

PA Supreme Court ERA Ruling Allows Greater Protection (and Potentially Regulation) of Privately Owned Public Resources

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On April 19, 2023, the Pennsylvania Supreme Court upheld the Department of Environmental Protection's ("DEP") oil and gas regulations that, among other things, protect privately-owned "public resources," such as playgrounds and recreation areas, environmentally sensitive areas, and "common areas of a school's property." DEP's challenged regulations require applicants for a well permit to notify public resource agencies responsible for managing public resources and allow DEP to consider comments from those entities when reviewing permit applications. In challenging the regulations, the gas industry specifically alleged that DEP exceeded its authority by including areas such as schools and playgrounds in the definition of public resources.

Relying upon Article II, Section 27 of Pennsylvania's Constitution, the Environmental Rights Amendment ("ERA"), the Court acknowledged that the ERA establishes the Commonwealth as trustee of Pennsylvania's "public natural resources." More importantly, the Court stated that this term, as well as the term "public resources" used in the challenged regulations, is derived from the ERA. Therefore, these terms must be broadly interpreted to include all public resources, whether publicly or privately owned. The Court used an example of a privately owned, public resource in its decision referencing Frank Lloyd Wright's Fallingwater house. The Court stated "Suggesting that a site such as Fallingwater is not protected by the ERA rolls back almost 50 years of precedent by reading out of the ERA any protection of historic or aesthetic value that is created by humans."

One practical impact of the Court's decision is that privately owned properties that include areas such as playgrounds, recreation areas, or environmentally sensitive habitats are now clearly afforded protection under the ERA. The Court's ruling, however, could be used as a justification for greater governmental regulation of such private properties. Under the Court's rationale, these privately owned public resources are all part of the environmental trust protected by the ERA. Accordingly, the Commonwealth, as trustee of the public natural resources, arguably has the authority under the ERA to act to protect these resources. Such actions could include restrictions on property use to protect said resources.

The Court's decision will certainly not be the last word on how the ERA is interpreted and applied, as this area of law is constantly evolving. If you have any questions pertaining to the case or the protection and regulation of privately owned public resources, please reach out to [me](#) or any member of our [Environment &](#)

Energy Industry Group.

The case, *The Marcellus Shale Coalition v. DEP*, can be found here at the link:

<https://www.pacourts.us/assets/opinions/Supreme/out/J-55-2022cdo.pdf?cb=2>

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