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Pennsylvania Supreme Court Vacates the Commonwealth Court 2018 Decision that had Invalidated "Public Resource" Portions of Chapter 78a Regulations

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The Marcellus Shale Coalition v. Department of Environmental Protection and Environmental Quality Board, 573 M.D. 2016.

In April 2023, the Pennsylvania Supreme Court vacated the Commonwealth Court's decision that had invalidated several "public resource" provisions in 25 Pa. Code Chapter 78a. The Supreme Court's decision is an abrupt departure from its 2018 decision affirming the preliminary injunction on Count I that had been imposed by the Commonwealth Court in 2016. The Supreme Court's latest ruling puts these regulations into effect in the well permit process for the first time.

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 Environmental Quality Board's (EQB) 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, requiring new notice and comment opportunities in addition to those expressly authorized by Act 13, as adopted in 2012. The relevant defined terms include:

Common areas of a school's property—An area on a school's property accessible to the general public for recreational purposes. For the purposes of this definition, a school is a facility providing elementary, secondary or post-secondary educational services.

Other critical communities—
(i) Species of special concern identified on a PNDI receipt, including plant or animal species:
(A) In a proposed status categorized as proposed endangered, proposed threatened, proposed rare or candidate.
(B) That are classified as rare or tentatively undetermined.(ii) The term does not include threatened and endangered species.

Playground—
(i) An outdoor area provided to the general public for recreational purposes.
(ii) The term includes community-operated recreational facilities.

Public resource agency—An entity responsible for managing a public resource identified in § 78a.15(d) or (f)(1) (relating to application requirements) including the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, the United States Fish and Wildlife Service, the United States National Park Service, the United States Army Corps of Engineers, the United States Forest Service, counties, municipalities and playground owners.

Following MSC's Petition for Relief, the Commonwealth Court preliminarily enjoined application of portions of the regulations on

November 8, 2016.[1] 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 preliminary injunction as to Count I on June 1, 2018. 185 A.3d 985 (Pa. 2018).[2]

On August 23, 2018, the Commonwealth Court issued a unanimous opinion invalidating portions of the new pre-permit process created in 25 Pa. Code §§ 78a.1 and 78a.15(f), and (g), pertaining to new "public resources." In its decision on the merits, the Commonwealth Court concluded that the new public resources and new public resource agencies that had been created by the EQB were beyond its legal authority.[3]

In the April 2023 decision, however, Justice Donohue writing for the Supreme Court concluded that the General Assembly intended to give the agencies "leeway to promulgate the challenged regulations and that those regulations are reasonable." The analysis provided in Section VI of the Court's opinion, which is 37 pages long addressing issues from statutory construction to the Environmental Rights Amendment to agency deference, is joined only by Chief Justice Todd.

Justice Wecht joined the opinion but would have affirmed the Commonwealth Court's invalidation of the definition of "other critical communities." Justice Dougherty joined the opinion regarding other critical communities but would have affirmed the Commonwealth Court opinion invalidating the definitions of common areas of schools' property, playgrounds, and including private entities as public resource agencies. Justice Mundy dissented, finding that the Commonwealth Court correctly determined that the agencies exceeded their statutory authority in promulgating each the challenged regulations.[4]

Despite the narrow outcome of a 3 to 2 Supreme Court decision, under Section 78a.15(f), well permit applicants must now notify the "public resource agency" for resources: 1) in a location that could impact other critical communities and 2) within 200 feet of common areas on a school's property or a playground. The public resource agencies for the non-listed special concern species are the jurisdictional agencies – PA Fish and Boat Commission, PA Game Commission, Department of Conservation and Natural Resources, and the US Fish and Wildlife Service. The "public resource agencies" for the schools and playgrounds are yet to be identified on a case by case basis.

Notice is to include a plat provided at least 30 days prior to submission of a well permit application. The public resource agency then has 30 days to provide written comments to the Department regarding measures, if any, the public resource agency recommends the Department consider as a condition on the well permit. The applicant may provide a response to the public resource agency comments.

Going forward, well permit applications are to include the identification of public resources, descriptions of functions and uses of the public resource, and measures proposed to avoid, minimize or otherwise mitigate impacts, if any. Under section 78a.15(g), the Department is to consider the proposed measures, other measures necessary to protect against probable harmful impacts, comments by public resource agencies, and the optimal development of the gas resources and the property rights of the gas owners.

The Department's denial of a well permit application or its imposition of conditions in a permit based on these newly applicable provisions is likely an appealable final action. In any such well permit appeal before the Pennsylvania Environmental Hearing Board, the Department has the burden of proving the well conditions imposed to protect any public resources listed in Section 3215(c) of Act 13 are necessary.[5]

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1 The Court partially enjoined regulations challenged in Counts I (public resources), II (area of review), IV (impoundments) and V (site restoration). MSC v. DEP, Memorandum Opinion and Order, Nov. 8, 2016, as amended Feb. 14, 2017, J. Brobson. Counts for which injunctive relief was not granted include challenges to: Count III, 25 Pa. Code §§ 78a.58(f) (onsite processing), Count VI, 78a.66 (remediation of spills), and Count VII, 78a.121(b) (waste reporting).

2 The Supreme Court also affirmed the preliminary injunctions related to Counts II and IV as it applied to centralized impoundments, but vacated the injunction related to freshwater impoundments and Count V.

3 The Order issued on August 23, 2018 stated: 1. The definitions of "other critical communities," "common areas of a school's property," and "playground" contained in Section 78a.1 of Title 25, Chapter 78a of the Pennsylvania Administrative Code (Chapter 78a Regulations), 25 Pa. Code §78a.1, are hereby declared void and unenforceable; 2. The definition of "public resource agency" in Section 78a.1 of the Chapter 78a Regulations, 25 Pa. Code §78a.1, to the extent that it includes "playground owners," is hereby declared void and unenforceable; and 3. Section 78a.15(g)'s requirement that the Department will consider comments and recommendations submitted by municipalities is declared unconstitutional and unenforceable based on the Supreme Court's decision in Robinson Township v. Commonwealth, 83 A.3d 901, 984, 1000 (Pa. 2013) (Robinson II), in which it declared Section 3215(d) of Act 13 of 2012, 58 Pa. C.S. §3215(d) – the statutory authorization for this regulatory provision – unconstitutional and enjoined its application and enforcement.

4 Justice Brobson recused himself from the Supreme Court's consideration of the agencies' appeal, having participated in the proceedings in the Commonwealth Court below. Former Chief Justice Baer participated in the oral argument but did not participate in the opinion of the Court.

5 Act 13 of 2012, Section 3215(e)(2)