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ALERT
ENERGY & NATURAL RESOURCES

Pennsylvania Commonwealth Court Invalidates Portions of Chapter 78a Regulations as Unlawful

On August 23, 2018, the Commonwealth Court issued a unanimous opinion invalidating components of the new pre-permit process created in 25 Pa. Code §§ 78a.1 and 78a.15(f), and (g), pertaining to new "public resources." The Marcellus Shale Coalition (MSC) challenged the provisions as unlawful and unreasonable, seeking declaratory and injunctive relief. *The Marcellus Shale Coalition v. Department of Environmental Protection and Environmental Quality Board*, 573 M.D. 2016.

There is no statutory right to judicial review of new regulations in Pennsylvania. Such challenges must proceed in the form of declaratory judgment action in the Commonwealth Court or "as applied" in an appeal before the Environmental Hearing Board on a case-by-case basis. The latter course is duplicative, lengthy and costly, offering only piecemeal relief. MSC challenged portions of the new Chapter 78a regulatory package through a declaratory judgment action in October 2016, seeking relief for its members from regulations beyond the scope of EQB's authority, regulations with high cost and little discernible benefit.

Count I of MSC's Petition for Review challenged Sections 78a.15(f) and (g), and the related definitions contained in Section 78a.1 of the Chapter 78a regulations. The provisions created a new pre-permitting process for well permit applicants, providing new notice and comment opportunities in addition to those expressly authorized by Act 13, as adopted in 2012.

Following a hearing for temporary injunctive relief, the Commonwealth Court preliminarily enjoined application of portions of the regulations on November 8, 2016. MSC filed an application for partial summary relief on Count I on August 31, 2017. Pending review of that application, the Pennsylvania Supreme Court affirmed the grant of preliminary injunction relief as to Count I on June 1, 2018. 185 A.3d 985 (Pa. 2018)

In its decision on the merits of Count I, the Court invalidated the new public resources and new public resource agencies that had been created by the EQB beyond its legal authority.

The Court held that by defining "other critical communities" to include "species of special concern," Section 78a.1 unlawfully expanded the list of public resources identified in Section 3215(c) of Act 13. The Court further held that the regulatory

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definition of "other critical communities" as including "species of special concern" included in the PNDI database violates the Commonwealth Documents Law, circumventing rulemaking requirements for notice and comment by the public.

The Court also held that the regulatory definitions of "common areas of a school's property" and "playground" are not of the same general class or nature as their statutory counterparts. The Court declared that the regulatory definition of "playground" is so broad as to defy quantification and compliance, the sheer diversity of which renders the regulation unreasonable. The Court concluded that the addition of these new "public resources" was unlawful.

The Court concluded that the addition of "playground owners" as a public resource agency is void. Given the definition of playground in Section 78a.1, playground owners are not easily identifiable, and they are neither government agencies nor trustees with any duties or obligations under Article I, Section 27 of the Pennsylvania Constitution.

Finally, the Court concluded that Section 78a.15(g)'s requirement that the Department will consider comments and recommendations submitted by municipalities fails absent statutory authority. In *Robinson Township v. Commonwealth*, the Supreme Court had invalidated Section 3215(d) which provided that "[t]he [D]epartment may consider the comments submitted under section 3212.1 (relating to comments by municipalities and storage operators) in making a determination on a well permit." 83 A.3d 901 (Pa. 2013)

On the other hand, the Court declined to invalidate Section 78a.15(f) entirely, allowing the Department to seek information from well applicants and comments from public resource agencies as part of its impact consideration required under Section 3215(c) of Act 13, limited in accordance with this decision. The Court also declined to invalidate Section 78a.15(g) of the regulation as unconstitutionally vague, leaving further evaluation of the legal limits of the regulation to be made on a case-by-case basis. The Court also declined to invalidate the regulation for Department's failure to estimate the costs of mitigation of impacts to public resources, finding no evidence to suggest that the Independent Regulatory Review Commission's review was thwarted by the lack of a cost estimate.

The Court's decision confirms that the obligations under Act 13 and Chapter 78a related to public resources for those seeking permits for unconventional oil and gas wells are consistent with those obligations as they existed before Chapter 78a was adopted in October 2016. What is new is the addition of an express regulatory notification obligation that had been part of standard industry practice for the protection of threatened and endangered species and listed resources, such as scenic rivers, national landmarks, and archaeological sites.

If you have any questions about the opinion or its impact on the oil and gas industry, please contact Jean M. Mosites at (412) 394-6468 or jmosites@babstcalland.com, or Kevin J. Garber at (412) 394-5404 or kgarber@babstcalland.com.

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