutional requirements of “protection” and “conservation,” the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the “zero-sum” game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.

Id.

78. *Id.* at 455 (citations omitted).

Commonwealth agent determines how to comply with Section 27. Other principles are substantive in nature—that is, they relate to justifying the substance of the actual decision in the context of complying with the mandates of Section 27.

Getting the *process* of Section 27 analysis correct is the first critical step in defining concrete principles for ensuring compliance with Section 27. This part of the article therefore articulates three important procedural principles essential to the correct application and interpretation of Section 27.

A. PROCEDURAL PRINCIPLE NO. 1: ASSESSMENT BEFORE ACTION (SUCH AS THE NEED FOR A PRE-ACTION ASSESSMENT)

The first important step in compliance with Article I, Section 27 is recognizing the need to make a serious assessment of the Section 27 implications of an action *before* taking that action.

The *Robinson Township* plurality—both expressly and by implication—repeatedly recognized the need to think before acting. In connection with First Sentence Rights, the plurality expressly stated that:

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.⁷⁹

In support of this conclusion, the plurality pointed to a question and answer document developed by the amendment’s chief legislative sponsor intended to aid voters in understanding the amendment, which stated that:

[O]nce [the amendment] is passed and the citizens have a legal right to a decent environment under the State Constitution, *every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people’s rights before it acts.* If the public’s rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate law suit⁸⁰

In connection with the Public Trust Rights, the plurality’s recognition of the need to think before acting is more implicit, but can be seen as arising out of two points in the plurality’s analysis. First, given that the Commonwealth and its agents have “an obligation to refrain from performing its trustee duties . . . unreasonably” and a “duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources,”⁸¹ the only way to fulfill those obligations

79. 83 A.3d 901, 952 (emphasis added).

80. *Id.* at 952 n.41 (emphasis added). A full copy of the Question and Answer document developed by chief legislative sponsor Franklin Kury can be found in Dernbach & Sonnenberg, *supra* note 1, at 269–73.

81. *Id.* at 957.

is to determine ahead of time whether a particular action is “unreasonable” or will “permit or encourage” degradation. Second, the plurality cited a California case⁸² in support of its analysis and provided this telling parenthetical of the case’s holding:

[P]ublic trust doctrine permits [the] sovereign to utilize trust resources required for prosperity and habitability of state, even if uses harm [the] trust corpus; but, *before state courts and agencies approve use of trust resources, they must consider effect of use upon public trust interests and attempt, so far as feasible, to avoid or minimize any harm to those interests; in that dispute, absence of “objective study” of impact on [a] natural resource was deemed to hamper proper decision.*⁸³

Separate and apart from the plurality’s analysis, private trust law’s requirement that the trustee administer the trust prudently⁸⁴ implies the need to assess before acting is an essential part of what a trustee must do. For example, Pennsylvania trust law has recognized that a trustee has a duty to obtain the “most advantageous price” when selling trust assets.⁸⁵ The only way the trustee can know that the price is the most advantageous would be to gather information that allows the trustee to feel comfortable that the price is the highest or best under the circumstances. Thus, assessment before taking action “forces [administrative agencies and local governments] to understand what features . . . their decisions are likely to affect and gives them the opportunity to avoid making decisions that will adversely affect those features and resources.”⁸⁶

Likewise, public trust law supports the notion of assessment before action. The *Waiahole Ditch* court’s recognition of an “affirmative duty to take the public trust into account in the planning and allocation” of resources⁸⁷ and its balancing test⁸⁸ can only be accomplished by thinking before acting. This requirement for pre-action assessment is made abundantly clear when the court states that the public trustee cannot be a mere “umpire passively calling balls and strikes” but rather must “take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.”⁸⁹

82. Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709 (Cal. 1983).

83. 83 A.3d at 958 (emphasis added). See Dernbach, *Constitutional Trust*, *supra* note 14, at 494–95 (same logic of plurality concerning First Sentence Rights applies to the public trust provisions; noting the plurality’s citation to the *National Audubon* case).

84. See 20 PA. CONS. STAT. § 7774 (2010).

85. See *Petition of Acchione*, 227 A.2d 816, 823 (Pa. 1967); *Helig Bros. Co. v. Kohler*, 76 A.2d 613, 616 (Pa. 1950).

86. Dernbach, *Constitutional Trust*, *supra* note 14, at 495.

87. 9 P.3d 409, 453 (Haw. 2000) (emphasis in original) (citation omitted).

88. *Id.* at 454.

89. *Id.* at 455 (citations omitted).

The notion of assessment before action is familiar in environmental law. The National Environmental Policy Act (“NEPA”)⁹⁰ requires a federal agency/actor to make a detailed statement if a proposed federal action will significantly affect the quality of the human environment.⁹¹ The regulations implementing this requirement generally require a two-step process: (1) conducting a summary “environmental assessment” to determine if the federal action might have a significant impact on the human environment; and (2) if the environmental assessment suggests such an impact is possible, then preparing a more detailed environmental impact statement.⁹² The regulations mandate that “NEPA procedures must insure [sic] that environmental information is available to public officials and citizens before decisions are made and before actions are taken”⁹³ because “[t]he NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and [to] take actions that protect, restore, and enhance the environment.”⁹⁴

The notion of assessment before action can also be found in Pennsylvania’s environmental regulations. For example, in connection with the issuance of National Pollution Discharge Elimination System (“NPDES”) permits for discharges to special protection watersheds (such as those designated as High Quality or Exceptional Value water bodies), the regulations require that an applicant proposing a new or additional point source discharge must provide a 3-part antidegradation analysis⁹⁵ in connection with its NPDES permit application. This allows DEP to assess whether there will be an adverse environmental impact *before* the permit is issued.

Thus, Pre-Action Assessment is a concept found in the law relating to governmental actions related to the environment and required by the nature of Section 27’s rights and duties.⁹⁶

90. 42 U.S.C. §§ 4321–4370 (2012).

91. National Environmental Policy Act § 102, 42 U.S.C. § 4332(2)(C) (2012).

92. See 40 C.F.R. §§ 1501.3–1501.4 (2016). Environmental assessment is defined in 40 C.F.R. § 1508.9 (2016), while environmental impact statement is defined in 40 C.F.R. § 1508.11 (2016) by reference to 42 U.S.C. § 4332(2)(C) (2012).

93. 40 C.F.R. § 1500.1(b) (2016).

94. 40 C.F.R. § 1500.1(c) (2016).

95. See 25 PA. CODE 93.4c(b)(1)(i) (2013) (requires applicant to show that (1) it has evaluated nondischarge alternatives and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge; (2) if no such environmentally sound and cost-effective nondischarge alternative exists, use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies; and (3) if no nondischarge alternative exists, show that the discharge will maintain and protect the water quality of the special protection watershed).

96. As a result, it seems reasonable to conclude that the failure of a Commonwealth agent to have a Pre-Action Assessment process in place (as evidenced by the fact that the agency has no process identified in agency regulation or guidance and/or engaged in actions without conducting Pre-Action Assessments) is not complying with the requirements of Section 27. John Dernbach has opined that, in addition to claims based on Violations of First Sentence and Public Trust Rights, a third type of claim can be “reasonably implied” from the text of Section 27: “the government violated section 27 by acting without first considering the impact of its

B. PROCEDURAL PRINCIPLE NO. 2: THE PRE-ACTION ASSESSMENT MUST INCLUDE
DIRECT AND INDIRECT AS WELL AS SHORT- AND LONG-TERM ENVIRONMENTAL EFFECTS

If an assessment should be done before the Commonwealth agent takes an action, what must be assessed? For First Sentence Rights, the agent must consider “the environmental effect of any proposed action on the constitutionally protected features”⁹⁷—such as upon the right itself. In addition, given the concern that “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,”⁹⁸ the assessment must also consider whether the agent’s action will “infringe upon or violate” the First Sentence Right at issue.

In the case of Public Trust Rights, the answer lies in consideration of what the public trustee must do. The *Robinson Township* plurality found that “the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action” and “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.”⁹⁹ Given these obligations, the public trustee’s assessment must consider whether the action is “unreasonable” and whether it will result in “degradation, diminution, or depletion” of the public natural resource(s). Note that the plurality recognizes that such negative environmental effects can arise in a “direct” way (by the effect arising as result of a direct state action) as well as in an “indirect” way (by allowing a private party—for example, through the issuance of a permit—to engage in actions that result in the negative environmental effect). Public trust law reinforces this conclusion.¹⁰⁰

In the Public Trust Rights context, there is a second layer of analysis of “degradation, diminution, or depletion” that is tied to the duties owed to beneficiaries:

The second, cross-generational dimension of Section 27 reinforces the conservation imperative: future generations are among the beneficiaries entitled to equal access and distribution of the resources, thus, the trustee cannot be shortsighted . . . Moreover, this aspect of Section 27 recognizes the practical

action on constitutionally protected resources and values.” Dernbach, *Constitutional Trust*, *supra* note 14, at 486.

97. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013).

98. *Id.* at 952.

99. *Id.* at 957.

100. See *Waiahole Ditch*, 9 P.3d 409, 455 (Haw. 2000) (“[T]he public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources.”).

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.¹⁰¹

In connection with this recognition of the effect of future generations as beneficiaries, the plurality emphasized in a footnote that “[i]n undertaking its constitutional cross-generational analysis, the Commonwealth trustee should be aware of and attempt to compensate for the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.”¹⁰²

This notion of a comprehensive consideration of effects also has analogues in federal environmental law. In NEPA, environmental impact statements require discussion of “direct” and “indirect” effects.¹⁰³ “Effects” are broadly defined.¹⁰⁴ “Direct” effects are defined as effects or impacts “caused by the action and occur at the same time and place,”¹⁰⁵ while “indirect effects” are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”¹⁰⁶ These concepts could provide some persuasive guidance for interpreting what the assessment should cover and how far it should go.

Thus, Section 27 requires that the Pre-Action Assessment should include the following three component parts:

1. A determination of the environmental effects of the proposed governmental action, where “[e]nvironmental effects” include:
 - a. positive and negative impacts
 - b. immediate, short-term, and long-term impacts
 - c. effects that are incremental, compound over time, and/or may develop over generations
 - d. impacts that can arise “directly” in the sense that they result from the

101. 83 A.3d at 959. For support, the plurality cites John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 132–37 (1999).

102. 83 A.3d at 959 n.46.

103. 40 C.F.R. § 1502.16 (2016).

104. 40 C.F.R. § 1508.8 (2016) (“Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”).

105. *Id.* at § 1508.8(a).

106. *Id.* at § 1508.8(b). The sub-section continues: “Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.*

- agent's action itself, or "indirectly" from the actions of some non-Commonwealth party that the Commonwealth agent allows to take place.
2. In connection with First Sentence Rights, the assessment should analyze whether, in light of the determined environmental effects, the proposed action will unduly infringe upon or violate the right(s) involved and/or unreasonably cause actual or likely deterioration of those environmental features.
 3. In connection with Public Trust Rights, the assessment should analyze whether, in light of the determined environmental effects, the proposed action will be "unreasonable" and/or in fact result in degradation, diminution, or depletion of public natural resource(s), including both the resource(s) directly involved as well as other resource(s) that might be impacted by the action. Given the multi-generational beneficiaries of the public trust, the assessment should be conducted with due recognition of and compensation for the "bias" towards present consumption by the current generation.

The first of these components is about gathering data, while the second and third components are ultimate judgments based on the data as well as the consideration of the purposes of Section 27.

C. PROCEDURAL PRINCIPLE NO. 3: PERFORMING AND FORMALIZING THE PRE-ACTION ASSESSMENT

Given the scope of the Pre-Action Assessment required by Section 27, Commonwealth agents must develop a process for conducting the assessments that ensures the agent will have all of the important data generated and make the relevant determinations. The best way to do this is to create a formal process or procedure that the agent will follow with each Pre-Action Assessment. The formal process or procedure suggested here would have three elements.

1. Procedural Principle No. 3 Element 1: Generate the Complete Data Set on Environmental Effects of the Proposed Action

Determining the complete set of the environmental effects of the proposed action as described in the first component above is essential to accuracy and defensibility of the ultimate judgments made in the second and third components. The failure to include an environmental effect in the analysis could lead to an erroneous conclusion (for example, that there would be no degradation, diminution, or depletion of public natural resource(s)) which ultimately exposes the Commonwealth agent to Section 27 liability. Thus, it is crucial that the data on environmental effects be comprehensive and complete.

One possible approach is to develop a checklist of possible environmental effects that prompts a Yes or No response, with a Yes response triggering the need for further analysis and explanation. For example, "Will the proposed action have

any effect on state-owned timber resources?” A Yes response would then prompt further questions designed to identify what the impacts (whether positive or negative) would be. Such an approach provides an ease of use advantage; structured properly, a checklist can guide the agent to consider all listed impacts so that the result is comprehensive as to the listed impacts.

The checklist approach, however, has at least two risks. First, a single checklist could prove unwieldy; some actions might very well not implicate certain types of impacts (environmental effects involving air impacts, for example, might not be relevant to an action that will impact only water resources). Second, if the checklist is not comprehensive enough, a relevant environmental effect could be missed, and then the ultimate judgment would be flawed. Given the breadth of the effects that must be considered (positive and negative; immediate, short, and long term; incremental, compounding over time and/or generations), the checklist could easily miss one or more effects. Given that the breadth of effects to consider is so broad, it may be the case that each proposed action will have some effects that are unique to the action. A checklist that tries to capture all the possibilities would be very long.¹⁰⁷

A different approach could be to create a structured process in which the agent is required to identify and analyze different categories of environmental effects and require the agent to identify what was or was not considered. Thus, for example, the agent would identify all immediate environmental effects and describe how he/she considered those effects, then move onto short-term effects, and so forth. The risk with this approach is that it cannot ensure the agent will in fact consider all effects that could fall within the category. But by institutionalizing the process for analyzing effects, it would at least require the agent to explain the analysis done, making review of the decision easier.

2. Procedural Principle No. 3 Element 2: The Commonwealth Agent has the Ultimate Responsibility for the Assessment

The analysis described here will likely be complicated and hands-on. Thus, a question arises about who should do the analysis. Governmental agents may well view this as another task on an already-burdensome list of official duties. Therefore, it is at least fair to ask whether the task could be given to some non-governmental actor. For example, applicants for air permits in Pennsylvania

107. One solution to the problem of creating an exhaustive list of effects to include in the checklist would be to structure the checklist to ask a series of questions that prompt consideration of the category of effects without naming them. Thus, for example, the checklist could prompt the agent to identify all immediate environmental effects, all short term effects, etc., without listing what those effects might be. While this shortens the checklist, it also undermines the list's comprehensiveness, as it cannot ensure that the agent will in fact consider all of the effects that could fall within the category.

already must provide significant information about their emissions in the permit application;¹⁰⁸ could those applicants be tasked with providing a preliminary Pre-Action Assessment for government review so that the Commonwealth agent does not have to spend the time (and money)?

While such “outsourcing” might be tempting, it poses significant risks to the Commonwealth agent involved in such an approach. First, at least in the context of Public Trust Rights, the Commonwealth agent/public trustee has fiduciary duties to the beneficiaries of the trust, including the duties of prudent care and loyalty. While it is true that private trust law allows trustees to have agents perform some of the trustee’s duties,¹⁰⁹ the trustee must exercise “reasonable skill, care, and caution” in making the delegation by establishing the scope and specific terms of the delegation consistent with the purposes of the trust and review the agent’s actions to monitor for compliance with the scope and terms of the trust.¹¹⁰ Assigning trustee work to a party whose interests would appear to be potentially adverse to the interests of the beneficiaries runs the risk that the delegation might not be done with reasonable skill, care, and caution so that the trustee’s action might well violate the duty of prudent care and/or loyalty. Even if the trustee’s delegation can be said to meet the requirement of being done with reasonable skill, care, and caution (which would then allow the trustee to avoid liability for the actions of the delegated agent),¹¹¹ the delegated agent can be liable to the beneficiaries.¹¹² It is not clear that a private applicant would want to take on that liability.

That does not mean that the Commonwealth agent cannot seek input from the applicant as part of the Pre-Action Assessment. Indeed, the applicant may well have some insights that would assist the agent in performing the analysis. But in that scenario, no “delegation” occurs; instead, the Commonwealth agent is still responsible for performing the Pre-Action Assessment independently and cannot simply “rubber stamp” the applicant’s conclusions. The Commonwealth agent, as trustee, bears the ultimate responsibility to ensure that the required comprehensive Pre-Action Assessment take place.

108. See, e.g., 25 PA. CODE § 127.411 (2008) (requiring operating permit applications contain information demonstrating, among other things, compliance with applicable requirements of state and federal law, minimal new source emissions through use of best available technology, attainment or maintenance of ambient air quality standards); 25 PA. CODE § 127.503 (2008) (identifying emission-related information that must be included in a Title V permit application).

109. See 20 PA. CONS. STAT. § 7777(a) (2010).

110. *Id.*

111. *Id.* at § 7777(c) (“A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.”).

112. *Id.* at § 7777(b).

3. Procedural Principle No. 3 Element 3: The Assessment Should be Memorialized

Precisely because the governmental action can implicate Section 27, and claims can be brought for the failure to comply with Section 27,¹¹³ a final essential aspect of the process of the Pre-Action Assessment is that the agent creates a reviewable record of how the decision was made. The development of a record allows a reviewing court to determine whether the decision-maker considered the appropriate environmental effects and, if so, whether that consideration satisfies the constitutional requirements of Section 27.¹¹⁴ This notion of creating an “administrative record” is a core concept within Pennsylvania’s statute governing the practice of administrative agencies¹¹⁵ and a standard requirement of courts reviewing decisions by Commonwealth agents.¹¹⁶ The record should contain both the agent’s determination of the environmental effects (component one above) and an explanation of the agent’s ultimate judgments (components two and three) as well as the reasons for those conclusions.

III. DEVELOPING PRINCIPLES FOR CONCRETE SUBSTANTIVE ACTIONS TO ENSURE COMPLIANCE WITH ARTICLE I, SECTION 27 DUTIES

With a comprehensive, workable process in place, it is equally important to develop guiding principles to make sure that the actual substance of the decision meets the requirements of Section 27. In other words, the ultimate judgments made in the second and third process components outlined in the previous section need to be “correct” in that they comply with the substantive requirements of Section 27. What makes a government action “unreasonable” so that First Sentence or Public Trust Rights can be found to be violated? How should the agent or court measure whether an identified environmental effect results in “degradation, diminution, or depletion of public natural resources” so as to violate Public Trust Rights?

113. See *supra* note 14.

114. See Dernbach, *Constitutional Trust*, *supra* note 14, at 495.

115. See 2 PA. CONS. STAT. § 504 (2012) (full and complete record shall be kept in agency adjudicative proceedings); *Id.* at § 507 (“All adjudications of a Commonwealth agency shall be in writing, [and] shall contain findings and the reasons for the adjudication . . .”).

116. See, e.g., *Hinkle v. City of Philadelphia*, 881 A.2d 22, 26 (Pa. Commw. Ct. 2005) (agency required by due process and 2 PA. CONS. STAT. § 507 to set forth the reasons behind its decision); *Popowsky v. Pennsylvania Public Utility Commission*, 683 A.2d 958, 962 (Pa. Commw. Ct. 1996) (“A factfinder, under the Administrative Agency Law, is required to include findings necessary to resolve the issues raised by the evidence and relevant to the decision.”).

A. SUBSTANTIVE PRINCIPLE NO. 1: STATUTORY COMPLIANCE DOES NOT EQUAL SECTION 27 COMPLIANCE

Section 27's duties are not the only duties that Commonwealth agents must address. State agencies and their employees have statutory obligations they must also satisfy. So, for example, the Department of Environmental Protection, while obviously concerned about "clean air" and "pure water" First Sentence Rights and conserving and maintaining public air and water resources protected under the Public Trust Rights, must also implement and carry out the Air Pollution Control Act¹¹⁷ and the Clean Streams Act.¹¹⁸ Municipal officials have Section 27 duties as well as the need to comply with local ordinances and the Pennsylvania Municipalities Planning Code.¹¹⁹ Does the fact that the Commonwealth agent is doing something (likely pursuant to a statutory grant of power) that addresses an environmental harm satisfy Section 27? What if Commonwealth agents act in compliance with their statutory duties—does that show compliance with Section 27 regardless of whether it adequately addresses an environmental harm?

It is initially important to recognize that legislation is the primary way that the General Assembly can discharge its obligations under Section 27. The *Robinson Township* plurality, in recognizing an obligation on the public trustee "to act affirmatively to protect the environment, via legislative action,"¹²⁰ noted that "[t]he General Assembly has not shied from this duty," having enacted numerous environmental statutes like the Clean Streams Act and Air Pollution Control Act.¹²¹ In fact, legislation serves to provide details by defining regulatory power and duties, prohibited conduct, and technical standards not set forth in the generalized terms of Section 27.¹²² Several Pennsylvania environmental statutes contain language referencing Section 27 or the rights contained therein.¹²³ In short, statutes can play a role in the Section 27 context.

117. 35 PA. STAT. AND CONS. STAT. ANN. §§ 4001–4015 (West 2016).

118. 35 PA. STAT. AND CONS. STAT. ANN. §§ 691.1–691.8 (West 2016).

119. 53 PA. STAT. AND CONS. STAT. ANN. §§ 10101–10109 (West 2016).

120. *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 958 (Pa. 2013).

121. *Id.*

122. *Id.*

123. *See, e.g.*, Dam Safety and Encroachment Act, 32 PA. STAT. AND CONS. STAT. ANN. § 693.2(3) (West 2016) (one of four enumerated purposes of Act is to "protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution"); Hazardous Sites Cleanup Act, 35 PA. STAT. AND CONS. STAT. ANN. § 6020.301(16) (West 2016) (one of sixteen enumerated powers and duties in Act is to "[i]mplement Section 27 of Article I of the Constitution of Pennsylvania"); Land Recycling and Environmental Remediation Standards Act, 35 PA. STAT. AND CONS. STAT. ANN. § 6026.102(4) (West 2016) (one of nine enumerated findings and declarations of policy is "[t]he General Assembly also has a duty to implement the provisions of Section 27 of Article I of the Constitution of Pennsylvania with respect to environmental remediation activities"); Wild Resource Conservation Act, 32 PA. STAT. AND CONS. STAT. ANN. § 5302(1) (West 2016) (one of eight enumerated purposes of Act is to "further provide for such species so as to enhance the constitutional rights guaranteed in section 27"); Pennsylvania Safe Drinking Water Act, 35 PA. STAT. AND CONS. STAT. ANN. 721.2(b) (West 2016) (stating "it is the purpose of this act to further the intent of section 27"); Solid Waste Management Act, 35 PA.

The fact that statutes may have a role to play does not mean, however, that statutory enactment ends the matter. Indeed, it is important to remember that statutes are subject to constitutional provisions like Section 27. As the *Robinson Township* plurality noted:

The General Assembly derives its power from the Pennsylvania Constitution in Article III, Sections 1 through 27. The Constitution grants the General Assembly broad and flexible police powers embodied in a plenary authority to enact laws for the purposes of promoting public health, safety, morals, and the general welfare [A]lthough plenary, the General Assembly's police power is not absolute; this distinction matters. Legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth *Specifically, ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution.*¹²⁴

In other words, the legislative power cannot interfere with the fundamental rights set forth in Article I; thus, a statute can never trump what Article I requires. Indeed, to drive home this point, the plurality continued:

Section 25 of Article I articulates this concept in no uncertain terms: “[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” Accordingly, Article I of our Constitution, as a general matter, is not a discrete textual source of police power delegated to the General Assembly by the people pursuant to which legislation is enacted 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 [Thus] [t]he 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.”¹²⁵

STAT. AND CONS. STAT. ANN. 6018.102(10) (West 2016) (one of eleven enumerated purposes is to “implement Article I, section 27 of the Pennsylvania Constitution”); Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, 53 PA. STAT. AND CONS. STAT. ANN. 4000.102(b) (West 2016) (one of fourteen enumerated purposes is to “implement Article I, section 27 of the Pennsylvania Constitution”); Oil and Gas Act, 58 PA. CONS. STAT. § 3202 (2012) (one of four enumerated purposes is to “protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania”).

124. 83 A.3d at 946–47 (emphasis added).

125. *Id.* at 947–48 (quoting *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1334–35 (Pa. 1986)). The plurality makes this same point in a slightly different way when, after recognizing the requirement in the first sentence to consider environmental effects in advance of taking action, it states: “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.” *Id.* at 952.

In short, Section 27—as part of the Declaration of Rights in Article I—imposes a limit on the General Assembly’s power to legislate, and thus legislation is always subject to (and therefore subordinate to) Section 27.

This constitutional reality has two important effects. First, legislation can never limit the reach or application of Section 27. Thus, the General Assembly could never pass a statute which, in word or effect, violated a First Sentence or Public Trust Right. Such a statute would be unconstitutional because it violates Section 27 and because the General Assembly had no constitutional power to pass the statute given the inherent nature of the limits that Article I imposes on the legislature. Just as important, a statute which seeks to limit Section 27 (by, for example, in word or effect specifying or implying that a particular action is sufficient to satisfy Section 27) cannot stand. That is the bottom-line effect of the *Robinson Township* plurality’s finding that certain provisions of Act 13 amending the Oil and Gas Act violated Section 27: “[c]onstitutionalizing public rights . . . means that these rights trump inconsistent statutes and regulations.”¹²⁶ Second, the mere existence of a statute does not mean that compliance with the statute equals compliance with Section 27 because the statute itself *as well as the actions taken in compliance with the statute* must still be measured against what Section 27 requires.

Nevertheless, because statutes provide frameworks by which Commonwealth agents act, it is possible that agents and courts may view statutes as “shortcuts” in the Section 27 analysis. There are at least two ways this can occur. The first involves a claim that the Commonwealth is taking some action pursuant to a statute—i.e., “doing something”—to address an environmental problem, and thus this mere action by the Commonwealth is sufficient by itself to satisfy Section 27. The second is the straightforward claim that, by complying with a statute, the Commonwealth agent has done all it needs to do to comply with Section 27.

As to the first of these shortcuts, the proof that mere action or “doing something”—even action that superficially appears to be beneficial—does not always equal Section 27 compliance can be found in some simple examples. For example, Public Trust Rights implicate principles of private trust law. A private trustee with control over a trust that includes a Picasso painting worth \$10 million could sell that painting for \$1000 to a dealer with whom he does other business. He will have “done something” that benefits the beneficiaries of the trust by generating \$1000 in cash. But no one would say that the trustee satisfied his obligations to the beneficiaries. The inadequacy of the price suggests a failure of prudence in the administration of the trust; his dealings with the purchaser might show self-dealing in breach of the duty of loyalty.¹²⁷ Thus, the fact that the trustee

126. Dernbach, *Constitutional Trust*, *supra* note 14, at 471.

127. See *Estate of Rothko*, 372 N.E.2d 291 (N.Y. 1977), for an example of this scenario.

did *something* does not establish compliance with the trust—otherwise, every trustee’s breach of duty would not be actionable. A similar conclusion applies in the context of First Sentence Rights. The forestry management program in the example above might be conducted in such a way that it pollutes a stream so that a citizen’s right to clean water is violated. The Commonwealth agent’s action—her “doing something”—does not prove compliance but instead results in a violation of a First Sentence Right.

The problem with a “we’re doing something” claim is that it is focused on the wrong thing: the action. What Section 27 requires is a focus on the *environmental effect* of the action. The appropriate question is not “Is the Commonwealth doing something?” Rather, it should be “Does the Commonwealth’s action unduly infringe upon or violate the right(s) involved and/or unreasonably cause actual or likely deterioration of those environmental features (with respect to First Sentence Rights)” and “is it unreasonable or will it directly or indirectly result in degradation, diminution, or depletion of public natural resource(s) (with respect to Public Trust Rights)?” Some Commonwealth actions may in fact generate negative answers to these questions, but will do so only because analysis of the environmental effects leads to those conclusions. Thus, the fact that the Commonwealth is “doing something” should never be the sole basis for a finding of Section 27 compliance. Rather, the Commonwealth’s action must be assessed in terms of the environmental effects of the action, and it is those environmental effects that will determine whether the action comports with Section 27.

The straight statutory compliance “shortcut” is similarly faulty. As noted above, statutes are subordinate to the constitutional limitations placed on the General Assembly; thus, if a statute or its application does not meet the constitutional requirement, compliance with the statute cannot bootstrap or create constitutional compliance. *Robinson Township* found unconstitutional provisions of a statute that expressly stated that its purpose was to “protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.”¹²⁸ Thus, statutory compliance alone is not enough; consideration of Section 27 principles must still take place.

This conclusion holds despite the role statutory compliance has played in the interpretation and application of Section 27 by Pennsylvania’s lower courts. In *Payne v. Kassab*,¹²⁹ the Commonwealth Court articulated a three-part test for disposing of claims made under Section 27:

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

128. Oil and Gas Act, 58 PA. CONS. STAT. § 3202 (2012).

129. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff’d* 361 A.2d 263 (Pa. 1976).

resources rather than no development. We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources. Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (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 the 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?¹³⁰

Thus, under the *Payne* test, judicial review starts with the question of whether there was "compliance with all applicable statutes and regulations." Despite criticism,¹³¹ the *Payne* test became the "all-purpose test for applying Article I, Section 27 when there is a claim that the Amendment itself has been violated."¹³² An analysis of the application of the *Payne* test published in 2015 reported that 23 of 24 reported lower court cases and 47 out of 55 reported administrative agency decisions found no Section 27 violations.¹³³ Some of these decisions appear to rely primarily—if not exclusively—on a finding of statutory compliance under the first prong of the test,¹³⁴ including (arguably) the Supreme Court's affirmance of the Commonwealth Court's decision in *Payne*.¹³⁵

130. 312 A.2d at 94.

131. See John C. Dernbach, *Taking The Pennsylvania Constitution Seriously When It Protects The Environment: Part I—An Interpretative Framework For Article I, Section 27*, 103 DICK. L. REV. 693, 696 (1999) ("The test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful.").

132. John C. Dernbach, *Natural Resources and the Public Estate*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 29.3[a] (Ken Gormley et al. eds., 2004). See also Robinson Twp. v. Commonwealth, 83 A.3d 901, 966 (Pa. 2013) ("[T]he *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text.").

133. Dernbach and Prokopchak, *supra* note 4, at 344, 348.

134. See, e.g., Szarko v. Dept. of Envtl. Res., 668 A.2d 1232 (Pa. Commw. Ct. 1995); O'Connor v. Pa. Pub. Util. Comm'n, 582 A.2d 427 (Pa. Commw. Ct. 1990); Snelling v. Dep't of Transp., 366 A.2d 1298 (Pa. Commw. Ct. 1976); Cmty. Coll. Of Del. Cnty. v. Fox, 342 A.2d 468 (Pa. Commw. Ct. 1975).

135. In affirming the *Payne* decision of the Commonwealth Court, the Supreme Court recognized that "There can be no question that the Amendment itself declares and creates a public trust of natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them." *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976). The Supreme Court then found that the safeguards provided by the state transportation statute, which prohibited highway construction through public parks unless there was no feasible alternative and the facility was designed and constructed to minimize harm to the park, "vouchsafe that a breach of the [Section 27 public] trust . . . will not occur" if state agencies comply with those safeguards. *Id.* at 273. Although on the surface this

By the time *Robinson Township* came before the court (and the *Payne* test's jurisprudence had more fully developed), the *Robinson Township* plurality found grounds to, and in fact did, criticize the *Payne* test:

In its subsequent applications, the Commonwealth Court has indicated that the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly's policy choices, rather than by the plain language of the amendment But, while the *Payne* test may have answered a call for guidance on substantive standards in this area of law and may be relatively easy to apply, the test poses difficulties both obvious and critical. First, the *Payne* test describes the Commonwealth's obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court's *Payne* decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control.¹³⁶

Despite this criticism, the Commonwealth Court has continued to apply the *Payne* test post-*Robinson Township* on the grounds that the discussion in *Robinson Township* was not a majority decision,¹³⁷ and therefore *Payne* continues to be applied as binding precedent by the Commonwealth Court.¹³⁸

Whether or not the *Payne* test should continue to have persuasive or precedential effect in light of *Robinson Township*,¹³⁹ the test as articulated proves that mere compliance with a statute does not end the Section 27 analysis. The second and third prongs of the *Payne* test are clearly focused on consideration of environmental effects (the minimization of “environmental incursion” in prong two and “environmental harm” in prong three); statutory compliance alone is not enough. Further, like the “mere action” concept discussed above, statutory

language could be taken to mean that compliance with the statute equaled compliance with Section 27, it appears that the Court was persuaded by the *substance* of what the statute required: limitation to situations where no feasible and prudent alternative existed and minimization on harm to the park. While the Supreme Court noted the use of the three-part test, *id.* at 273 n.23, it viewed the test as requiring “nothing more in this case than does normal appellate review” of actions under the transportation statute, *id.*; it did not adopt the test or approve its general use. *See* Dernbach & Prokopchak, *supra* note 4, at 343 (discussing *Payne* affirmation: “The Supreme Court did not understand the three-part test to be an all-purpose substitute for the text of the Amendment”).

136. 83 A.3d at 966–67.

137. *See* Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015).

138. *See, e.g.,* Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot., 131 A.3d 578, 589 (Pa. Commw. Ct. 2016).

139. There are many reasons to think that the *Payne* test should no longer be “the all-purpose test” for applying Section 27 after *Robinson Township*, including those articulated by the plurality. Fully discussing those reasons is beyond the scope of this article. For a more complete analysis and critique of the *Payne* test, see Kenneth T. Kristl, *It Only Hurts When I Use It: The Payne Test and Pennsylvania's Environmental Rights Amendment*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10594 (2016).

compliance by itself focuses on the action instead of the environmental effects of the action. A proper Section 27 analysis still requires a determination of whether the action nevertheless fails to comply with the duties imposed by First Sentence and Public Trust Rights. As such, statutory compliance should never be the sole basis for finding Section 27 compliance.

This is not to say that statutory compliance has *no* role to play in determining Section 27 compliance. As noted earlier, the *Robinson Township* plurality suggested that state and federal air and water laws and regulations may play a role in helping to define what “clean air” and “pure water” might mean for purposes of First Sentence Rights.¹⁴⁰ A statutory scheme like that in the Air Pollution Control Act or the Clean Streams Act might provide a starting place for consideration of Public Trust Rights. A properly-constructed statute can also go a long way toward protecting the rights stated in Section 27. What is critical, however, is to recognize that Section 27 requires going beyond the statutory provisions to consideration of the language and purposes of Section 27 itself: “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.”¹⁴¹

B. SUBSTANTIVE PRINCIPLE NO. 2: SECTION 27 COMPLIANCE CONCERNING FIRST
SENTENCE RIGHTS SHOULD BE MEASURED BY REFERENCE TO REASONABLENESS
ROOTED IN THE TEXT AND PURPOSE OF THE AMENDMENT

As described earlier in this article, the text of Section 27, the interpretation of that text by the *Robinson Township* plurality, and principles from private and public trust law all provide important general guideposts for determining substantive compliance with different parts of Section 27. The guideposts for determining substantive compliance with First Sentence Rights can be summarized as follows:

- Citizens have “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” (Text).¹⁴²
- “Clean” air and “pure” water “have relative rather than absolute attributes” (Plurality).¹⁴³
- Commonwealth officials have a duty “to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action” (Plurality).¹⁴⁴

140. See 83 A.3d at 953.

141. *Id.*

142. PA. CONST. art. I, § 27.

143. 83 A.3d at 953.

144. *Id.* at 952.

- Section 27 “protects the people from governmental action that unreasonably causes actual or likely deterioration of these features” (Plurality).¹⁴⁵

These guideposts suggest some important discrete elements that can generate concrete, practical principles for measuring Section 27 compliance concerning First Sentence Rights.

1. Substantive Principle No. 2 Element 1: First Sentence Rights are Independent of Public Trust Rights

First Sentence Rights have some important distinctions from the Public Trust Rights in Section 27. The first is textual; First Sentence Rights are created in a different part of Section 27, and the fact that the text identifies both First Sentence and Public Trust rights separately means that they must have some differences or distinctions (or else there would be no need to mention them twice). The second is that First Sentence Rights cover different ground than the Public Trust Rights; while Public Trust Rights apply only to “public natural resources,” First Sentence Rights are not so limited. The right to “pure water” covers both private and public water. The “preservation of the natural, scenic, historic and esthetic values of the environment” appears to be broader in coverage than what could conceivably fall within Public Trust Rights. In short, although there might be some overlap concerning the resources (like air and water) involved, First Sentence Rights are different and therefore independent of Public Trust Rights.¹⁴⁶

This independence is important because it means that a cause of action based on violation of a First Sentence Right need not implicate (and therefore does not require) Public Trust Right issues or principles for its resolution.¹⁴⁷ This does not mean that claims asserting violations of both types cannot be brought;¹⁴⁸ but it does mean each type of claim can stand on its own. As a result, a Commonwealth

145. *Id.* at 953.

146. See Dernbach, *supra* note 131, at 700 (“The two parts [of Section 27] differ in scope, in the types of rights they create, and in the responsibilities they articulate for the state. Because these two parts contain separate legal rules, it is impossible to analyze the Amendment in a useful manner unless each part is discussed separately.”); *id.* at 701–04 (discussing the differences in detail).

147. See ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 175 (1985) (“If the courts were to accept the clear language of the section as expressing two separate concepts, it would result in a more logical and orderly application of the section, and would permit a more accurate application of the principles of constitutional construction and of trusts.”).

148. This is not to say that claims based on violations of both First Sentence and Public Trust Rights cannot be brought. Indeed, as the *Robinson Township* plurality noted, “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.” 83 A.3d at 950–51. As John Dernbach put it, “when the two parts overlap, they both apply. To the extent that air and water have not been privately appropriated, they are subject to both [First Sentence] environmental rights and the public trust doctrine. Natural, scenic, historic, and esthetic values of the environment that are on public lands are also subject to both parts of the Amendment.” Dernbach, *supra* note 131, at 701–02.

agent must consider First Sentence Rights *in addition to* Public Trust Rights when analyzing the Section 27 compliance of a proposed action, and a reviewing court must analyze First Sentence Rights claims independently of the Public Trust Rights claims. Given their independence from Public Trust Rights, it is therefore important to identify the First Sentence Rights at issue in connection with the Commonwealth agent's action.

2. Substantive Principle No. 2 Element 2: Violations of First Sentence Rights Arise from the Actual or Likely Deterioration of the Feature Underlying the Right as Measured by the Action's Environmental Effects

As noted in the third general guidepost set forth above, the *Robinson Township* plurality viewed First Sentence Rights as protecting against government action that "causes actual or likely deterioration of these features."¹⁴⁹ The "features" being referenced here are the environmental features to which the right attaches—such as "clean air," "pure water," and the "natural," "scenic," "historical," or "esthetic" values of the environment. In this formulation, a violation of a First Sentence Right occurs when the government action actually leads or is likely to lead to a deterioration of one or more of these environmental features.

What does it mean for one of these features to "deteriorate?" The dictionary defines this term as "to make or become worse or inferior in character, quality, [or] value."¹⁵⁰ Thus, if the government action actually does or likely will make the air or water quality worse, or make the natural, scenic, historical or aesthetic value of the environment inferior to what it was, then a violation of a First Sentence Right might be occurring. How can one determine if a feature has deteriorated or will deteriorate? The environmental effects identified in a properly-prepared Pre-Action Assessment should provide the information needed to make such a determination.

3. Substantive Principle No. 2 Element 3: Violations of First Sentence Rights Occur when the Deterioration is Unreasonable as Measured by the Purpose of Section 27 to Prevent Actual or Likely Deterioration of Environmental Resources

The *Robinson Township* plurality recognized that not all "deteriorations" of underlying environmental features should be actionable violations of First Sentence Rights. When discussing First Sentence Rights, the plurality took pains to note that:

The Environmental Rights Amendment does not call for a stagnant landscape; nor . . . for the derailment of economic or social development; nor for a

149. 83 A.3d at 953.

150. *Deteriorate*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 541 (2d ed. 2001).

sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster.¹⁵¹

This notion that economic and social development can still occur under Section 27 was further explained in this way:

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.¹⁵²

Thus, the plurality resolves the potential conflict between economic development and First Sentence Rights by making “unreasonable degradation of the environment” to be the trigger for First Sentence protection.

How, then, does a Commonwealth agent or court determine the boundary between “reasonable” and “unreasonable” degradation of the environment? The decision must be guided by the language and purpose of Section 27 itself. As the *Robinson Township* plurality put it:

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 . . . 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.¹⁵³

As the *Robinson Township* plurality also suggested,¹⁵⁴ a different way to look at reasonableness in this context is by reference to the concept of sustainable

151. 83 A.3d at 953.

152. *Id.* at 954.

153. *Id.* at 953.

154. *Id.* at 958.

development (discussed more fully *infra* Section III.C). Thus, a different (and perhaps more accessible) approach to determining whether the “actual or likely deterioration” is unreasonable is to ask whether the action produces a sustainable result.

4. Substantive Principle No. 2 Element 4: The Combined Substantive Analysis for First Sentence Rights Claims

Combining the concepts of these three sub-principles together, agents and courts can analyze an action’s compliance with Section 27’s First Sentence Rights and obligations by considering at least these factors:

1. The extent to which the action will cause an actual or likely deterioration of the feature (air, water, “natural,” “scenic,” “historical,” or “esthetic” values of the environment) underlying the First Sentence Right, as measured by the environmental effects identified in a properly-prepared Pre-Action Assessment.
2. The extent to which the “actual or likely deterioration” is unreasonable as measured by the language and purpose of Section 27 itself, including principles of sustainability.

C. SUBSTANTIVE PRINCIPLE NO. 3: SECTION 27 COMPLIANCE CONCERNING PUBLIC TRUST RIGHTS SHOULD BE MEASURED BY REFERENCE TO THE CONCEPT OF SUSTAINABILITY

The guideposts for determining substantive compliance with Public Trust Rights found in text of Section 27, the interpretation of that text by the *Robinson Township* plurality, and principles from private and public trust law can be summarized as follows:

- Public natural resources “are the common property of all the people, including generations yet to come” that the Commonwealth and its agent, as trustee, “shall conserve and maintain them for the benefit of all the people” (Text).¹⁵⁵
- What constitutes “public natural resources” covered by the Section “implicates relatively broad aspects of the environment” that “includes not only state-owned lands, waterways, and mineral resources, 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” (Plurality).¹⁵⁶
- The public trustee’s duty to “conserve and maintain” the public resources “implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources” that includes both a duty to refrain

155. PA. CONST. art. I, § 27.

156. 83 A.3d at 955.

- from permitting or encouraging” such degradation and a duty to “act affirmatively to protect the environment, via legislative action” (Plurality).¹⁵⁷
- The public trustee is a fiduciary for and must act in the interest of the beneficiaries of the trust (Private trust law).¹⁵⁸
 - Because the beneficiaries of the trust are multi-generational, “the trustee has an obligation to deal impartially with all beneficiaries and . . . balance the interests of present and future beneficiaries” (Plurality).¹⁵⁹

The *Robinson Township* plurality provided an important clue to help identify concrete applications of these guideposts:

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*.¹⁶⁰

This concept of allowing use of trust property but only in a “sustainable” way is also found in private trust law. Precisely because the duty of impartiality requires a trustee to treat successive or multi-generational beneficiaries equitably,¹⁶¹ capital assets in a perpetual financial trust that produce income (in the form of interest, dividends, rent, and the like) can have this income distributed to present generation beneficiaries while the asset (principal) is preserved for future generation beneficiaries (who will then get the income from the investment when they are the “present generation” while the principal is preserved for future generations). This strategy is “sustainable” because it maintains the ability of the trust to provide a similar benefit (the income) to each generation of beneficiaries in perpetuity.

Thus, in connection with Public Trust Rights, compliance with Section 27 involves making sure that the environmental effects of the Commonwealth agent’s action result in a “sustainable” use of the public natural resource(s) which equitably benefits “all the people” including “generations yet to come.”

Section 27 has one explicit demand on the public trustee: to “conserve and maintain” the public natural resource(s) involved “for the benefit of all the

157. 83 A.3d at 957–58.

158. RESTATEMENT (THIRD) OF TRUSTS § 86 (2007).

159. 83 A.3d at 959.

160. *Id.* at 958 (emphasis added). The plurality cites to *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 727–29 (Cal. 1989), describing the case as holding that “public trust doctrine permits sovereign to utilize trust resources required for prosperity and habitability of state, even if uses harm trust corpus; but, before state courts and agencies approve use of trust resources, they must consider effect of use upon public trust interests and attempt, so far as feasible, to avoid or minimize any harm to those interests” For a thoughtful discussion of what “sustainable development” means, see John C. Dernbach, *Creating The Law Of Environmentally Sustainable Economic Development*, 28 PACE ENVTL. L. REV. 614 (2011).

161. See 20 PA. CONS. STAT. § 7773 (2010); RESTATEMENT (THIRD) OF TRUSTS § 79 (2007).

people.” Concrete, practical principles for measuring Section 27 compliance emerge from each of the parts of this textual demand. The analysis would involve these elements.

1. Substantive Principle No. 3 Element 1: Sustainability in the Context of
“Conserve and Maintain”

As discussed above in Section I on the general principles of Section 27, the *Robinson Township* plurality found, “[t]he 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,”¹⁶² whether through direct action by the state on the resource or indirectly by allowing a private party to so affect the resource.¹⁶³ The private trust law duty to protect the trust property¹⁶⁴ imposes a similar type of obligation on the public trustee: “The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res [sic] which would be performed by a reasonably prudent man”¹⁶⁵ Thus, what a Commonwealth agent must do to comply with the public trustee duties of Section 27 is to preserve and protect the public natural resource(s) so as to prevent (or in some cases remedy) the degradation, diminution, or depletion of the resource(s). Put in the language of the *Robinson Township* plurality’s sustainability concept, an action will promote “sustainable development” and therefore comply with Section 27 if it will prevent or remedy the degradation, diminution, or depletion of the public natural resource(s) involved.

Measuring that compliance begins with the complete identification and assessment of environmental effects mandated in the Pre-Action Assessment described in Section II *supra*. Once that complete list is generated, the agent or court can then use the list to make the substantive assessment of whether or not the action prevents or remedies degradation, diminution, or depletion of the public natural resource(s).

One way to approach the substantive analysis is to define the terms “degradation,” “diminution,” and “depletion” and use those definitions as guideposts in the Section 27 substantive analysis.¹⁶⁶ These terms have been defined as follows:

162. 83 A.3d at 957.

163. *Id.* at 957–58.

164. 20 PA. CONS. STAT. § 7779 (2010).

165. George C. Bogert et al., *BOGERT’S TRUSTS AND TRUSTEES* § 582, 346 (West rev. 2d ed. 1980). *See also* RESTATEMENT (SECOND) OF TRUSTS § 176 (1959) (“The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.”).

166. The idea of using definitions is not new. Pennsylvania law specifies that, for statutes, “words and phrases shall be construed according to . . . their common and approved usage” 1 PA. CONS. STAT. § 1903 (2012). Courts have recognized that using a dictionary is an acceptable means of determining common and approved usage. *See St. Ignatius Nursing Home v. Dep’t of Pub. Welfare*, 918 A.2d 838, 845 (Pa. Commw. Ct. 2007) (“in ascertaining the common and approved usage or meaning of a word, we can resort to a dictionary”).

- Degradation: the act of degrading or state of being degraded, where “degrade” is defined as “to lower in character or quality; debase;” “to reduce in amount, strength, intensity, etc.,” “to weaken or worsen; deteriorate.”¹⁶⁷
- Diminution: “the act, fact, or process of diminishing; lessening; reduction,” where “diminish” is defined as “to make or cause to seem smaller, less, less important, etc.; lessen; reduce.”¹⁶⁸
- Depletion: the act of depleting, where “deplete” is defined as “to decrease seriously or exhaust the abundance or supply of.”¹⁶⁹

With this definitional approach, a Commonwealth agent or a court would take the environmental effects identified in the Pre-Action Assessment and determine whether one or more of these definitions have been satisfied. If so, then the action does not comport with Section 27.

Of course, this definitional exercise requires a certain amount of reasonableness and common sense. Cutting down a single tree in a 1000-acre state forest does “reduce” the timber resource by one tree but may not amount to a “diminution” of the public resource; clear-cutting the entire 1000 acres, however, could do so. The guiding principle should be whether or not the action can fall within the notion of “sustainable development.”¹⁷⁰

The definitional approach may raise other questions based on the definitions themselves. For example, how much “lower in character or quality,” “debasement,” “reduction in amount, strength, intensity,” “weakening or worsening,” or “deterioration” must occur for there to be “degradation”? As noted above, cutting one tree is literally a reduction but may not satisfy the concept of “diminution.” Thus, it would be helpful to have additional guidance to help understand the parameters of these terms.

a. Impairment of Resources

One way to measure for degradation, diminution, and depletion is to examine the effect of the action on the resource(s) involved. Removing a single cup of water from a stream probably does not affect the quality of the water, the quantity of water available to downstream human users, or the environmental services (habitat for flora and fauna, water for wildlife, etc.) that the stream provides;

While the “degradation,” “diminution,” and “depletion” terms are neither statutory nor constitutional (as they are used in the *Robinson Township* plurality’s description of the public trustee’s duty), defining those terms can provide insight into what they can mean.

167. *Degradation*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 524 (2d ed. 2001).

168. *Diminution*, *id.* at 555.

169. *Depletion*, *id.* at 534.

170. As John Dernbach framed it, Section 27 “is not anti-development; it supports what was then called conservation and what we now call sustainable development . . . [which] has been defined as ‘socially responsible economic development’ that protects ‘the resource base and the environment for future generations.’” Dernbach, *supra* note 131, at 716–17 (quoting United Nations Conference on Environment and Development, Agenda 21, ¶ 8.7, U.N. Doc. A/CONF.151/26 (1992)).

removing a large percentage of the water (say, to provide water for natural gas hydrofracking), on the other hand, could have adverse effects on all those users and services. This suggests a criterion for applying the definitions: an action may amount to a degradation, diminution, or depletion when its effect is to impair the resource itself or the resource's functions or benefits. This notion of "impairment" is fact-, situational-, and resource-specific. Pollutants introduced into air, water, or soil will have different impacts depending on the quantity and toxicity of the pollutant, as well as the condition of the receiving medium. Thus, determining whether "impairment" will occur for Section 27 purposes requires close consideration of the environmental effects identified in a proper Pre-Action Assessment on all public natural resources affected by the action. Properly applied, an "impairment of the resources" standard would allow for both the *de minimis* exceptions discussed in Section I *infra* and the example of cutting one tree down *supra* to pass muster under Section 27 because it allows for the sustainable development that the *Robinson Township* plurality saw as allowable under Section 27.

b. Effects on Renewable Resources

A different way to think of impermissible impairment is to consider the nature of the resource involved. Some resources are renewable—proper management of the use will allow the resource to regenerate and therefore continue to provide the same benefits. Timber harvested in a sustainable manner allows for present use of the timber while making sure that future timber resources are available through managed replanting; clear cutting without managed replanting does not (and therefore likely amounts to a diminution and/or depletion of the resource). Fishing and game stocks are similarly renewable; appropriate limits on the amount that can be fished or hunted allows for present enjoyment while seeking to preserve the resource so that future fishing or hunting can occur.¹⁷¹ In the conceptual language of private trust law, the sustainable harvest of a renewable resource is the "income," while the remaining stock (along with new "replacement" resources) necessary to generate future harvests is the "principal," and the trustee's obligation is to protect the principal from being diminished by present uses. "Sustainable development" occurs when the resource's ability to renew is not directly or indirectly impaired by the Commonwealth agent's action. Thus,

171. Some liken this concept to the principle that life-tenants are only entitled to the "usufruct" of the property that can replenish of its own accord. See Wood, *supra* note 17, at 170 ("The life-tenant may not purloin the capital portion of the account; in other words, he may pick the fruit, but he may not chop down the tree that bears the fruit."). Thomas Jefferson, in a 1789 letter to James Madison, stated his belief that "the earth belongs in usufruct to the living" because every generation comes equally to possession of the earth "unencumbered by their predecessors, who, like them, were but tenants for life." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in *SOCIAL AND POLITICAL PHILOSOPHY: READINGS FROM PLATO TO GANDHI* 261–63 (John Somerville & Ronald J. Santoni eds. 1963).

one measure of Section 27 compliance with renewable public natural resources is to examine the identified environmental effects to see if the renewability of the resource will be impaired.

This notion of measuring “sustainability” by reference to maintenance of renewable resources has analogues in the law. For example, the National Forest Management Act¹⁷² imposes a principle of “sustained yield” on timber harvesting;¹⁷³ similar concepts can be found in the federal Marine Mammal Protection Act.¹⁷⁴ Thus, sustainability as a driver of resource management is not a new or anomalous concept.

The fact that one resource’s development is sustainable does not, however, automatically mean that Section 27 compliance exists. The near-term effect may be good, but the long-term effect might reduce the resource’s renewability. Action taken that benefits one public natural resource may cause degradation, diminution, or depletion of another resource. This is why the completeness of the Pre-Action Assessment of environmental effects is so important. Section 27 compliance is not assured until the agent or court can establish that the action will prevent or remedy the degradation, diminution, or depletion of *all* public natural resources that the action might affect.

Non-renewable resources (for example, oil or natural gas in the ground) present a different issue; by their very nature, the “benefit” of the resource comes from the one time it is used. A cubic foot of publicly-owned natural gas only generates its value when it is extracted from the ground and sold or used. But such extraction and use would seem to only benefit the present generation—leaving nothing for the future generations of beneficiaries. One approach is to leave it in the ground so that all generations are treated equally (because none get the economic benefit). A different approach would allow extraction and sale but require that the proceeds be used in a manner that could benefit both present and future generations. For example, the proceeds could be put into a fund that generates income that is used by the present beneficiaries, while the principal in the fund assures future generations of a benefit. Or the funds could be used to purchase an asset (say, land converted into a state park) that can provide benefits to present and future generations. Indeed, this is the very approach taken by Pennsylvania in the 1955 statute creating the Oil and Gas Lease Fund—as described by the Commonwealth Court in *Pennsylvania Environmental Defense*

172. 16 U.S.C. §§ 1600–1687 (2012).

173. 16 U.S.C. § 1601(d)(1) (2012) (“It is the policy of the Congress that all forested lands in the National Forest System shall be maintained in appropriate forest cover with species of trees, degree of stocking, rate of growth, and conditions of stand designed to secure the maximum benefits of multiple use sustained yield management in accordance with land management plans.”).

174. 16 U.S.C. § 1361(2) (2012) (“[S]uch species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.”).

Foundation v. Commonwealth.¹⁷⁵

Under a 1955 law known as the Oil and Gas Lease Fund Act (Lease Fund Act) [71 P.S. §§ 1331–33], all “rents and royalties” from gas leases on Commonwealth land are to be deposited into a fund called the Oil and Gas Lease Fund (Lease Fund). The Lease Fund is to be “exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes.” Section 1 of the Lease Fund Act. The Lease Fund Act places the determination of “the need for and the location of any project authorized” by the Lease Fund Act within the discretion of DCNR. Section 2 of the Lease Fund Act. The Lease Fund Act expressly appropriates “[a]ll the moneys from time to time paid into” the Lease Fund to DCNR to carry out the purposes of the Lease Fund Act. Section 3 of the Lease Fund Act.¹⁷⁶

c. Remedy or Improvement of Resources

The *Robinson Township* plurality found within the “plain meaning” of “conserve and maintain” a duty to “prevent and remedy” the degradation, diminution, or depletion of public natural resources.¹⁷⁷ This means that the public trust imposes a two-sided obligation on Commonwealth agents. The first—found in the “prevent” aspect of the plurality’s analysis—requires the agent to avoid making things worse by directly or indirectly causing degradation, diminution, or depletion of the resource(s). The second—found in the “remedy” command—requires the agent to act in a way that improves (and therefore lessens) the degradation, diminution, or depletion that public nature resources have already suffered. This two-sided obligation means that it is not enough to show that action will not make things worse; rather, when dealing with an already-impaired resource, the action must have some effect that will make an impaired resource better.

2. Substantive Principle No. 3 Element 2: Sustainability in the Context Of Multi-Generational Beneficiaries

An additional practical principle for applying Section 27 in connection with Public Trust Rights arises from the fact that Section 27’s public trust is multi-generational because the public natural resources are “the common prop-

175. 108 A.3d 140 (Pa. Commw. Ct. 2015).

176. *Id.* at 143. In 2009 and 2010, as the Marcellus Shale boom occurred, the General Assembly changed the Act so that the millions of dollars in royalty funds would go not to the Lease Fund but to the General Fund to meet current, unrelated obligations. *Id.* at 145–46, 147–48. The Section 27 claim in *Pa. Env’tl. Def. Found.*, is at least in part about whether that diversion of funds to present uses violates the public trust obligations imposed by Section 27. *Id.* at 157.

177. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957–58 (Pa. 2013).

erty of all the people, *including generations yet to come*.”¹⁷⁸ By identifying future generations as beneficiaries of the public trust, Section 27 imposes on the public trustee fiduciary obligations to those generations. These include: a duty of loyalty that prevents favoring private or even present generation interests at the expense of the future generations and a duty to protect and preserve the property of the trust that prevents the present invasion of trust “principal” via unsustainable development. Indeed, the private trust law concept that successive or multi-generational beneficiaries must be treated equitably¹⁷⁹ means that the Section 27 analysis of whether an action is sustainable must include the consideration of future effects.

This notion of equitable treatment of the interests of present and future generations is captured in Edith Brown Weiss’ principle of intergenerational equity. She described it in this way:

Intergenerational equity calls for equality among generations in the sense that each generation is entitled to inherit a robust planet that on balance is at least as good as that of previous generations. This means all generations are entitled to at least the planetary health that the first generation had. In practice, some generations may improve the environment, with the result that later generations will inherit a richer and more diverse natural resource base. In this case, they would be treated better than previous generations. But this extra benefit would be consistent with intergenerational equity, because the minimum level of planetary robustness would be sustained and later generations would not be worse off than previous generations. The converse is also possible, that later generations would receive a badly degraded environment with major loss of species diversity, in which case they would be treated worse than previous generations. This latter case would be contrary to principles of intergenerational equity. Equity among generations provides for a minimum floor for all generations and ensures that each generation has at least that level of planetary resource base as its ancestors. This concept is consistent with the implicit premises of trusteeship, stewardship and tenancy, in which the assets must be conserved, not dissipated, so that they are equally available to those who come after.¹⁸⁰

Or, stated more succinctly: “[e]ach generation should maintain the quality of the planet so that it is passed on in no worse condition than the generation [that] received it, and each generation is entitled to an environmental quality comparable to that enjoyed by previous generations.”¹⁸¹

178. PA. CONST. art. I, § 27 (emphasis added).

179. See 20 PA. CONS. STAT. § 7773 (2010); RESTATEMENT (THIRD) OF TRUSTS § 79 (2007).

180. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 200 (1990).

181. LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 56 (1994) (citing EDITH WEISS BROWN, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989)).

For Section 27 purposes, the multigenerational component of the public trust means that the Commonwealth agent/public trustee must be able to show that the action will result in future generations receiving the public natural resource(s) impacted in no worse a condition than it is in now (or, to state it in prohibitory terms, that the action will not result in future generations receiving the public natural resource(s) impacted in worse condition). As the *Robinson Township* plurality said, because “future generations are among the beneficiaries entitled to equal access and distribution of the resources” and “the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations,” “[t]he 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.”¹⁸² This is why the consideration of long-term and incremental environmental effects in the Pre-Action Assessment is so important—it is impossible to know what the condition of the resource will be for future generations without looking at the possibility of impacts that may not show up for some time.

3. Substantive Principle No. 3 Element 3: The Combined Substantive Analysis for Public Trust Rights Claims

Combining the concepts of these two sub-principles together, agents and courts can analyze an action’s compliance with Section 27’s “conserve and maintain” requirement by considering at least these factors:

1. The extent to which the environmental effects of the action can be said to satisfy the definitions of degradation, diminution, or depletion.
2. The extent to which the resource(s) involved are impaired by the action.
3. The extent to which the renewability of all resources will be affected by the action.
4. The extent to which the action will remedy or improve the impaired resource(s) involved.
5. The extent to which the action can be said to promote development that is sustainable.
6. The extent to which the action will result in future generations receiving the impacted public natural resource(s) in no worse condition than it is now.

CONCLUSION

The revitalization of Pennsylvania’s Environmental Rights Amendment by the plurality decision in *Robinson Township* requires Commonwealth agents at the

182. 83 A.3d at 959.

state, regional, and local levels to take into account the First Sentence and Public Trust Rights of the Amendment when making decisions, as claims under the Amendment are likely to be the basis for challenges to those decisions. Likewise, courts must develop analytical approaches for considering and deciding those challenges that take into account the true legal implications of the constitutional mandate.

Section 27 has both procedural and substantive implications for Commonwealth agents and courts that provide a roadmap for the application of Section 27 that is true to the meaning and import of the Environmental Rights Amendment. Robust assessments of environmental effects *before* actions are taken are key to providing the information critical to discharging the constitution's requirements. Analysis of that comprehensive data by reference to the Amendment's text and purpose (as well as through the lens of legal obligations imposed by the fiduciary duties inextricably tied to the Public Trust Rights) are the only way to assure correct application of the Amendment. The concrete substantive factors identified here can help agents and courts begin to move towards achieving the amendment's original purpose. Application of these concrete procedural and substantive principles will allow Commonwealth agents and judges to assure that Section 27 plays a vital role in helping to protect Pennsylvania's environment and public natural resources. Just as importantly, recognition and application of these principles can help Pennsylvania serve as a national example of constitutional stewardship of environmental rights and public resources.