

## Pennsylvania Supreme Court holds key provisions of Act 13 unconstitutional

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On December 19, 2013, the Pennsylvania Supreme Court ruled that key provisions of Act 13, a statute amending the Pennsylvania Oil and Gas Act, were unconstitutional. In *Robinson Twp. v. Pennsylvania*, Nos. 63 MAP 2012, 64 MAP 2012, 72 MAP 2012, 73 MAP 2012 (Pa. Dec. 19, 2013) (full decision [here](#)), the Court concluded that language barring local regulation of the oil and gas industry violated the Commonwealth's duties as trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment.

### Background on Act 13

Signed into law in February 2012, Act 13 enacted broad changes to Title 58 of the Pennsylvania Consolidated Statutes, which governs oil and gas development in the Commonwealth. Specifically, Sections 3303 through 3309 of Act 13 addressed the impact of local ordinances relating to oil and gas operations. The Court observed the stated intent of Act 13 as to "preempt and supersede local regulation of oil and gas operations." Then, the Court analyzed the constitutionality of Act 13 under Article I, Section 27 of the Pennsylvania Constitution — the Environmental Rights Amendment. Looking beyond Act 13's stated intent, the Court noted that any action taken by government to limit protected rights must "reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster." The Court observed that the Commonwealth has a duty to refrain from allowing the degradation of public natural resources, as well as a duty to treat all citizens of Pennsylvania impartially. In the end, the Court held the following sections of Act 13 to be unconstitutional.

### Section 3303: Unconstitutional Exercise of the General Assembly's Police Power

Section 3303 of Act 13 declared that the environmental regulation of the oil and gas industry is "of statewide concern" and, as a result, Pennsylvania's oil and gas regulations preempt "all local environmental legislation that might be perceived as affecting oil and gas operations." The high Court, however, observed that Pennsylvania citizens who buy homes and raise families in residential areas have "a reasonable expectation concerning the environment" in which they live. The Court held that Act 13 subverts this expectation; specifically, that Section 3303 "commands municipalities to ignore their obligations" under the Environmental Rights Amendment and "directs municipalities to take affirmative actions to undo existing protections of the environment in their localities." Indeed, this amounts to a "fundamental disrupt[ion]" of local concerns. Such sweeping statewide regulation, the Court held, exceeded the General Assembly's delegated police power.

### Section 3304: Two Fatal Flaws

Section 3304 instituted uniform statewide regulations of the oil and gas industry by allowing for the "reasonable development of oil and gas resources." The Court noted that Section 3304 required local governments "to take certain dictated actions while approving and permitting oil and gas operations[.]" For example, Section 3304 stated that local governments "[s]hall authorize oil and gas operations . . . as a permitted use in all zoning districts." Further, Section 3304 prohibited municipalities from imposing conditions on oil and gas operations that are "more stringent" than those imposed on other industrial construction projects within that local government's boundaries. The Court concluded that Section 3304 failed to fulfill the General Assembly's

obligation under the Environmental Rights Amendment “to prevent degradation, diminution, and depletion” of Pennsylvania’s public natural resources. The Court gave two reasons for its conclusion.

First, the Court held that in light of Pennsylvania’s vast differences in “terrain and natural conditions” from locale to locale, Section 3304’s statewide regulatory scheme — which permits “industrial uses as a matter of right in every type of pre-existing zoning district” — is “incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.” Thus, Act 13 effectively disposes of local regulatory structures which have bearing on citizens’ “significant financial and quality of life decisions[.]”

Second, the Court held that by requiring local governments to permit oil and gas operations in all zoning districts, Section 3304 requires some communities to bear much higher environmental and habitability burdens than other communities. The Court held that this discrepancy is irreconcilable with the General Assembly’s obligation to “all the people” of Pennsylvania.

Section 3215(b): Too “Malleable and Unpredictable”

Section 3215(b) concerned the protection of Pennsylvania’s waters. It required mandatory setbacks for the gas industry, but also required the Department of Environmental Protection to waive the setbacks if the applicant submitted “a plan” to protect the affected waters. The Court observed that Section 3215(b) required the department to articulate “necessary” protective terms and conditions, but altogether failed to describe what measures are necessary for the setback waiver to apply. As the Court stated: “we are constrained to conclude that what the crucial term ‘necessary’ entails in the context of Section 3215(b) remains malleable and unpredictable.” The Court continued by noting that “the statute does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver of the Section 3215(b) setbacks.” This lack of clarity “fosters departures from the goal of sustainable development,” violating the Pennsylvania Constitution.

Conclusion

The Pennsylvania Supreme Court’s decision in *Robinson Twp. v. Pennsylvania* enables Pennsylvania municipalities to impose local regulations on oil and gas development. While local regulation might better respect local citizens’ “reasonable expectations” regarding quality of life in those municipalities, it runs the risk of hindering development of Pennsylvania’s oil and gas resources by requiring developers to abide by a patchwork of locally-imposed regulatory structures. In fact, Pennsylvania Governor Tom Corbett’s administration voiced strong reservations about the decision, reportedly asking the Court to reconsider the constitutionality of Act 13, according to the *Pittsburgh Post-Gazette*. While the decision may discourage development in Pennsylvania, some think it will encourage development across the border in Ohio, as reported in *Youngstown, Ohio’s The Business Journal*.

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