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Pennsylvania High Court Rules on Amended Oil and Gas Act

Decision on Act 13 strikes down Pennsylvania's attempt to establish a standard set of rules governing development and operation for the oil and gas industry.

On December 19, the Pennsylvania Supreme Court issued its ruling in *Robinson Township v. Commonwealth*,¹ striking down and enjoining many of the core components of the amended Pennsylvania Oil and Gas Act. In so ruling, the court blocked the state legislature's efforts to improve regulatory predictability for the state's oil and gas industry and allow consistency in the development of shale gas resources.

In *Robinson Township*, the court was tasked with deciding a challenge to Pennsylvania's Oil and Gas Act, which was amended in 2012 in response to the burgeoning development of the state's unconventional shale resources, including the Marcellus Shale, the Utica Shale, and the Upper Devonian Shales. These shale resources lie beneath more than 1,000 municipalities, townships, and cities. Many of these local governments have proposed and passed ordinances that impose restrictions on and require approvals for oil and natural gas operations. The amended Oil and Gas Act (known as Act 13) incorporated a combination of these land-use restrictions and provided for impact fees to allow consistent and responsible development of shale gas resources. The townships and organizations that challenged Act 13 claimed the law was unconstitutional because it unduly limited municipal authority to enact local ordinances—including zoning laws—that affect the development of shale gas resources. The Pennsylvania Supreme Court agreed with the challengers.

Featured in the court's decision was the view that section 27 of the Declaration of Rights in the Pennsylvania Constitution (the Environmental Rights Amendment) would be violated if the court upheld the challenged provisions of Act 13. Section 27 of the Pennsylvania Constitution states the following:

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 yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

A plurality of the court expressed its concern for the legacy environmental impacts of coal mining and other industrial activities and opined that section 27 was added to the Pennsylvania Constitution to prevent further environmental degradation. In reaching its conclusion, the Pennsylvania Supreme Court appeared to accept certain allegations raised by the challengers of air and water contamination resulting from oil and gas development, even though these allegations are unsubstantiated. The majority invalidated the Act on substantive due process grounds.

The challengers also claimed that Act 13 was an unconstitutional enactment of special laws (i.e., those that unjustifiably apply to a particular member or members of persons or entities in the same situation). In addition, they challenged provisions of the law relating to eminent domain and the authorization of private companies to acquire real property interests to store natural gas. The Supreme Court ruled that the lower court improperly dismissed these claims and remanded these issues for further consideration. The lower court will also address whether the Supreme Court missed any portions of the law that should have been invalidated under the ruling. If

1. No. 63 MAP 2012 (Pa. Dec. 19, 2013), available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-127A-D-2012oajc.pdf>.

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additional sections of Act 13 are found to be so intertwined as to be unseverable, they too can be struck down.

Implications

Unfortunately, this decision presents a missed opportunity to establish a standard set of rules governing the responsible development and operation of natural gas resources and could allow some local communities to attempt to discourage such development and operation. The decision does not completely eliminate the concept of preemption as it exists to protect the integrity of statewide oil and gas and environmental laws, but it does leave open the scope of such preemption. While the Commonwealth Court considers and decides the remanded issues, natural gas operators will need to work closely with cities, counties, municipalities, and townships to collaborate on approaches to allow and encourage responsible development of these important shale resources. This will present additional challenges simply because the rules will likely be different from each local government authority and the scope of the authority remains unsettled, and it will certainly add to the complexity, scheduling, and costs involved with natural gas development efforts.

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