Lessons from the Wellhead: Legal Developments
Professor Ross H. Pifer

Drilling into the Pennsylvania Supreme Court’s Ruling on the Constitutionality of Act 13

Lessons from the Wellhead: Recent Marcellus Shale Legal Developments

April 25, 2014
Pennsylvania Oil and Gas Law
Birthplace of the Industry

- August 27, 1859 – Drake well
- Nov. 3, 1878 – Haymaker well
- January 1883 – Natural gas pipeline constructed to Pittsburgh
Haymaker well (1878)

“Without the slightest warning there was a terrific roar and rumble that was heard 15 miles away. Every piece of rigging went sky high whirling around like so much paper caught in a gust of wind. But instead of oil, we had struck gas. It was being shot out under such enormous pressure that it continued to shake the ground and roar for months rattling windows for miles around.”
Pennsylvania Oil and Gas Law
Relative Decline of the Industry

- **Early 20th Century (1900-01)**
  - 43% of total value of natural gas extracted in United States
  - 37% of active gas well in United States
  - 42% of pipeline miles in United States

- **Early 21st Century (2005)**
  - 16th nationally in annual natural gas production
  - 3rd nationally in number of active natural gas wells (11% of national total)
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Pennsylvania Oil and Gas Law
Reemergence of the Industry

<table>
<thead>
<tr>
<th>Ranking</th>
<th>2011</th>
<th>2012</th>
<th>State</th>
<th>% change</th>
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<td>1</td>
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<td>1</td>
<td>Texas</td>
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<td>2</td>
<td>2</td>
<td>2</td>
<td>Louisiana</td>
<td>-2%</td>
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<td>3</td>
<td>7</td>
<td>3</td>
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<td>New Mexico</td>
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<td>11</td>
<td>10</td>
<td>W. Virginia</td>
<td>+37%</td>
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Marketed natural gas in the top 10 producing states (2011-12)

trillion cubic feet per year
Shale Development

Current Legal and Policy Issues

- Environmental / Public Health Issues
  - Water Quality
  - Air Quality
  - Injection-induced Earthquakes

- Economic Issues
  - Landowner Income
  - Employment
  - Business Opportunities
Foundational Question:
Who Should Regulate Shale?

- Federal vs. State Government
- State vs. Local Government
  - Pennsylvania
  - New York
  - West Virginia
  - Colorado
  - Texas
Enactment of Act 13

Legislative History

- Impact Fee, local regulation, etc.
  - Nov. 15, 2011 – Senate passes SB 1100
  - Nov. 17, 2011 – House passes HB 1950

- HB 1950 / Act 13
  - Feb. 7, 2012 – House adopts Conference Committee Report
  - Feb. 8, 2012 – Senate adopts Conference Committee Report
  - Feb. 14, 2012 – Governor signs Bill
Enactment of Act 13
Major Statutory Provisions

- Changed Title 58 by adding:
  - Chapter 23 – Unconventional Gas Well Fee
  - Chapter 25 – Oil and Gas Lease Fund
  - Chapter 27 – Natural Gas Energy Development Program
  - Chapter 32 – Development (replaces Oil and Gas Act)
  - Chapter 33 – Local Ordinances Relating to Oil and Gas Operations
  - Chapter 35 – Responsibility for Fee
Declining fee schedule dependent upon gas price

- Year one – $40,000 to $60,000
  - ($45,000 in 2012; $50,000 in 2013)
- Year fifteen – $5,000 to $10,000

Impact fee due annually thereafter on April 1.

Payments to date:
- $204 million at 9/1/2012 deadline
- $202 million at 4/1/2013 deadline
- $223 million at 4/1/2014 deadline
Act 13 – Chapter 32
Development (former Oil and Gas Act)

- Section 3211 – Well permits
- Section 3212 – Permit objections
- Section 3213 – Well registration and identification
- **Section 3215 – Well location restrictions**
- Section 3216 – Well site restoration
- Section 3217 – Casing requirements
- Section 3218 – Protection of water supplies
- Section 3220 – Plugging requirements
- Section 3222 – Well reporting requirements
- Section 3225 – Bonding
Three “hurdles” to clear in acting:

- Section 3302 – operations regulated by Chapter 32 (former Oil and Gas Act)
- Section 3303 – operations regulated by environmental statutes
- Section 3304 – allowance for “reasonable development of oil and gas resources”
“Except with respect to ordinances adopted pursuant to the MPC and 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.”
To the extent that federal or state environmental acts regulate oil and gas operations, they occupy the entire field of regulation.

- Local ordinances preempted
All local ordinances shall allow for reasonable development

- With some exceptions, oil and gas operations must be permitted use in all zoning districts
- With some exceptions, impoundments areas must be authorized as permitted use.
- With some exceptions, compressor stations must be authorized as permitted use in ag and industrial districts
- With some exceptions, processing plant must be authorized as permitted use in industrial district.
Supreme Court – “few could seriously dispute how remarkable a revolution is worked by this legislation upon the existing zoning regimen in Pennsylvania, including residential zones.”
March 2012 – Complaint filed

Plaintiffs
- Municipalities
- Residents and elected officials
- Non-profit environmental group
- Physician

Act 13
Background of Litigation
Act 13
Background of Litigation

- July 2012 – Commonwealth Court ruling enjoined application of:
  - Section 3304 – zoning
  - Portions of sections 3305 to 3309 that enforce section 3304
  - Section 3215(b)(4) – setback waivers
- December 19, 2013 – Supreme Court ruling
  - Robinson Twp. v. Commonwealth, 83 A.3d 901
Robinson Twp. v. Commonwealth
Commonwealth Court Opinion

- Substantive due process
  - Provisions violated citizens’ rights to due process
  - Requiring uniformity in zoning failed to protect property interests of landowners
  - Requires municipalities to allow incompatible land uses.
  - Disruption of zoning is not rationally related to purpose of efficiently extracting oil and gas.
Robinson Twp. v. Commonwealth
Supreme Court Opinion

- Standing
  - Municipalities – yes
  - Residents and elected officials – yes
  - Non-profit environmental group – yes
    - Have shown that members are threatened with injury
  - Physician – yes
    - “In light of Dr. Khan’s unpalatable professional choices in the wake of Act 13, the interest he asserts is substantial and direct.”
Invalidated portions of Act 13

- Section 3303 – preemption by environmental statutes
- Section 3304 – zoning
  - Portions of sections 3305 to 3309 that implement 3304
- Sections 3215(b)(4) – setback waivers
  - Entirety of section 3215(b), (c), and (d); these subsections are not severable.
  - Section 3215(d)
Remanded to Commonwealth Court for further consideration:

- Consideration of Act 13 broadly
  - Article III, section 32 of PA Constitution (Special Laws)
  - Severability
- Consideration of specific sections of Act 13
  - Section 3241 – eminent domain
  - Section 3222.1 – chemical disclosure provisions
Robinson Twp. v. Commonwealth
Supreme Court Opinion

- 3-1-2 decision
  - 3 justices based decision on Environmental Rights Amendment (Article I, section 27) to Pennsylvania Constitution.
  - 1 justice agreed with result but based decision on substantive due process grounds.
  - 2 justices dissented.

- Impact of plurality opinion?
  - Importance of Environmental Rights Amendment in future cases?
Environmental Rights Amendment
PA Constitution – Article I, section 27

- 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.
  - Court – provides an obligation upon government to refrain from violating this right
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.

- Court – public natural resources includes ambient air, surface and ground water, wild flora and fauna
As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

- Establishes public trust doctrine
- Imposes prohibitory and affirmative duties
Commonwealth is named as trustee.

- Duties and powers are vested in all branches of government as well as at local level.

- Permits use of trust resources but adverse effects must be considered and minimized.

- Must recognize that beneficiaries include generations to come.
Environmental Rights Amendment
Background and Rationale

“It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”

- Logging boom
- Disappearance of wildlife
- Coal
Environmental Rights Amendment
Background and Rationale

- Ratified by voters on May 18, 1971
  - 1,021,342 to 259,979
- Montana and Rhode Island are only other states to provide environmental rights in same manner as political rights
Environmental Rights Amendment
Application to Act 13

- Court – “By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth century, since there was no Environmental Rights Amendment. The response is available now.”
Environmental Rights Amendment
Application to Act 13

- Court
  - Impact upon “natural resources cannot reasonably be assessed on the basis of a statewide average.”
  - “Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.”
  - “The Act degrades the corpus of the trust.”
Environmental Rights Amendment
Application to Act 13

- Court
  - “To comply with the constitutional command, the General Assembly must exercise its police powers to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy, and esthetically-pleasing environment.”
Robinson Twp. v. Commonwealth

Impact of Decision

- Impact on municipalities?
- Impact on environmental protection?
- Impact on Act 13 overall?
- Impact outside oil and gas sector?
Continuation of case through reconsideration and remand
  - Additional appeals?
Remedial legislation?
  - To address removal of setback requirements?
  - Now or after completion of Robinson Twp. case?
Public pressure for enactment of restrictive municipal regulations?
Court challenges to existing municipal regulations?
Robinson Twp. v. Commonwealth

What’s Next?

- Application of Environmental Rights Amendment
  - What governmental action / inaction will be challenged?
  - What framework will be utilized?
  - How will lower courts view plurality opinion?
  - How quickly will this issue again reach the PA Supreme Court?
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Other Resources:
www.law.psu.edu/marcellus
Municipal Regulation after Robinson Twp.

- One “hurdle” remains:
  - Section 3302 – operations regulated by Chapter 32 (former Oil and Gas Act)
  - Section 3303 – operations regulated by environmental statutes
  - Section 3304 – allowance for “reasonable development of oil and gas resources”
Oil and Gas Act § 602 (Repealed)

- “Except with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code, and the . . . Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.”
Act 13 – Section 3302

- Any difference between section 3302 and former section 602 “is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation . . .”
Oil and Gas Act Preemption

- **Huntley & Huntley v. Borough of Oakmont** (Pa. 2009)
  - Zoning restriction was permitted in R-1 district.
  - Example of permissible municipal regulation.

- **Range Resources v. Salem Township** (Pa. 2009)
  - Comprehensive regulatory scheme was not permitted.
  - Example of impermissible municipal regulation.
Act 13 – Section 3302

- Section 3301 – Definition of Oil and Gas Operations
  - Well location assessment
  - Water / fluid storage or impoundment
  - Pipelines
  - Compressor stations
  - Natural gas processing plants
  - Equipment directly associated with activities and necessarily located at or adjacent to site
Section 3215 – Well Location Restrictions

- Section 3215(a) – setbacks from buildings, water wells, surface water intake, reservoirs, and water supply extraction points
  - This subsection is unaffected by the ruling.
Section 3215 – Well Location Restrictions

- Section 3215(b)
  - (b)(1) – well site setbacks from streams, springs, or body of water on USGS map
  - (b)(2) – disturbed area setbacks from streams, springs, or body of water on USGS map
  - (b)(3) – setbacks from wetlands
  - (b)(4) – DEP waivers from setback requirements
Section 3215 – Well Location Restrictions

- Section 3215
  - (c) – consideration of impacts
  - (d) – consideration of municipality comments
  - (e) – regulation criteria
Commonwealth Court Remand

- PA Constitution – Article III, section 32
  - “The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law. . .”
- Is Act 13 a special law?
  - Differing treatment must be reasonable rather than arbitrary.
Commonwealth Court Remand

**Severability**

- Can remaining provisions of Act 13 stand in light of specific provisions being invalidated?
- Presumption is that statutes are severable.
  - Act 13 itself is silent on severability.
- Standard: Are valid provisions “so essentially and inseparably connected with” void provisions . . . ?
Commonwealth Court Remand

- Specific provisions remanded for determination on the merits:
  - Section 3222.1(b) – medical access to chemical information
    - Dr. Khan has standing.
  - Section 3241 – eminent domain
    - Court offered no view on merits of claim.