

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



## The Pennsylvania Supreme Court Invalidates Key Provisions of Act 13

In a far-reaching decision that may reverberate far beyond the oil and gas industry, the Pennsylvania Supreme Court has ruled that several critical provisions of Act 13, the General Assembly's 2012 comprehensive update to the former Oil and Gas Act, are unconstitutional. In addition to invalidating a key section of Act 13 placing limits on the regulatory authority of local governments, the Court's ruling also struck down a number of the legislation's well location restrictions administered by the Department of Environmental Protection ("DEP").

The decision of the Supreme Court in *Robinson Township v. Commonwealth* is the culmination of litigation filed in early 2012 by seven municipalities, along with two local elected officials, the Delaware Riverkeeper Network, and a physician challenging the legality of Act 13, primarily contending that the legislation unconstitutionally limited the authority of local governments to regulate the oil and gas industry. The challenge also asserted that a section of Act 13 that authorized DEP to grant waivers from certain well location restrictions was unconstitutional because it did not set forth any standards to be considered in addressing such requests.

### *Limits on Local Regulation*

By far the most contentious issue in the litigation was the petitioners' claim that Section 3304 of Act 13, which placed limits on the powers of local governments, was invalid. Section 3304 requires that all local ordinances provide for the "reasonable development of oil and gas resources," specifically that they: (1) authorize most oil and gas operations as permitted uses in all zoning districts, with the exception that wells located in residential districts may be prohibited or required to go through the conditional use process if the well bore is located within 500 feet of an existing building; (2) authorize compressor stations as permitted uses in agricultural districts and industrial districts, and as conditional uses in all other zoning districts, subject to certain distance and noise limitations; (3) authorize processing plants as permitted uses in industrial districts, and as conditional uses in agricultural districts, subject to certain distance and noise limitations; (4) allow impoundments as permitted uses in all zoning districts subject to a distance requirement; (5) allow pipeline/well assessment and subterranean operations throughout the municipality; (6) place maximum time limits on zoning decisions; (7) prohibit certain restrictions on hours of operation; and (8) in numerous other respects, treat industry construction activities and permanent facilities in a manner consistent with industrial uses.

The Commonwealth Court, in a 4-3 decision, had declared Section 3304 unconstitutional on the grounds that it violated substantive due process, the Court ruling that it allowed incompatible uses in zoning districts, was inconsistent with municipal comprehensive plans, did not protect the interests of neighboring property owners, altered the character of the neighborhood, and made irrational classifications. The Supreme Court, in a 4-2 decision, affirmed the Commonwealth Court. Although Justice Baer based his decision invalidating Section 3304 on substantive due process grounds, the three other Justices in the majority, in an opinion authored by Chief Justice Castille,

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ruled that the section violated Article 1, Section 27 of the Pennsylvania Constitution, commonly known as the “Environmental Rights Amendment.” In addition, these four justices proceeded to invalidate Section 3303, which the Commonwealth Court had found to be valid. Section 3303 provided that “environmental acts” are of statewide concern and preempt local regulation of oil and gas operations regulated by these acts.

In addition to invalidating Sections 3303 and 3304, the Supreme Court majority also enjoined Sections 3305 through 3309 “to the extent that these provisions implement or enforce those Sections of Act 13 which we have found invalid.” Section 3305(a) authorizes municipalities to seek advisory opinions from the Public Utility Commission (“PUC”) on whether proposed ordinances violate the Municipalities Planning Code (“MPC”) [the state statute governing zoning and land use in the Commonwealth], Chapter 33 [Act 13’s limits on municipal regulation], or Chapter 32 [Act 13’s state-wide environmental regulations]. Section 3305(b) authorizes owners and operators of oil or gas operations and municipal residents aggrieved by local ordinances to challenge adopted municipal ordinances with the PUC. Section 3306 authorizes direct ordinance challenges to Commonwealth Court. Section 3307 provides for the assessment of attorney fees and costs against a local government that has enacted or enforced a local ordinance with willful or reckless disregard of the MPC, Chapter 33 or Chapter 32. Section 3308 penalizes municipalities violating these provisions with the loss of well fees. Section 3309 sets forth deadlines (now long-expired) for municipalities to bring their ordinances into compliance with Act 13.

Justices Saylor and Eakin issued separate dissenting opinions, largely agreeing in their analyses of the majority’s decision. Both justices argue that the majority opinion exceeded the role of the judiciary and infringed upon the legislature’s authority to establish Commonwealth-wide economic, environmental and social policies. The majority did so, according to the dissenting justices, without any evidentiary support for the conclusion that Act 13 violates the Environmental Rights Amendment or acknowledgement of the Act’s extensive environmental protections. The dissenting opinions also raised concerns about the majority’s determination that the party municipalities had standing to pursue the constitutional rights of individuals, i.e. those rights guaranteed by the Environmental Rights Amendment, against the Commonwealth.

The petitioners also brought a broader challenge to not only Section 3304, but also the municipal “enforcement” provisions of Act 13 noted above, claiming that they are unconstitutional “special laws” which single out the oil and gas industry for disparate treatment. The Commonwealth Court had dismissed this claim. The Supreme Court majority vacated this ruling and remanded the issue to the Commonwealth Court for an “appropriate disposition in accordance” with its opinion.

### ***State-Wide Well Location Restrictions***

The Supreme Court majority also struck down several provisions of Section 3215. This section, like Section 205 of the 1984 Oil and Gas Act that it replaced, imposes restrictions and considerations for the location of well bores and well sites with respect to buildings, water wells, surface waters, wetlands, and listed public resources, such as parks, forests, national natural landmarks, etc. Section 3215(a) applies to buildings and water wells, while Section 3215(b) applies to surface waters and wetlands. Variances under Section 3215(a) may be obtained by receiving consent from landowners, while waivers under Section 3215(b) may be obtained from the DEP upon submission of a plan with additional measures to protect waters of the Commonwealth. Under Act 13, Section 3215(b)(4) waivers must include terms and conditions that the DEP determines to be “necessary.”

The Commonwealth Court held Section 3215(b)(4) to be null and void because it gave the DEP insufficient guidance to waive setback requirements and allowed the DEP to make legislative policy judgments. Upon review, the Supreme Court majority agreed that Act 13 failed to provide adequate standards for such waivers and concluded that “Act 13 has failed to properly discharge the Commonwealth’s duties as trustees of the public natural resources.” In its Order, however, the Supreme Court held that all of Section 3215(b), including the setbacks from waters of the Commonwealth, is invalid because the waiver provision is not severable from the remainder of that section. The implications of this holding are unclear, as the DEP and well permit applicants now have no defined setbacks from surface waters or wetlands under Act 13 or any other statute.

The Supreme Court also held that Section 3215(d) [allowing the DEP to consider comments from municipalities in its permit decision making process] is unconstitutional and that Sections 3215(c) [listing public resources to be considered] and 3215(e) [requiring the Environmental Quality Board to develop criteria for the DEP to utilize for conditioning well permits based on impacts to public resources] are enjoined from enforcement to the extent that they enforce Sections 3215(b) or (d). It remains to be seen how this decision will impact the well permit application and review process, which relies upon established forms, procedures and timeframes that are required under both Act 13 and Pennsylvania's Clean Streams Law.

### *Physician's Claims*

Among the petitioners was a physician who treats patients in an area where drilling operations occur. He claimed that Sections 3222.1(b)(10) - (11) improperly prevent physicians from sharing the specific identity and amount of chemicals used in drilling operations, which could potentially preclude the effective treatment of patients. The Commonwealth Court held that the physician would not have standing until he actually requested confidential information regarding chemicals used in drilling operations under Section 3222.1(b). However, the Supreme Court reversed, finding that his claims were not remote or speculative because he could be placed in the position of choosing to violate a confidentiality agreement or treating a patient to acceptable standards. As a result, the Supreme Court remanded his claims to the Commonwealth Court for a decision on the merits.

### *Severability*

Finally, in addition to remanding the special legislation and physician's claims back to Commonwealth Court, the Supreme Court also directed the Commonwealth Court on remand to address whether any of the remaining provisions of Act 13, to the extent they are valid, can be "severed." If the Courts find that these otherwise valid sections are "so essentially and inseparably connected with, and so dependent upon, the void provision," they too will be enjoined from enforcement, as were Sections 3215(b), (c) and (e).

### *What's Next?*

By invalidating Sections 3303 and 3304 of Act 13, the Pennsylvania Supreme Court has judicially reversed the regulatory uniformity of the oil and gas industry sought by the General Assembly. Although the repercussions of the Court's ruling can only be resolved over time, it is clear that the immediate impact will be to increase exponentially regulatory impediments and disputes at the local level. Likewise, the Supreme Court's holding with respect to setbacks and the consideration of impacts on public resources will create ambiguity for both applicants when navigating and governmental agencies when administering the well permit review and approval process.

Babst Calland has assisted the oil and gas industry in tracking, understanding and responding to municipal ordinance activity throughout the Commonwealth, and in addressing the state-wide environmental regulation of the industry. The firm is positioned to counsel oil and gas operators on the implementation of strategies in response to the uncertain regulatory environment created by the Supreme Court's ruling.

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