Pennsylvania Supreme Court Rules on Injunctive Relief for the Marcellus Shale Coalition[1]

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On June 1, 2018, the Pennsylvania Supreme Court largely affirmed and partially vacated a November 8, 2016 temporary injunction granted to the Marcellus Shale Coalition (MSC) in its challenge to several new regulations that had been promulgated by the Pennsylvania Environmental Quality Board[2] on October 8, 2016.

MSC had filed a Petition for Review[3] of limited sections of the new Chapter 78a Regulations on October 13, 2016, seeking expedited relief in the form of a temporary injunction of the challenged regulations pending review and resolution on the merits.

The Commonwealth Court Decision

Following a two-day hearing before a single judge of the Commonwealth Court in October 2016, the Court held that MSC had satisfied the six-part test[4] for obtaining injunctive relief for four of its seven substantive counts. The Court enjoined Pennsylvania Department of Environmental Protection from implementing and enforcing:

> Count I – new obligations related to potential impacts of well sites on non-listed species, which are neither threatened nor endangered species, and common areas of school property and playgrounds, and the creation of new "public resource agencies" with whom applicants would be required to consult prior to submission of well permit applications (25 Pa. Code §§ 78a.1 and 78a.15(f) and (g) (Public Resources));
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> Count II – new obligations related to monitoring or remediation wells owned or operated by others (25 Pa. Code §§ 78a.52a(c)(3) and 78a.73(c) and (d) (Area of Review));
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> Count IV – requirements to upgrade, re-permit or close existing freshwater impoundments and centralized impoundments (holding produced water) (25 Pa. Code §§ 78a.59b(b) and 78a.59c (Impoundments)); and

[1] *Marcellus Shale Coalition v. Pennsylvania Department of Environmental Protection and Environmental Quality Board*, Docket No. 573 M.D. 2016 (Commonwealth Court of Pennsylvania); and *MSC v. PADEP and EQB*, Docket No. 115 MAP 2016 (Pennsylvania Supreme Court). Babst Calland represents the Marcellus Shale Coalition in this action.

[2] In Pennsylvania, the EQB promulgates regulations authorized by various environmental statutes as well as the Pennsylvania Oil and Gas Act, 58. Pa. C.S. 2301 *et seq*. (Act 13), which authorizes the EQB to regulate the unconventional oil and gas industry through 25 Pa. Code Chapter 78a. Chapter 78a is a new chapter in the Pennsylvania Code that applies solely to the unconventional oil and gas operations, as defined in Act 13. As a practical matter, PADEP develops and proposes the regulations that the EQB formally adopts, usually without any revision.

[3] MSC filed its challenge to the Chapter 78a Regulations as a declaratory judgment action under the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S. §7531 *et seq*. There is no statutory right to judicial review of regulations in Pennsylvania, but there is a long line of case law affirming the right to pre-enforcement review under some circumstances. *See Arsenal Coal Co. v. Commonwealth*, 477 A.2d 1333 (Pa. 1984).

[4] *See* Slip Op. fn 4 for the six-part test, which is uncontested.

Count V – new obligations for post construction stormwater management at well sites post drilling (25 Pa. Code § 78a.65(d) (Site Restoration)).[5]

The PADEP and the EQB, collectively the Agencies, appealed the injunction to the Pennsylvania Supreme Court.[6] The parties briefed the matter, and the Supreme Court heard oral arguments in October 2017. On June 1, 2018, Chief Justice Saylor authored the majority opinion that was joined by Justices Baer, Todd, Dougherty, Wecht and Mundy. Justice Donohue filed a concurring and dissenting opinion.

The Supreme Court Decision

The Supreme Court upheld the injunctions for Counts I and II, upheld a portion of the injunction for Count IV, and vacated the injunction for Count V entirely. Justice Donohue, in dissent, would have reversed the preliminary injunction on all counts.

The Supreme Court vacated a portion of the injunction of Count IV, related to the registration and upgrade of existing freshwater impoundments, believing that the PADEP claimed undisputed authority under the Dam Safety and Encroachments Act[7] for the regulation. The freshwater impoundments in question, however, are those that fall below the threshold for permits under DSEA and have been regulated by means of earth disturbance permits issued pursuant to the Clean Streams Law.[8]

Proceeding count by count, the Supreme Court squarely addressed two key parts of the six-part standard for injunctive relief—raising a substantial legal question and showing irreparable harm.

Substantial Legal Question

As for the substantial legal question, the Agencies had offered a new three-part test, citing no authority for their proffered standard of review. Slip Op. at 18. The Supreme Court confirmed the standard of review of a trial court order granting a temporary injunction is an inquiry into the record to determine "if there were any apparently reasonable grounds for the action of the court below." Slip Op. at 20, quoting *Brayman Constr. Crop. V. PennDOT*, 13 A.3d 925, 935-36 (Pa. 2011) (emphasis omitted).

The Supreme Court noted that the regulations at issue are legislative rules, rules that establish controlling standards of conduct, which are only valid if they "fall within the scope of the rulemaking power granted by the General Assembly." Slip Op. at 19. The Agencies argued that

[5] *MSC v. DEP*, Memorandum Opinion and Order, Nov. 8, 2016, as amended Feb. 14, 2017, J. Brobson. Counts for which injunctive relief was not granted include challenges to: 25 Pa. Code §§ 78a.58(f) (onsite processing), 78a.66 (remediation of spills), and 78a.121(b) (waste reporting).

[6] Under Pennsylvania Rule of Appellate Procedure 1736, there is an automatic supersedeas afforded when the Commonwealth appeals an order, effectively staying the temporary injunction pending resolution of its appeal. Accordingly, MSC filed for and obtained expedited relief vacating the automatic supersedeas and allowing the temporary injunction to stay in place during review by the Supreme Court. *MSC v. DEP*, No. 573 M.D. 2016 Order, J. Brobson (Dec. 8, 2016).

[7] Act 325 of Nov. 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27.

[8] Act 394 of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-1001. Upon a joint request by the parties, the Commonwealth Court subsequently issued an order providing new deadlines related to freshwater impoundments, resetting the original time frames to start from the Court's order.

the trial court had not afforded appropriate deference to their interpretation of their enabling statutes but cited no authority for such deference. Slip Op. at 17-18. The Supreme Court concluded that less deference is afforded to an agency in the context of a preliminary injunction than would be applicable to a final determination on the merits. Slip Op. at 20. And as appellants, the Agencies had the burden to demonstrate the error in the trial court. Slip Op. fn 13.

The substantial legal questions implicated by the counts for which injunction was granted and affirmed include:

- the doctrine of *ejusdem generis*, as related to the expansion of the list of public resources enumerated in Act 13, Section 3215(c);
- statutory construction of the term "other critical communities" in Act 13, Section 3215(c);
- the new requirement to enter and take action on other persons' property, related to the area of review obligations and offset wells;
- the application of retroactive permitting standards to impoundments that were built in accordance with PADEP approvals and permits, with no change in the governing law; and
- the scope of the exemptions from Pennsylvania's Solid Waste Management Act[9] for oil and gas operations.

Irreparable Harm

As for irreparable harm, the Agencies' rulemaking record included cost estimates required by the Regulatory Review Act,[10] which were submitted to the Independent Regulatory Review Commission with both the proposed and final rulemaking packages. PADEP estimated the initial costs of compliance with the challenged provisions to range from $40 to $70 million, and up to $16 million annually thereafter.[11] As acknowledged by the Commonwealth and Supreme Courts, the costs of compliance with a rule that is ultimately invalidated are not costs recoverable from the Commonwealth, making the harm irreparable. Slip Op. at 23.

Current Status

The Supreme Court's majority opinion authorized continuation of the status quo for MSC members regarding new regulations that are drastic departures from the previous law, as well as new regulations that would impose substantial costs that would be unrecoverable if and when the challenged regulations are invalidated. As for the merits, both parties have briefed and will argue their applications for summary relief this fall before the Commonwealth Court, potentially resolving all remaining counts on the current record without the need for an evidentiary hearing.

[9] Act 97 of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-1003.

[10] Act 181 of June 25, 1982, P.L. 633, 71 P.S. §§ 745.1-745.15.

[11] MSC has challenged PADEP's cost estimates as being too low, but points to the rulemaking record as admissions by PADEP regarding the inevitability of substantial costs.