

## The Four Biggest Takeaways from the Pennsylvania Supreme Court's Marcellus Shale Decision

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### SUMMARY

In a huge victory for municipal governments and opponents of unconventional gas drilling, the Pennsylvania Supreme Court struck down portions of the commonwealth's 2012 Oil and Gas Act (also known as "Act 13"). This Alert reviews the four major takeaways.

The Pennsylvania Supreme Court struck down portions of the commonwealth's 2012 Oil and Gas Act (also known as "Act 13"), an act that had been supported by the Corbett administration, the General Assembly and the Marcellus Shale gas industry, and, in doing so, gave an enormous victory to municipal governments and opponents of Marcellus drilling. In a 4-2 decision, the Supreme Court largely affirmed the *Commonwealth Court in Robinson Township v. Commonwealth of Pennsylvania*, 52 A.3d 463 (Pa. Cmwlth. 2012).

Act 13 was enacted on February 14, 2012. Among many provisions, one goal of the law was to establish statewide land use and zoning standards. Almost immediately the new law was challenged. In particular, opponents disputed those provisions that overruled local zoning and land use laws and established statewide standards. In 2012, the Commonwealth Court struck down as unconstitutional the portions of Act 13 that attempted to preempt and supersede municipal zoning requirements. The Commonwealth Court had also ruled that portions of the law were an unconstitutional delegation of authority to the Pennsylvania Department of Environmental Protection ("DEP"). That court found the remainder of Act 13 to comply with constitutional and statutory mandates.

After more than a year of deliberation, on December 19, 2013, the Supreme Court held that sections of Act 13 dealing with preemption of local zoning (§ 3303), statewide uniformity of local ordinances (§ 3304), mandatory waiver of setback requirements (§ 3215(b)(4)), and limits on the right to appeal DEP decisions (§3215(d)) violate Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment. At the heart of the opinion, the majority stated that as an exercise of police power, these provisions of Act 13 "are incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources." In addition, on severability grounds, the Supreme Court sent Act 13 back for a review by the Commonwealth Court for "further inquiry into the continued viability of the entire statute or of discrete provisions...."

The majority opinion centered heavily on local governments' substantial interest in protecting the environment and their role in maintaining individual property rights and quality of life. Justice Baer's concurrence, focusing on the diversity of Pennsylvania and the importance of local control over the due process and property rights of its citizens, agreed with the result, but would have decided the zoning issues on narrower due process grounds. The dissents by Justices Saylor and Eakin emphasized that although municipalities have the power to manage land use, such power is given by the legislature, not the Constitution. They also proffer that judicial review of social policymaking by the legislature ought to be highly deferential and closely constrained.

In a 161-page opinion, the Supreme Court affirmed the lower court and enjoined application and enforcement of both the zoning and setback sections. It also reversed the lower court ruling that several challengers lacked standing and remanded the claims of a doctor who challenged the “gag-rule” for decision on the merits. Further, the Supreme Court directed the lower court to consider on remand the severability of the remaining portions of Act 13 and permitted the court to request additional briefing by the parties on the issue of severability.

Understanding the full ramifications of this decision will unquestionably take some time and careful analysis. In the immediate aftermath, however, here are the four biggest takeaways from the Supreme Court’s decision:

**1. In unprecedented fashion, the Supreme Court reinvigorated and breathed new life into the Environmental Rights Amendment.** This may open the door to more challenges under that constitutional provision. In earlier cases, the Supreme Court has generally found that the regulatory scheme surrounding the issuance of environmental permits provides sufficient protection to satisfy concerns under the amendment. Through yesterday’s opinion, however, the Supreme Court developed a comprehensive analytical scheme to apply the Environmental Rights Amendment, and indicated that prior case law does not offer any controlling guidance with respect to the relevant claims in this case. In fact, the Supreme Court drastically limited its own prior rulings on the amendment. This may have the practical effect of placing additional burdens on industry related to efforts to drill wells or place pipelines throughout Pennsylvania, including through state parks and state forests. Not only that, the ruling on the amendment will not be limited solely to oil and gas drilling activities, so a variety of environmentally-intensive projects may come under scrutiny by the courts.

**2. Pennsylvania’s 2,562 municipalities have a voice in environmental regulation.** In the Supreme Court’s own words, the “protection of environmental values ... is a quintessential local issue that must be tailored to local conditions.” Municipalities, while not completely unfettered by procedural processes, may be inclined to test the boundaries in regulating activities that have traditionally been regulated primarily by DEP. With over 2,500 municipalities, this may create a challenging climate for the oil and gas industry, not to

mention the countless other industries impacted by environmental permitting requirements. This may lead to industry pushback and further litigation in the municipal arena.

**3. Impacts to other intensive industries.** Although drawing parallels can be difficult given the unique nature of Act 13, there are other Pennsylvania laws that contain provisions preempting local regulation of intensive industries, such as those regulating the mining and hazardous waste disposal industries. The Supreme Court’s decision may spur challenges to state laws that preempt local regulation.

**4. There is still uncertainty despite a 161-page opinion.** The Supreme Court remanded to the Commonwealth Court, leaving open questions regarding the constitutionality of the entire law. One key provision in question is a requirement that health professionals execute confidentiality agreements relating to medical emergencies involving hydraulic fracturing chemicals; another is whether the eminent domain provisions of Act 13 (dealing with natural gas storage fields) authorize the unconstitutional taking of property for private purposes. Further, DEP recently proposed approximately 75 pages of revised regulations regarding Marcellus Shale activity. Many of the proposed regulations were spurred by Act 13. The Supreme Court’s decision will likely cause DEP to reassess its regulatory proposals and may act to further delay the already lengthy rulemaking process. Significantly, the Supreme Court ruled that the entire law was subject to review by the Commonwealth Court: “We believe that further inquiry into the continued viability of the entire statute [Act 13] or of discrete provisions, including additional provisions deemed unconstitutional on remand, if any, and guided by additional, targeted briefing from the parties is salutary and necessary.”

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