DRILLING AND FRACKING: A VIOLATION OF "ENVIRONMENTAL RIGHTS?"

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Introduction

The development of unconventional oil and gas resources has had a dramatic impact on the economy in Pennsylvania and other states in the past decade. Initially, oil and gas producers in Pennsylvania were subject to local ordinances with respect to siting of wells and drilling operations. Although municipalities could not regulate the technical aspects of drilling that were governed by the Pennsylvania Oil and Gas Act, they could limit the location of wells to specified areas within their municipal boundaries, and prohibit oil and gas development in other areas. As a result, oil and gas producers complained that they were denied access to large areas and that they were subject to inconsistent local regulations governing oil and gas production.

In an attempt to address these concerns, the Pennsylvania legislature adopted a comprehensive amendment to the Oil and Gas Act, known as Act 13. The stated purpose of Act 13 is, in part, to "permit optimal development of oil and gas resources" while at the same time protecting "the natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa. C.S. § 3202. Among other things, Act 13 (i) required municipalities to allow certain oil and gas operations in all zoning districts (including residential districts), (ii) prohibited municipalities from treating oil and gas operations differently from other land uses, (iii) imposed uniform rules for hydrofracturing in the state and prohibited local governments from establishing more stringent rules, (iv) established limited time periods for local review of applications related to oil and gas operations, and (v) provided minimum setback requirements for drilling and other oil and gas operations near streams, wetlands and other water bodies, but also required the Department of Environmental Protection ("DEP") to waive the distance requirements if the permit applicant identified "additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth." 58 Pa. C.S. § 3215(b)(4).

Act 13 Found Unconstitutional

Act 13 was controversial and was challenged almost immediately. In Robinson Township, et al. v. Commonwealth, et al., 63 MAP 2012 _____ A.3d _____, 2013 WL 6687290 (Pa. 2013), Robinson Township, six other municipalities, the Delaware Riverkeeper Network, and certain individuals brought twelve separate constitutional challenges to Act 13. The case was first considered by the Commonwealth Court, which, by a 4-3 majority, held Act 13 unconstitutional in part and enjoined application of certain provisions of the Act. Specifically, the Commonwealth Court found that (i) the Act's statewide land use regime violated substantive due process because it allowed incompatible uses in zoning districts, did not protect the interests of neighboring property owners, altered the character of the neighborhood, and made irrational classifications, and (ii) the Act violated the nondelegation doctrine because it gave no guidance to DEP in granting waivers from the water body setback requirements. The Commonwealth
Court rejected the remaining challenges, including the claim that Act 13 violated Article I, § 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment.\(^1\)

Although the Pennsylvania Supreme Court promptly accepted the case for review, and it was promptly briefed and argued, the Supreme Court did not issue its long-awaited decision until December 19, 2013.\(^2\) The Supreme Court affirmed the Commonwealth Court's decision on the two provisions it held unconstitutional; however, the majority split 3-1 on the rationale, leaving only a plurality opinion on the constitutional limitations on the Commonwealth's authority.

The plurality opinion was based on the Equal Environmental Rights Amendment, despite the facts that there was little precedent to support the opinion and the parties had not focused on the Environmental Rights Amendment in their briefs or arguments.\(^3\)

Before Robinson, the Environmental Rights Amendment served as a source of authority to justify legislative action, but created no affirmative rights or obligations. The plurality opinion in Robinson turned this interpretation on its head, articulating a dramatic new view of citizens' rights and limitations on the Commonwealth's power under the Environmental Rights Amendment. The plurality opinion held that the first sentence of the Environmental Rights Amendment established (i) rights in the people, to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment, and (ii) a limitation on the Commonwealth’s power to act contrary to these rights. According to that opinion, these rights are binding on state and local governments and are equal in status and enforceability to all other rights protected by the Pennsylvania Constitution, including property rights. The plurality opinion also held that the second and third sentences of the Environmental Rights Amendment established a public trust and that the Commonwealth's obligations as trustee are: (i) to refrain from permitting or encouraging the degradation, diminution or depletion of public natural resources; and (ii) to act affirmatively to protect the environment, via legislative action.

In the context of these rights and obligations, the plurality opinion held that Act 13 was unconstitutional. The plurality opinion was not subtle in its view of "the mischief to be remedied," comparing oil and gas extraction to massive deforestation, the loss of game, and industrialization and coal mining. In an act of appellate fact-finding of stunning breadth, based on little more than anecdotal accounts in landowner affidavits, the plurality opinion made the following sweeping generalization: "[T]he exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, the people, their children, and future generations, and potentially on the public purse, potentially rivaling the environmental effects of coal extraction." Slip op. at 118.

\(^1\) Article 1, § 27 of the Pennsylvania Constitutes states: "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 to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

\(^2\) The Commonwealth's Petition for Reargument has since been denied.

\(^3\) The concurring opinion was based on substantive due process and there were two dissenting opinions.
Accordingly, the plurality opinion held that: (i) the imposition of statewide regulation of oil and gas operations violates Article 1, Section 27 because the legislature has no authority to remove a municipality's authority to carry into effect its constitutional duties;\(^4\) (ii) the requirement that oil and gas development be permitted in every district is irreconcilable with the government's duty to conserve or maintain the constitutionally-protected aspects of the public environment and a certain quality of life; and (iii) the authority of DEP to waive setback requirements from streams and other water bodies violates Article 1, Section 27, because the legislation does not provide standards by which public natural resources are to be protected and marginalizes participation by residents and business owners whose interests are to be protected by the setback requirements.\(^5\)

Two justices dissented, expressing the following reservations, criticisms and concerns: (i) the majority improperly substituted its view on a matter of public policy for those of the state legislature; (ii) the plurality redefined the role of municipalities relative to the sovereign; (iii) the plurality hypothesized an unreasonably deleterious impact of Act 13 on the environment; and (iv) the decision is based on aspirational terms that are too broad and insufficiently defined to provide meaningful guidance in the future.

**The Future of Environmental Rights**

Although the Robinson decision does not constitute binding precedent on Article 1, Section 27, it represents the first use ever by the Pennsylvania Supreme Court to hold a statute unconstitutional. The consequences of the decision, while uncertain, are likely to be felt for a long time. The decision will certainly affect the development of oil and gas production in Pennsylvania, but may also have a broader impact on any proposed land use that has an arguable impact on air, water, natural, scenic, historic or esthetic values.

The likely implications of the Robinson decision on the oil and gas industry are as follows: (i) oil and gas developers will be subject to different local regulations in every municipality; (ii) municipalities may be emboldened to further restrict or even ban oil and gas development; (iii) private citizens may be emboldened to challenge any permitted oil and gas development as a violation of their environmental rights; (iv) other regulations under the Oil and Gas Act may now be subject to challenge; and (v) oil and gas development, in many areas, will take longer and become more expensive.

The possible broader implications of the Robinson decision are as follows: (i) an expansion of litigation, since any action (or inaction) of the Commonwealth or its municipalities can be challenged on the basis that it threatens the environment or the values protected by the Environmental Rights Amendment; (ii) a fundamental alteration of the relationship between the Commonwealth and its municipalities, which now have rights separate and apart from those

\(^4\) Since municipalities are political subdivisions created by the state legislature and derive their authority only from the state, query why the state legislature cannot limit that authority?

\(^5\) Certain issues were remanded to the Commonwealth Court for a decision on the merits; these included a special legislation claim and an eminent domain claim. The Commonwealth Court was also directed to consider whether any remaining provisions of Act 13, to the extent they are valid, are severable.
granted to them by the state legislature; and (iii) a longer and more expensive entitlements process for many projects since an environmental impact assessment will likely be required.

In conclusion, only time will tell the impact of the Robinson decision on development in Pennsylvania and on its economy.
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