

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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The Pennsylvania Commonwealth Court Invalidates Additional Provisions of Act 13

Last week, the Pennsylvania Commonwealth Court issued an opinion invalidating additional sections of Act 13 of 2012, Pennsylvania's comprehensive overhaul of the former Oil and Gas Act. The cumulative effect of this ruling, combined with the Pennsylvania Supreme Court's previous landmark decision in December 2013, is that all of Chapter 33 of Act 13 has been declared invalid, with the exception of the definitions section (Section 3301) and most of the updated version of the former Oil and Gas Act preemption provision (Section 3302). Local zoning matters relating to oil and gas will "now be determined by the procedures set forth under the [Municipalities Planning Code (MPC)] and challenges to local ordinances that carry out a municipality's constitutional environmental obligations," and the Commonwealth Court and the Pennsylvania Public Utility Commission (PUC) no longer have the authority to review local ordinances for compliance with Act 13 and to withhold well fees where ordinance defects are found. On the other hand, the Commonwealth Court rejected challenges to Act 13's provisions regarding disclosure of spills, the identity and amount of hydraulic fracturing additives and the exercise of eminent domain for gas storage purposes.

The Remand

In its December 2013 opinion, the Pennsylvania Supreme Court invalidated two key provisions of Act 13 addressing the uniformity of and limitations on municipal ordinances, specifically Section 3303, regarding consistency with environmental acts, and Section 3304, which identified multiple ways in which municipal ordinances had to provide for the "reasonable development of oil and gas resources." In addition, the Supreme Court remanded a number of issues to the Commonwealth Court for further consideration. The issues addressed by the new Commonwealth Court opinion were: (1) whether Section 3302 and Sections 3305 through 3309 of Act 13 were so intertwined with Section 3303 and Section 3304 that they were not "severable" and therefore also had to be invalidated; (2) whether notice by the Pennsylvania Department of Environmental Protection (DEP) to only owners of public drinking water systems following a drilling-related spill, but not of private water supplies, was unconstitutional (Section 3218.1); (3) whether prohibiting disclosure of the identity and amount of hydraulic fracturing additives claimed to be proprietary information was unconstitutional (Section 3222.1(b)(10) and (11)); and (4) whether Act 13 unconstitutionally conferred the power of eminent domain on a private party for a private purpose, specifically for gas storage or reservoir protective areas (Section 3241(a)).

(over)

Chapter 33: Local Ordinances

Section 3302 of Act 13 provides that “[e]xcept with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. *The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.*” (Emphasis added). The Commonwealth Court held that the underscored sentence of Section 3302 was invalid because the other substantive portions of Chapter 33 (Section 3303 and Section 3304) were unconstitutional. However, the Court left the balance of Section 3302 intact. Sections 3305 through Section 3309(a) gave the PUC and the Commonwealth Court jurisdiction to review local zoning ordinances with regard to compliance with the MPC, or Chapter 32 or Chapter 33 of Act 13, and authorized the award of attorneys’ fees against and the withholding of well fees from municipalities violating those provisions. The Court found that these sections were not severable and therefore were invalid because they enforced the substantive portions of Chapter 33 that were previously invalidated by the Supreme Court.

Other Claims

Regarding the other issues, the Commonwealth Court dismissed claims that require DEP to notify only owners of public drinking water systems following a spill from drilling operations and prohibit health professionals from disclosing proprietary information concerning the identity and amount of hydraulic fracturing additives were unconstitutional special legislation. Thus, these provisions of Act 13 were upheld. The Court also dismissed the claim that Act 13 conferred the power of eminent domain to illegally permit the taking of private property for use by a private enterprise for gas storage or reservoir protection areas, on the basis that the power was conferred on regulated public utilities only.

What’s Next?

The impact of the Commonwealth Court’s new ruling with regard to local ordinances is primarily procedural in nature. Although Section 3303 and Section 3304 were invalidated by the Supreme Court late last year, the preemption language of Section 3302 remains in effect except as it relates to its cross-reference to other portions of Chapter 33. Thus, in large part, the status of preemption jurisprudence now has reverted back to where it was under the former Oil and Gas Act, as interpreted by the Supreme Court’s decisions in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009) and *Range Resources-Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009). However, challenges to local zoning ordinance provisions related to oil and gas operations now must be asserted in accordance with the MPC and other generally applicable laws.

For more information regarding issues relating to land use and municipal implications of the Commonwealth Court’s ruling, please contact Blaine A. Lucas at 412-394-5490 or blucas@babstcalland.com, Krista M. Staley at 412-394-5406 or kstaley@babstcalland.com, or Lawrence H. Baumiller at 412-394-5490 or lbaumiller@babstcalland.com.

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