

4-26-2019

Pennsylvania's Environmental Rights Amendment: Past, Present, & Future

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Pennsylvania State Legislator, 1969-1980

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Recommended Citation

Kury, F. (2019). Pennsylvania's Environmental Rights Amendment: Past, Present, & Future. Retrieved from https://digitalcommons.wcupa.edu/srca_sp/4

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Earth Week Teach-In

with Mr. Franklin Kury,
Pennsylvania State
Legislator (1969 - 1980)

Friday, April 26th
12:00pm to 1:30pm
Mitchell Hall Room 102

Sponsored by:
Office of Sustainability
Office of the President
Earth Club
Sustainability Advisory Council
Chester County Environmental
Alliance

**Pennsylvania's Environmental Rights Amendment
Past, Present, & Future**



Article I Section 27 of the PA Constitution, entitled **Natural Resources and the Public Trust**, 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.

WEST CHESTER UNIVERSITY EARTH DAY APRIL 26, 2019

By
Franklin L. Kury

Earth Day, 2019 coincides with the 48th anniversary of the adoption of the environmental rights amendment to the Pennsylvania Constitution. As overwhelmingly approved by the state's voters in the primary election of 1971, the amendment, now Article 1, Section 27 of the constitution provides:

Natural Resources and the Public Estate.

The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In two years, we will mark the 50th anniversary and I look forward to that. But celebration alone this year or 2021 is not enough.

The environment of our state, our nation and our world are in great peril.

A great cloak of invisible darkness is falling across the skies of our planet that blocks the normal relationship between our atmosphere and the sun. The result is a global warming, or climate change, that is slowly but certainly advancing against the natural environment we need to survive on this Earth.

I will use my remarks to describe how Article 1, Section 27 came to be, but I also want to articulate how the amendment can help save us from the slow destruction of global warming. These remarks will start with a reviews of the history of the environmental rights amendment, and then focus on what the amendment hopefully will do in the next half century. Where will the environment of our state, nation and the planet be in 2071? That is the central question I will ask.

My remarks will be in three parts. First, I will place Article1, Section 27 in its historical context, both nationally and in Pennsylvania, including our state's environmental revolution of 1965-1972.

This will be followed by a discussion of how Pennsylvania's courts have treated Article 1, Section 27, and what other states have done on this issue.

I will then turn to how Article 1, Section 27 might be used in the United States and the world at large. We need, I will argue, an environmental rights amendment in the U.S. Constitution. We need its principles in the constitutions of other countries. We need its principles in treaties and international agreements.

Finally, I will ask how our natural environment will be in 2071 and what we can do to provide the right answer.

The United States Constitution drafted in 1787 is silent on the question of the natural environment and resources. This is quite understandable. The Constitution writers were focused on great political questions to create a new government. Their new land was so large and the population so small that there was no impact on the natural environment that called attention. There were no coal, railroad or steel industries to devour the great deposits of iron and coal that were still to be discovered.

At its founding, the United States of America had a population of 3,929,214. It was an agricultural and trading nation on the edge of a vast continent with people unaware of the huge industrial organizations its resources would engender. In eighty years, this had changed.

A scene in the motion picture "Gone with the Wind" shows it. The Georgia gentlemen are in Scarlett O'Hara's drawing room discussing how easy it will be to whip the Yankees. But then Clark Gable steps up and tells them they are overlooking something. "Up north they have steel mills, railroads, and coal mines."

The Civil War ignited the industrial enterprises that provided the tools for the Union to prevail in the War, but also for the expansion to the Pacific and World War One. The power of the steel, railroad and coal industries became so strong that they dominated the economy of state and gave them virtual control of their state governments for the next century.

The anthracite coal industry of Pennsylvania is a case in point. It was so strong that it did not pay for the medical care of its injured employees. That was pushed on to the public. The legislature established ten state hospitals throughout northeastern Pennsylvania for the treatment of injured miners, all at state taxpayers' expense.

There was no state regulation of what the steel mills, railroads and coal companies did to the natural environment. When the legislature began to deal with pollution of the streams, the coal industry was not included.

Pennsylvania enacted its first clean streams law in 1905 in response to diseases resulting from the discharge of raw sewage. The coal companies were excluded from the law. The legislature enacted further clean streams laws in 1919, 1939 and 1945. In each one the coal industry was exempted or given favorable treatment.

By the mid-twentieth century, the exploitation of Pennsylvania's natural resources by the coal, steel and railroad industries left the state's environment horribly disfigured. In Pittsburgh and the southwestern counties, the air was heavily polluted by toxins from the steel mills. In northeastern Pennsylvania there were 2500 miles of acid mine drainage polluted streams, and thousands of acres of abandoned culm banks.

The days of industrial exploitation were terminated by Pennsylvania's environmental revolution that changed forever our state's policy towards the environment.

That revolution began quietly with the passage in 1965 of H.B. 585 that brought coal companies completely under the clean streams' laws.

About the same time television and newspaper reporting became focused on environmental disasters, such as the Santa Barbara oil spill in California and acid mine discharges into the Susquehanna River..

Television did for the environmental cause what it did for Martin Luther King and Civil Rights – it brought the horrible problems of the environment to national public attention.

Starting with the 1966 election the people of Pennsylvania voted for state legislators committed to reclaiming the environment.

I was one of those legislators. In 1966 I ran for the House from Northumberland County against the senior Republican in the house on the clean streams issue. The incumbent had voted against H.B.585. I committed myself to seeking an even stronger clean streams law.

My wife took the photograph of me holding two jars of water – one clean and one polluted from Shamokin Creek – that was used in campaign advertisements to say to the voters, “The choice is yours.”

I defeated the incumbent by almost 1000 votes. A photo of me and my wife was carried in the Pittsburgh and Philadelphia papers the next day declaring my win the major upset of the 1966 elections.

The environmental revolution was on its way. In that and following elections more and more state legislators were elected on environmental issues.

After the 1968 elections John Laudadio of Westmoreland County was made Chairman of the House Conservation Committee and I was designated its Secretary. Our committee become in effect a revolutionary tribunal sitting in judgment of the state’s environmental past and legislating for the future. I was at its center.

In the next four years we enacted more environmental laws than in the history of Pennsylvania, before or since:

- A comprehensive clean streams law.
- The all surface mining act.
- The coal refuse disposal control act.
- The air pollution control act.
- The solid waste management act.
- The scenic rivers act.
- The land and water conservation and reclamation act.
- An act to require the Department of Transportation to comply with environmental law in its projects.
- An act to create the Department of Environmental Resources.
- Article I, Section 27 of the state constitution.

It was an exhilarating ride! I had been placed in a position of legislative influence I never dreamed of during my 1966 campaign for the House.

Of course, the highlight for me is Article 1, Section 27.

The idea for the amendment came to me in August 1968 while I was reading in the New York Times of an amendment to the New York Constitution to further protect its forests. Why not a comparable amendment for Pennsylvania, but broader and less detailed?

On April 20, 1969 - with 33 co-sponsors of both parties – I introduced H.B. 958, a proposed environmental amendment to the state constitution. The bill moved quickly through both houses, with five amendments to the text but no negative votes.

The turning point came on April 14, 1970, which House Speaker Herbert Fineman designated as Earth Day. As part of that program I moved the House to approve the amendments to H.B. 958 so it could be considered again in the next legislative session, as required by the state constitution.

After my motion was approved, Speaker Fineman introduced the main speaker for this first Earth Day, Senator Gaylord Nelson of Wisconsin, a founding father of Earth Day.

Senator Nelson delivered a speech that presciently described the world we live in and the environmental problems we must confront. (I will discuss this at greater length soon.)

January 20, 1971

– with 70 co-sponsors of both parties – I introduced the final version of H.B.958 as H.B. 31. The bill passed both houses quickly and went to the voters on the May 21, 1971 primary election ballot for public consideration. Voters approved the proposed amendment by a four to one margin and the proposed amendment became Article I, Section 27 of our state constitution.

Article 1, Section 27 had an immediate impact on state government. The Department of Environmental Resources required every applicant for a permit that involved impact on the environment to fill out a form showing how the project would impact the environment and how they would minimize the impact. Ralph Abele and the Fish Commission enthusiastically promoted the amendment in their publication and work.

The courts of Pennsylvania were, however, less enthusiastic. To them, it was a baffling provision, a puzzlement. They declined to read the amendment at face value.

They adopted a three point test for determining complying with the amendment. Known as the Payne v Kassab test, it asked three questions. Did the project comply with the environmental statutes? What would the applicant do to minimize the adverse impact? Do the benefits of the project outweigh the damage to the environment?

The Payne v. Kassab test ignored the plain language of Article1, Section 27 and it was the reigning interpretation of Article 1, Section 27 for forty years.

How to explain this? I can only speculate, but my guess is that Article1, Section 27 was just too revolutionary for many judges. I recall a conversation with the late Judge Robert Woodside, author of a book on the Pennsylvania constitution, and former Superior Court justice. He simply

and sincerely believed that the environmental amendment did not belong in the constitution. It was not a proper subject matter for the framework of state government.

On December 12, 2013 the Pennsylvania Supreme Court brought the environmental amendment back to its intended vitality. In the Robinson Township case Chief Justice Ronald Castille directed the courts of Pennsylvania to read the plain English language of the amendment and apply it accordingly. In the Robinson Township case, the court did so and invalidated two sections of the state's oil and gas law. Two years later the same state Supreme Court used the amendment to invalidate the legislature's diversion of environmentally dedicated royalties from the gas fund to the general state purposes. The Payne v. Kassab test was overruled and dispatched to the wastebasket.

Since these two cases there is an increasing amount of litigation challenging perceived environmental infringements.

I can, therefore, report to you today that Article 1, Section 27 is alive and well. It is firmly ensconced in our constitution as a fundamental declaration of our state's environmental policy.

This is not, however, a reason to relax and celebrate. We do that at our environment's peril. The world's environment has changed significantly since 1971. We need to deal with those changes or risk loss of our planet.

In his 1970 Earth Day speech to the Pennsylvania House of Representatives, Senator Gaylord Nelson spelled out the challenge we face today. The earth, he said, is a single ecosystem that is globally intertwined. The air and water of our planet are critical to everyone and cross all political boundaries.

We cannot, he warned, continue to believe that the Earth can continue to absorb the damage inflicted on it. Our Earth is a finite globe with fixed physical limitations and a growing population.

What Senator Nelson described in words is demonstrated by the photograph of our earth taken from outer space. The photograph leaves no room for doubt. We live on the only globe in a vast universe where we can exist. There is no escape. We cannot transfer our lives on earth to the moon, Mars, or any other celestial body. We live or die on this planet.

Climate change and global warming were not known or discussed in 1971. In 2019 they mandate a global imperative to halt climate change.

I do not need to document the truth of climate change. That is well documented by scientists and environmental leaders around the world.

Knowledgeable observers like David Attenborough and Al Gore have done so in popular books and motion pictures. There is a consensus among those who know the subject that climate change is real, and we ignore it at our peril.

There are those who are still in denial of climate change. Unfortunately, some of them control the White House and the executive branch of the national government.

What can we do about it? Can Article 1, Section 27 be helpful?

The place to start is here at home, in the United States. Twenty-two of our United State states have an environmental provision in their constitutions. Our Article 1, Section 27 is believed to be unique because it is so comprehensive. Hopefully the remaining states will enact amendments such as ours.

The U.S. Constitution is as silent now as it was in 1787. Senator Nelson introduced an environmental amendment to the U.S. Constitution in 1970. It provides:

EVERY PERSON HAS THE INALIENABLE RIGHT TO A DECENT ENVIRONMENT. THE UNITED STATES AND EVERY STATE SHALL GUARANTEE THAT RIGHT.

Nelson's proposal gained no political traction and died. Other proposals have been made but were just as unsuccessful.

It should also be noted that, starting with a bill offered by Republican Congresswoman Claudia Schneider in 1988 a number of legislators from both parties have offered climate change bills in Congress. None have been passed.

The lack of an explicit environmental amendment has not deterred efforts to establish environmental rights under the U.S. Constitution. The case of Juliana v. The United States is now pending in a federal district court in Oregon. The plaintiffs are twenty children from age 12 to 18 who are suing the U.S. government to protect them and their environment from climate change. They are relying on the 5th amendment to the U.S Constitution, which provides in part that life, liberty or property can be taken without due process of law.

Most legal observers believe that the Juliana plaintiffs are not likely to prevail. Regardless, the question is raised. Why not an environmental amendment to our national constitution?

My answer is simple, there is no reason. We need and should have an environmental amendment in our U.S. Constitution!

When Senator Nelson offered his amendment in 1970 the population of the United States was 207 million and the population of the world was only 3.7 billion. Now the population of the United States is 327 million and the world is 7.6 billion. The size of the earth is the same, but now it is wallowing in a blanket of climate change.

Although the United States has only five per cent of the world population, it has about a quarter of the global economy. We are a leader in the international community and the best way to lead is by example.

Let us start the process of amending our national constitution to include a provision that declares a right to a clean environment, provides for public ownership of our public natural resource such as the air, and makes the government the trustee of our public natural resources for future generations.

Be clear, such an amendment will not directly stop climate change. An environmental amendment is not a substitute for legislative and executive action on climate change. But it can provide a legal framework for governmental action and it can provide an example for the rest of

the world. It can provide the ultimate expression of the will of the American people. Perhaps most important, it will require everyone who takes the oath of public office swearing to uphold it.

Enacting an environmental amendment to the national constitution will be difficult.

Congress, like any other legislative body, is a large committee that responds to disaster. Legislative bodies are usually reactive rather than proactive.

In 1971 Article 1, Section 27 was enacted after the coal industry had finished exploiting our resources. The legislature reacted to the disaster that had accumulated over a century by passing laws and an environmental amendment to be sure such plundering could not happen again.

In the case of global warming, we do not have the luxury of waiting for the disaster to be complete. Time is against us. We must ask our Congress to become proactive and act now to stop climate change. With or without an environmental amendment we need to act while the disaster is still in progress, not after it has run its course.

We should also look outside the United States to seek adoption of the principles of Article 1, Section 27 in the international community.

The Paris Climate Accord should be revisited. The United States should rejoin it as soon as possible and seek to strengthen it.

The United Nations, the World Bank, and the International Monetary Fund should be visited to see if the principles of Article 1, Section 27 can be incorporated into their work.

There are undoubtedly other international entities that can use or incorporate the Article 1, Section 27 principles in their work. We should talk with all of them.

What will the condition of our Earth's environment be in 2071, the 100th anniversary of Article 1, Section 27?

What will the condition of our constitutional and legal systems be?

The answer is in your hands, more than mine. I am 82 years of age, and many of you are young enough to be my grandchildren.

Will you move on from celebration of Earth Day and Article 1, Section 27 to use your idealism and energy to expand the environmental amendment's role in the nation and the world?

Will you support and give financial contributions to candidates who will do so?

Will you yourself go into politics to further the application of the amendment to our national and international policies?

Will you run for the House of Representatives or Senate to do it?

If you answer any of those questions with a Yes, it can happen.

You can do it!

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