

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 63 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania, BRIAN COPPOLA, Individually and in his Official Capacity as Supervisor of Robinson Township, TOWNSHIP of NOCKAMIXON, Bucks County, Pennsylvania, TOWNSHIP of SOUTH FAYETTE, Allegheny County, Pennsylvania, PETERS TOWNSHIP, Washington County, Pennsylvania, DAVID M. BALL, Individually and in his Official Capacity as Councilman of Peters Township, TOWNSHIP of CECIL, Washington County, Pennsylvania, MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania, BOROUGH OF YARDLEY, Bucks County, Pennsylvania, DELAWARE RIVERKEEPER NETWORK, MAYA van ROSSUM, the Delaware Riverkeeper, and MEHERNOSH KAHN, M.D.,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as Chairman of the Public Utility Commission, OFFICE OF THE ATTORNEY GENERAL, LINDA L. KELLY, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MICHAEL L. KRANCER, in his Official Capacity as Secretary of the Department of Environmental Protection,

Appeal of: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission and PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF ROYALTY OWNERS, PENNSYLVANIA CHAPTER, IN SUPPORT OF APPELLANTS

_____ Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012. _____

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The National Association of Royalty Owners, Pennsylvania Chapter (“NARO-PA”), submits this brief as *Amicus Curiae* and pursuant to Pa.R.A.P. 531(a), in support of the appeals of the Appellants (“Commonwealth Parties”) from the Commonwealth Court’s July 26, 2012 order declaring portions of Act 13 of 2012 facially unconstitutional.

I. THE INTERESTS OF *AMICUS CURIAE*

NARO is the only national organization promoting the rights and responsibilities of citizens that own, and partner with others to develop, oil, gas, coal and other natural resources in our country. NARO’s members, partnering with resource exploration and production companies, earn royalties in return for permitting and encouraging the development of the essential sources of energy upon which all of us depend.

Royalty owners are in every state. They represent every profession. They are the landowners who embody the American right to freely own and freely develop their property. Royalty owners have started major oil companies. Philanthropic efforts of royalty owners have paid for medical research, university bricks and mortar and every imaginable charitable cause. Royalties have paid for the family farm, and have provided the tax base for states to provide the highest quality of life and education.

The mission of NARO is to encourage and promote exploration and production of natural resources in the United States while preserving, protecting, advancing and representing the interests and rights of mineral and royalty owners through education, advocacy and assistance to our members, to NARO chapter organizations (including NARO-PA), to government bodies and to the public.

NARO-PA embraces Chapter 33 of Act 13, because it protects the rights of private property and royalty owners from the well-documented threats from over-reaching local

governments, such as: exclusionary zoning, unreasonable setbacks, arbitrary noise regulations, confiscatory fees, burdensome environmental regulations, and other restrictions that are discriminately applied to oil and gas extraction, while not applied to other commercial and industrial activity. Chapter 33 of Act 13 clearly defines the activities townships must allow as “reasonable development” of natural gas production within their borders.

Since the onset of Marcellus shale natural gas development in the Commonwealth there has been a proliferation of inconsistent and varying “zoning” and other landuse ordinances adopted by municipalities across the Commonwealth, including the municipalities in this case, targeted specifically at natural gas development, many of which are overtly hostile to such development. Those ordinances have impeded the development of the gas resources in the Commonwealth which, in turn, has impeded NARO-PA members from realizing royalties from gas production.

The Commonwealth Court, by the narrowest majority, allowed these hostile zoning ordinances to stand, thus ensuring continued, unwarranted and unlawful municipal interference with the responsible development oil and gas resources and operations across the Commonwealth. Although these local ordinances purport to have been adopted for the health, safety, morals and general welfare of their citizens, those purposes had already been addressed by the former Oil and Gas Act and the Department of Environmental Protection’s extensive regulatory regime governing oil and gas operations. Those purposes have been further addressed by the Legislature, as a matter of State policy, through its passage of Act 13.

The decision by the lower court here affects royalty and other payments to NARO-PA members and other landowners who have oil and gas leases. The decision draws into question

whether the oil and gas industry will be able to rationally develop sources of energy in our Commonwealth or whether such operations have been, or will be, zoned out by municipalities.

The municipalities challenging Act 13, despite what they may think, do not embody the public interest. While these municipalities may represent certain facets of the public, they do not represent NARO-PA members and other landowners throughout the Commonwealth who receive royalty and other payments from oil and gas drilling activities – these landowners too, are members of the public whose interest must be considered and weighed.

II. ARGUMENT

The oil and gas industry involves a highly complex and interconnected infrastructure. Balkanization and inconsistency put the entire enterprise at risk. A single municipality, located anywhere within this interconnected enterprise of production, transmission and distribution, has the ability to disrupt the entire enterprise and hold these precious natural resources hostage. Such disruption impacts not only the enterprise, but the rights of property owners located well beyond the borders of the recalcitrant municipality. Uniform regulation of oil and gas production, transmission and distribution across municipal borders is essential.

The efficient production and utilization of the State's natural resources, including oil and gas, is a legitimate governmental purpose for legislation. *See Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 865-66 (Pa. 2009). Act 13 clearly promotes that purpose by providing for uniform standards and limitations on the development of oil and gas resources throughout the Commonwealth. *See* 58 Pa.C.S. §§ 3201-3309.

Act 13 is a carefully balanced legislative solution that, on one hand, recognizes the need to protect the Commonwealth, its residents and the environment from the impacts of developing

oil and gas resources, while, on the other, recognizes that the development of these natural resources presents unique challenges:

Oil and gas deposits can exist in a residential district just as easily as they might exist in an industrial district. What a local municipality allows, through its comprehensive plan, to be built above ground does not negate the existence and value of what lies beneath.

The General Assembly recognized this when it crafted Act 13 and, in particular, Section 3304. It decided that it was in the best interest of all Pennsylvanians to ensure the optimal and uniform development of oil and gas resources in the Commonwealth, wherever those resources are found. To that end, Act 13 allows for that development under certain conditions, recognizing the need to balance that development with the health, safety, environment, and property of the citizens who would be affected by the development.

* * *

. . . Section 3304 of Act 13 is a valid exercise of the police power. The law promotes the health, safety, and welfare of all Pennsylvanians by establishing zoning guidance to local municipalities that ensures the uniform and optimal development of oil and gas resources in this Commonwealth. Its provisions strike a balance both by providing for the harvesting of those natural resources, wherever they are found, and by restricting oil and gas operations based on (a) type, (b) location, and (c) noise level. The General Assembly's decision, as reflected in this provision, does not appear arbitrary, unreasonable, or wholly unrelated to the stated purpose of the law.

Robinson Twp., 2012 Pa. Commw. LEXIS 222, at *83-*84, *92 (Brobson, J., dissenting).

The oil and gas resources of this Commonwealth cannot be optimally developed if such development is subject to an ever-changing patchwork of restrictions that differ from municipality to municipality. The inconsistency and uncertainty of regulation that is rampant at the municipal level of government in our Commonwealth has discouraged, and will continue to discourage, investment by the oil and gas industry and the rational, organized development of our oil and gas resources. That not only harms the *thousands* of landowners who have entered into oil and gas leases, but our Commonwealth *as a whole*. The economic multiplying, or ripple,

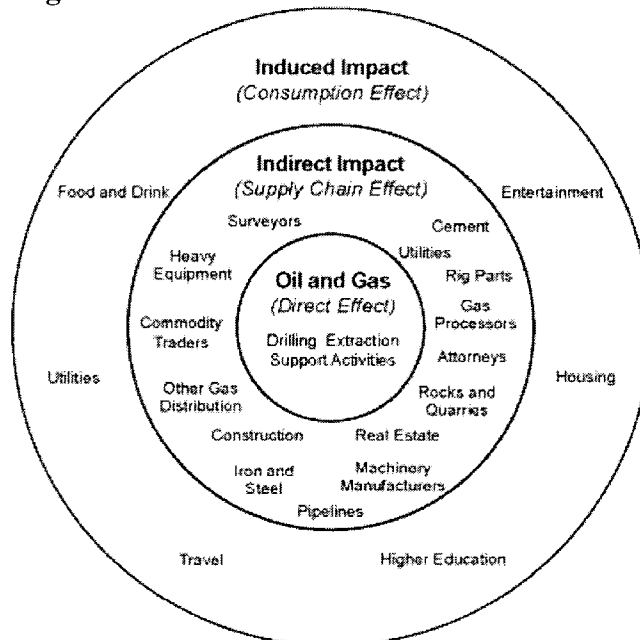
effect of the Marcellus shale natural gas play cannot be reasonably denied. As explained by the the Governor’s Marcellus Shale Advisory Commission Report:

8.3.2 MULTIPLYING EFFECT OF THE MARCELLUS SHALE NATURAL GAS PLAY

Generally, when the public thinks of jobs that are associated with the Marcellus Shale natural gas play, the perception is drilling work. However, the natural gas industry employs individuals from many other trades and sectors. From site selection and preparation to pre-drilling work, to production stages and finally, delivery of the natural gas, each stage engages many other industries. A study published by Penn State provides the following example: *“Exploration crews purchase supplies, stay at hotels, and dine at local restaurants. Site preparation requires engineering studies, heavy equipment and aggregates. Drilling activity generates considerable business for trucking firms and well-support companies now based in Pennsylvania that, in turn, buy supplies, such as fuel, pipe, drilling materials and other goods and services. Likewise, construction of pipelines requires steel, aggregates, and the services of engineering construction firms.”* The Penn State study goes on to state that for every \$1.00 that Marcellus producers spend in the state, \$1.90 of total economic output is generated.

The ripple effect that the natural gas industry causes enables businesses to hire additional workers, which ultimately leads to higher income taxes. This business-to-business activity has already generated increased sales and sales tax revenues and has the potential to produce even greater returns in the future (Fig. 27).

Figure 29: Marcellus Shale Related Industries



Source: Marcellus Shale Education and Training Center

Governor's Marcellus Shale Advisory Commission Report, pp. 83-84 (July 22, 2011) (emphasis original).¹

It is common knowledge that business demands predictability and abhors uncertainty. This is especially so for the oil and gas industry given the *highly complex and interconnected infrastructure* required to optimally develop oil and gas resources. As explained by the the Governor's Marcellus Shale Advisory Commission Report:

8.2 INFRASTRUCTURE DEVELOPMENT CHALLENGES & OPPORTUNITIES

8.2.1 OVERVIEW OF INFRASTRUCTURE DEVELOPMENT ISSUES

After a natural gas deposit is located, the process of drilling and extraction begins. However, because natural gas is not utilized at the point of extraction, an infrastructure is needed to process, compress, store, and transport the natural gas to market.

...

There are two main types of infrastructure needed to develop natural gas from the Marcellus Shale formation. The direct infrastructure consists of the wells and related physical facilities to extract, move and sometime store, the gas and related by-products as it goes to markets and end-users. These facilities include, but are not limited to, pipelines, compressor stations and processing plants. Indirect infrastructure consists of road and bridge improvements, water and wastewater facilities and other ancillary services such as housing.

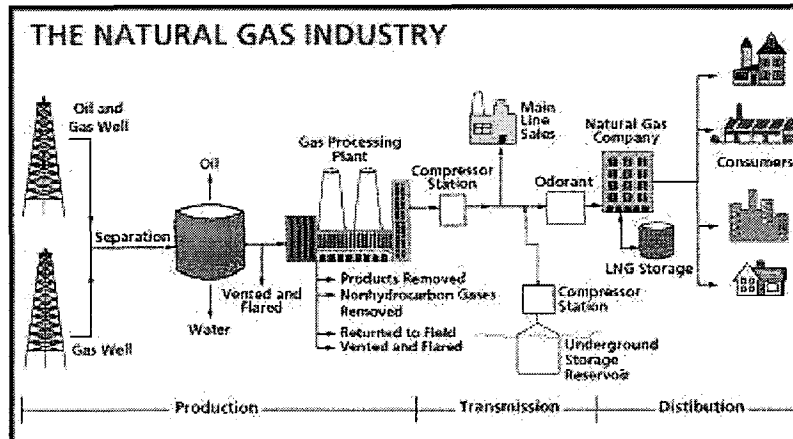
...

The natural gas industry is divided into three parts, upstream, downstream and midstream. Exploration, extraction and production are upstream activities. Gathering gas from multiple wells, storage and the treatment and processing of gas are midstream activities. Transportation and marketing are downstream activities. These three parts frequently overlap, with treatment and processing often occurring at both production facilities and transportation pipelines

¹ Available at:

http://www.portal.state.pa.us/portal/server.pt/community/marcellus_shale_advisory_commission/20074.

Figure 27: The Natural Gas Industry Infrastructure



Source: U.S. Department of Energy, Energy Information Agency.

Regulation of natural gas occurs at both the federal and state levels. Laws and regulations include the general governmental supervision applicable to any industry (environmental protection, occupational safety and health, etc.) and those which are directed to energy or utility industries in general or to the natural gas industry alone. The latter vary considerably by industry segment and also by the source of the laws. Some areas are exclusively federal, some are exclusively state, and some areas overlap.


Governor's Marcellus Shale Advisory Commission Report, pp. 79-80 (July 22, 2011) (emphasis original).

This highly complex and interconnected infrastructure, consisting of upstream, downstream and midstream operations, demands predictability, consistency and, most of all, uniformity of regulation. Where there is balkanization and inconsistency, *i.e.*, when local governments are permitted to seal their borders, the entire enterprise is at risk. A single municipality, located anywhere among the production, transmission and distribution chain illustrated above, left unchecked, has the ability to hold our oil and natural gas resources hostage. A single municipality has the ability to disrupt the entire operation. Moreover, given the interconnectivity of the oil and natural gas development enterprise, the ripple effects of a single exclusionary ordinance will extend for miles, impacting the rights of property owners located

well beyond the borders of the recalcitrant municipality. As a result, uniformity of regulation across municipal borders is a necessity. Chapter 33 Act 13 supplies that necessary uniformity in direct response to this Court's decision in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

NARO-PA thanks this Court for considering the observations set forth above. With respect to the many legal issues now before this Court, NARO incorporates and adopts by reference the Brief of Appellants, the Commonwealth Parties, and the Brief of *Amici Curiae* the Pennsylvania Independent Oil and Gas Association, the Marcellus Shale Coalition, MarkWest Liberty Midstream & Resources, LLC, Penneco Oil Company, Inc., and Chesapeake Appalachia, LLC, in support of Appellants, and the arguments asserted in those briefs as to why the Commonwealth Court erred in declaring portions of Act 13 facially unconstitutional.

Respectfully submitted,
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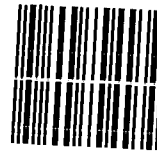
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