



## **FRACTURED PENNSYLVANIA SUPREME COURT ISSUES DECISION ON CONSTITUTIONALITY OF OIL AND GAS LAW**

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On December 13, 2013, the Supreme Court of Pennsylvania issued its long-awaited ruling in *Robinson Twp. v. Commonwealth*, Case No. 63 MAP 2012, 2013 WL 6687290 (Pa. 2013), a case involving a challenge to the constitutionality of the Commonwealth's new oil and gas law, Act of Feb. 14, 2012, P.L. 87, No. 13 ("Act 13"). Relying on a novel interpretation of the Pennsylvania constitution, a plurality of three justices concluded, among other things, that Act 13's limitations on the authority of local governments to regulate oil and gas operations violated the Environmental Rights Amendment of the Pennsylvania Constitution. Another justice reached the same conclusion but on different grounds, ruling that Act 13 violated the substantive due process provisions of the Pennsylvania and U.S. constitutions. Two other justices dissented, opining that the challenged provisions in Act 13 should be upheld.

Although the Pennsylvania Public Utility Commission and Department of Environmental Protection ("DEP") recently filed a petition for reconsideration, it is likely that the Supreme Court's decision will have a significant impact on oil and gas operations in Pennsylvania for some time. The case is also indicative of a trend in other shale states, including Ohio, New York and Colorado, where towns and municipalities with concerns about the practice of hydraulic fracturing are bringing similar challenges to the preemptive effect of state oil and gas laws.

### **BACKGROUND**

Pennsylvania, located in the heart of the gas-rich Marcellus Shale formation, is the third-highest natural gas producer – and soon to be second highest – in the country.

Responding to the recent surge in production, the General Assembly enacted a comprehensive revision of the Commonwealth's Oil and Gas Act in February 2012. The legislation, Act 13, provided local political subdivisions with new sources of income in the form of impact fees imposed on producers and included new environmental requirements for oil and gas activities. It also gave the oil and gas industry a degree of regulatory certainty by providing that they could not be subject to stricter environmental requirements set forth in the Act, or be prohibited from engaging in production activities by local political subdivisions.

Among other things, the key provisions of Act 13:

- established specific, statewide setback parameters, provided the DEP with the authority to grant waivers of setbacks, and denied municipalities the ability to appeal DEP waiver determinations;
- required political subdivisions to allow well and pipeline location and assessment operations;
- prohibited political subdivisions from imposing conditions, requirements or limitations on the construction of oil and gas operations that were more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government;
- required political subdivisions to “authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants,” as a permitted use in all zoning districts;
- established specific setback and noise requirements; and
- prohibited the imposition of limits or condition on subterranean operations or hours of operation of compressor stations and processing plants, or hours of operation for the drilling of oil and gas wells.

Shortly after the passage of Act 13, a group of Petitioners challenged the validity of certain provisions on constitutional grounds. The challenge, brought in the Commonwealth Court of Pennsylvania, included a count alleging that Act 13 violated substantive due process under the Pennsylvania Constitution and the Fourteenth

Amendment to the U.S. Constitution; and a count alleging a violation of Article 1 § 27 of the Pennsylvania Constitution (the “Environmental Rights Amendment”), which states that:

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.

### THE PENNSYLVANIA COMMONWEALTH COURT’S DECISION

In an *en banc* decision, a majority of the Commonwealth Court of Pennsylvania concluded that by requiring local governments to adhere to the specifications of the Act, Section 3304 of the Act caused municipalities “to violate their comprehensive plans for growth and development.” Specifically, the court stated: “[Section 3304] violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications.” The majority held, therefore, that Section 3304 was unconstitutional and permanently enjoined the Commonwealth from enforcing that provision.

The majority of the Commonwealth Court also held that Section 3215 (b)(4) of the Act, which granted authority to the DEP to waive setback requirements, violated the non-delegation rule of Article 11, §1 of the Pennsylvania Constitution. The three justices found that because the provision gave no guidance with respect to how waivers could be granted, it granted the DEP the power to make legislative judgments reserved for the General Assembly.

With respect to the challenge brought under the Environmental Rights Amendment, the *en banc* majority held that Act 13 was a legislative act that preempted the municipalities’ responsibility “to deal with the environment.” They held that the municipalities, therefore, had no cause of action on that count and it should be dismissed.

## THE PENNSYLVANIA SUPREME COURT DECISION

A three-justice plurality of the Pennsylvania Supreme Court affirmed the judgment of the lower court but on different grounds. The plurality stated that the Environmental Rights Amendment makes “the Commonwealth” a trustee of Pennsylvania’s environment, and that “the Commonwealth” includes “all existing branches and levels of government,” not just the General Assembly. As trustees, both the Commonwealth and municipalities have a fiduciary duty to (1) act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality, and (2) act affirmatively to protect the environment. The General Assembly, the plurality noted, does not have the power to abrogate these constitutional duties by legislation.

In addressing the latter question, the plurality stated that Section 3304 of Chapter 33 of the Act:

compels exposure of otherwise protected areas to environmental costs . . . air water and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape. The [Act] alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment, which contribute significantly to a quality of environmental life in Pennsylvania.

Accordingly, the plurality held that these limitations in Act 13 were incompatible with the Commonwealth’s duty as trustee of Pennsylvania’s public natural resources and violated the Environmental Rights Amendment. Having made that finding, the plurality declined to address the substantive due process claim, the basis of the Commonwealth Court’s holding, or the separation of powers (non-delegation) issue that arose with respect to Section 3215(b)(4) of the Act.

The lone concurring justice did not join the opinion of the plurality. He agreed with their judgment, but based his decision on the fact that Act 13’s regulation of municipalities’ property rights was a violation of substantive due process under the state and federal constitutions:

Act 13 promotes and mandates . . . commandments to the municipalities of the Commonwealth in a vacuum, without due consideration for any effect upon those municipalities . . . . Accordingly, because [the provisions of Act 13] force municipalities to enact zoning ordinances which violate the substantive due process rights of their citizenries, they cannot survive constitutional scrutiny.

Thus, he supported the legal reasoning of the court below and voted to hold that sections of Chapters 32 and 33 of the Act violated substantive due process under the state and the U.S. constitutions. The concurring justice did agree with the plurality that key sections of Chapters 32 and 33 of Act 13 should be remanded to the Commonwealth Court to determine whether they were severable in light of their judgment.

The two dissenting justices concluded that the court was acting outside of its purview in addressing an economic and social issue reserved for the legislature. They stated that it was the province of the legislature, not the various municipalities, to balance the economic interests of the state, and that it was not the province of the court to balance the factors on which a political decision was made by the legislature.

## **APPLICATION FOR RECONSIDERATION**

On January 2, 2014, the Pennsylvania Public Utility Commission and DEP (together, the “Pennsylvania agencies”) filed for reconsideration of the Pennsylvania Supreme Court’s December 13 decision. The Pennsylvania agencies argued that the court established an unprecedented balancing test in examining the constitutionality of Act 13 and made “sweeping factual conclusions” that had no factual support in the record. For these reasons, they urged the Pennsylvania Supreme Court to grant reconsideration and remand the case to the Commonwealth Court for development of additional facts. The Pennsylvania agencies also argued that the court had incorrectly found that subsections (c) and (e) of section 3215 of the statute were not severable. The Pennsylvania Supreme Court has not yet issued its ruling on this request.

## ANALYSIS

The plurality opinion of the Pennsylvania Supreme Court obviously has an immediate impact on the Pennsylvania oil and gas industry. In exchange for paying impact fees and complying with stricter environmental requirements, Act 13 promised industry a key concession: uniformity of local regulation. Producers have lost the regulatory certainty that the law created and now must, once again, negotiate individually with each political subdivision - and there are over two thousand of them in the state - in order to conduct hydraulic fracturing.

The decision's effect on municipalities and their citizens is varied. The plurality appears to empower municipalities with greater authority — as “trustees” of the environment under the Environmental Rights Amendment – to regulate or limit hydraulic fracturing within their borders. But what about municipalities who support hydraulic fracturing? An issue may arise whether citizens can bring suits against their municipalities for failing to uphold the municipalities' fiduciary duty to protect the environment by permitting hydraulic fracturing. And the court's decision also affects municipalities who have no local oil and gas zoning regulations. Arguably, Act 13 required new minimum environmental requirements that now are no longer in place. The issue becomes what regulatory constraints - such as setback requirements - are in place for these political subdivisions.

The decision likely does not have significant legal precedential value in other states. The court did not reach a clear consensus as to why Act 13 was unconstitutional, and the Environmental Rights Amendment is unique to Pennsylvania; few states have similar amendments. Only one justice found Act 13 to be a violation of substantive due process under the state and federal constitutions.

The influence of the decision in other states will not be immediate. The fact that a state constitutional provision providing citizens with rights to clean air and water was relied upon to overturn a state oil and gas law may spur movements in other states to adopt such constitutional amendments. There are also Supremacy Clause issues that must be considered in other states interested in regulating oil and gas development.

Provisions of the Clean Air Act and the Clean Water Act are administered by state agencies through delegation. If a challenge to a state oil and gas law based on a state constitutional provision comes into conflict with federal requirements, an issue may arise whether the state constitutional provision is preempted.

Although the argument that Act 13 violated substantive due process did not prevail, the legal basis for the federal constitutional argument was fully developed in the Act 13 litigation. The lower court and the lone dissenting judge concluded that Act 13 prohibited municipalities from protecting the individual characteristics of their communities and the enjoyment of private property through zoning ordinances (*i.e.*, the municipalities' fundamental property rights) without providing a rational basis, nor a remedy for damages, for this assertion of police power. Similar substantive due process arguments can be raised in other state litigation.

It is noteworthy that the three justices and the concurring justice concluded that the court had an independent, judicial role to determine whether Act 13 "impinge[d] upon the rights reserved to citizens and guaranteed by the Pennsylvania Constitution and the U.S. Constitution," and the issues raised were not political questions. Thus, they held, the issues raised by the Petitioners were justiciable. The issue of justiciability is applicable in other states where municipalities are challenging the scope of state oil and gas laws to limit their ability to regulate energy activities, including hydraulic fracturing. The legal reasoning of the opinions of the Pennsylvania Supreme Court on this issue can be applied to address arguments in other states that oil and gas laws are solely policy determinations by the state legislature that are outside the province of judicial review.

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