

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
DOCKET Nos. 63 and 64 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, MEHERNOSH KHAN, M.D.,

Appellees,

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 OF PENNSYLVANIA, 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

Appellants.

AMICUS CURIAE BRIEF OF MEMBERS OF THE DEMOCRAT CAUCUS OF THE PENNSYLVANIA SENATE IN SUPPORT OF THE APPELLEES, ROBINSON TOWNSHIP, ET AL.

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I. **STATEMENT OF INTEREST OF *AMICI CURIAE***

The Members of the Democrat Caucus of the Senate of Pennsylvania (hereinafter "Senate Democrat Caucus") named below file this brief in support of the position of Appellees: Robinson Township; Brian Coppola; Township of Nockamixon; Township of South Fayette; Peters Township; David M. Ball; Township of Cecil; Mount Pleasant Township; Borough of Yardley; Delaware Riverkeeper Network; Maya Van Rossum and Mehernosh Khan, M.D..

The Senate Democrat Caucus is comprised of 20 duly elected members of the Senate of Pennsylvania for the 2011-2012 Legislative Sessions.

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43rd Senate District. He was elected by members of the Senate Democrat Caucus to serve as the Democrat Leader for the 2011-2012 Legislative Sessions.

State Senator Richard Kasunic is a duly elected member of the Senate of Pennsylvania representing the 32nd Senate District. He was elected by members of the Senate Democrat Caucus to serve as Caucus Chair for the 2011-2012 Legislative Sessions.

State Senator Christine Tartaglione is a duly elected member of the Senate of Pennsylvania representing the 2nd Senate District. She was elected by members of the Senate Democrat Caucus to serve as Caucus Secretary for the 2011-2012 Legislative Sessions.

State Senator Wayne Fontana is a duly elected member of the Senate of Pennsylvania representing the 42nd Senate District. He is the Caucus Administrator for the Senate Democrat Caucus for the 2011-2012 Legislative Sessions.

State Senator Lisa Boscola is a duly elected member of the Senate of Pennsylvania representing the 18th Senate District. She was elected by the members of the Senate Democrat Caucus to serve as Chairwoman of the Democrat Policy Committee for the 2011-2012 Legislative Sessions.

State Senator Jim Ferlo is a duly elected member of the Senate of Pennsylvania representing the 38th Senate District. He is the Democrat Vice-Chairman of the Senate Appropriations Committee for the 2011-2012 Legislative Sessions.

State Senator John Blake is a duly elected member of the Senate of Pennsylvania representing the 22nd Senate District. He is the Democrat Chairman of the Senate Local Government Committee for the 2011-2012 Legislative Sessions.

State Senator Jim Brewster is a duly elected member of the Senate of Pennsylvania representing the 45th Senate District. He is the Democrat Chairman of the Senate Urban Affairs and Housing Committee for the 2011-2012 Legislative Sessions.

State Senator Andy Dinniman is a duly elected member of the Senate of Pennsylvania representing the 19th Senate District. He is the Democrat Chairman of the Senate Education Committee for the 2011-2012 Legislative Sessions.

State Senator Larry Farnese is a duly elected member of the Senate of Pennsylvania representing the 1st Senate District. He is the Democrat Chairman of the Senate Communications and Technology Committee for the 2011-2012 Legislative Sessions.

State Senator Shirley Kitchen is a duly elected member of the Senate of Pennsylvania representing the 3rd Senate District. She is the Democrat Chairwoman of the Senate Public Health and Welfare Committee for the 2011-2012 Legislative Sessions.

State Senator Daylin Leach is a duly elected member of the Senate of Pennsylvania representing the 17th Senate District. He is the Democrat Chairman of the Senate Judiciary Committee for the 2011-2012 Legislative Sessions.

State Senator Judy Schwank is a duly elected member of the Senate of Pennsylvania representing the 11th Senate District. She is the Democrat Chairwoman of the Senate Agriculture and Rural Affairs Committee for the 2011-2012 Legislative Sessions.

State Senator Mike Stack is a duly elected member of the Senate of Pennsylvania representing the 11th Senate District. He is the Democrat Chairman of the Senate Banking and Insurance Committee 2011-2012 Legislative Sessions.

State Senator LeAnna Washington is a duly elected member of the Senate of Pennsylvania representing the 11th Senate District. She is the Democrat Chairwoman of the Senate Aging and Youth Committee for the 2011-2012 Legislative Sessions.

State Senator John Yudichak is a duly elected member of the Senate of Pennsylvania representing the 14th Senate District. He is the Democrat Chairman of the Senate Environmental Resources and Energy Committee for the 2011-2012 Legislative Sessions.

As elected, sworn and seated members of the Senate of Pennsylvania, *Amici Curiae*, in accordance with the Pennsylvania Constitution Article VI, Section 3, have sworn to “support, obey and defend . . . the Constitution of this Commonwealth.” *Amici Curiae* represent numerous local governments and approximately four million citizens of this Commonwealth from urban, suburban, and rural areas. *Amici Curiae* strongly believe that Act 13 of 2012 (“Act 13”), specifically the provisions preempting local zoning prerogatives and the waiver of setback requirements, violate Article I, Section 1 and Article II, Section 1 of the Pennsylvania

Constitution. Consequently, *Amici Curiae* have a direct and substantial interest in the resolution of the constitutional issues raised by the Petitioners. *Amici Curiae* believe the Court would greatly benefit from their perspective and file this brief in support of the Petitioners.

II. STATEMENT OF THE QUESTIONS INVOLVED

Amici Curiae incorporate by reference Numbers 1 through 4 inclusive of the Counter-Statement of the Questions Involved set forth in Appellees' Briefs on page 1.

III. STATEMENT OF THE CASE

Amici Curiae incorporate by reference the Counter-Statement of the Case set forth in Appellees' Briefs on pages 2 through 7.

IV. SUMMARY OF ARGUMENT

This Honorable Court should affirm the July 26th Order of the Commonwealth Court, which properly determined that 58 Pa. C.S. § 3304 violates Article I, Section 1 of the Pennsylvania Constitution. The blanket zoning preemption provisions contained in section 3304 of Act 13 are an improper exercise of the Commonwealth's police power as they are not designed to protect the health, safety, and welfare of the citizens of Pennsylvania. As a result, 58 Pa. C.S. § 3304 violates Article I, Section I of the Pennsylvania Constitution.

This Honorable Court should affirm the July 26th Order of the Commonwealth Court because the Court properly applied the *PAGE* test and determined that the powers delegated in 58 Pa. C.S. § 3215(b)(4) to the Pennsylvania Department of Environmental Protection, which allow the department to grant waivers without defined standards, is an unconstitutional breach of the non-delegation doctrine.

Moreover, this Honorable Court should hold that 58 Pa. C.S. § 3215(a) is also an unconstitutional delegation of power to the Department of Environmental Protection, which allows the Department to grant variances from setback distance restrictions without providing sufficient standards to guide and restrain the exercise of the delegated authority.

V. ARGUMENT

A. THIS HONORABLE COURT SHOULD UPHOLD THE COMMONWEALTH COURT'S DETERMINATION THAT SECTION 3304 OF ACT 13 IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROTECT THE HEALTH, SAFETY, AND WELFARE OF THE CITIZENS OF PENNSYLVANIA.

Act 13's blanket local zoning preemption provision, 58 Pa.C.S. § 3304, which benefit the oil and gas industry is an unconstitutional exercise of the Commonwealth's police power. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit. *See*, PA. CONST. Art. I, Sec. 1; *see also*, Appeal of Girsh, 437 Pa. 237, 241, 263 A.2d 395, 397, n. 3 (1970). The right of citizens to acquire, possess and protect property is a fundamental right.¹ Therefore, when enacting zoning regulations, all public authorities, including the Pennsylvania General Assembly, must exercise this police power in furtherance of the public health, safety, and welfare of the particular community. *See*, Exton Quarries, Inc. v. Zoning Bd. of Adjustment of

¹ The right to own property is recognized in the United States and Pennsylvania Constitutions. The 14th Amendment to the United States Constitution prohibits any state from depriving any person of property without due process of law. Article I, Section 1 of the Pennsylvania Constitution states that "All men ... have certain inherent and indefeasible rights, among which are those of ... acquiring, possessing and protecting property...." U.S. Const. Amend. XIV, Sec. 1; PA. CONST. Art. I, Sec. 1.

West Whiteland Twp., 425 Pa. 43, 66, 228 A.2d 169, 182 (1967) (concurring opinion of Chief Justice Bell).

The police power to zone cannot be exercised in an unreasonable or arbitrary manner and must be based upon the unique facts and circumstances present in each community. In Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365, 387 (1926), the United States Supreme Court recognized that universal, or statewide zoning is impractical and constitutionally impermissible, “[a] regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” See also, Eller v. Bd. of Adjustment, 414 Pa. 1, 198 A.2d 863 (1964). A zoning ordinance is only constitutional when it promotes the public health, safety, and welfare of the community and the regulations are substantially related to the purpose the ordinance purports to serve. Id. It is for these reasons that this Court has consistently ruled that zoning ordinances must be in conformance with a comprehensive plan to allow the community to develop in an orderly manner while observing the public interest of the community as a whole. Best v. Zoning Board of Adjustment of the City of Pittsburgh, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958).

Act 13 takes great care to protect the financial health and welfare of the oil and gas industry but ignores the public health, safety, and welfare of the citizens of the Commonwealth. Act 13 local zoning preemption provisions essentially give the oil and gas industry unfettered ability to drill in any zoning district, without oversight or regard for the existing local municipalities’ comprehensive plans, need for orderly development or the desires and needs of the citizens of local communities. There is no reasonable justification to preempt all local zoning for an industry that has been thriving in the Commonwealth for several years. As

explained by the President Judge of the Commonwealth Court: “Before we had this act, we [had] a lot of gas drilling. I think the estimate is 20,000 permits were issued in the Commonwealth. . . . [T]he industry was very successful before the act, and . . . employed a lot of people and . . . received thousands and thousands permits.” R.1259a-60a. As such, this Honorable Court should affirm the *en banc* panel of the Commonwealth Court Judges’ holding that section 3304 of Act 13 is not in the interest of the health, safety, and welfare of the citizens of this Commonwealth and is, therefore, an unconstitutional exercise of the Commonwealth’s police power.

To make matters worse, the Commonwealth, in the lower court, took great liberties with the language of Act 13. For example, in its Answer the Commonwealth wrote: “Further guidance can be found through the Clean Water Act and other existing environmental laws which the Legislature made clear are to work concurrently with Act 13 so as to further the environmental goals of the Commonwealth.” *See* 58 Pa. C.S. § 3257. However, the Commonwealth either knew or should have known when it made this assertion to the Commonwealth Court that the natural gas industry is exempt from key provisions of many major federal environmental laws.² Consequently, the Commonwealth’s claim that existing

² Natural gas exploration and production processes are exempted from protections under the Clean Water Act, Safe Drinking Water Act (SDWA), National Environmental Policy Act (NEPA), Clean Air Act, Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under the Clean Water Act, it is illegal to discharge a pollutant into navigable waters of the United States without a permit. The revisions under the Energy Policy Act of 2005 exempted “water, gas, or other material which is injected into a well to facilitate production of oil or gas” from the definition of “pollutant.” 33 U.S.C. § 1362. The Safe Drinking Water Act establishes minimum requirements for State underground injection programs to prevent drinking water contamination. 42 U.S.C. § 300h. The Energy Policy Act amended the SDWA to exempt hydraulic fracturing fluids from the definition of “underground injection.” 42 U.S.C. § 300h(d). The Energy Policy Act also provided for a categorical exclusion from NEPA requirements for certain oil and gas

environmental laws are to “work concurrently with Act 13” is disingenuous. Thankfully, the *en banc* panel of the Commonwealth Court Judges’ saw through this argument and deemed section 3304 of Act 13 unconstitutional.

To many people it may be perfectly acceptable, in the name of jobs and profits, to provide the gas industry with the unfettered power and predictability provided for in Act 13. However, this Honorable Court has expressly maintained that, “[g]ood intentions do not excuse non-compliance with the Constitution.” Mesivtah Eitz Chaim of Bobov, Inc., v. Pike County Board of Assessment Appeals, 44 A.3d 3, 8 (Pa. 2012). In that ruling, this Honorable Court stated, “[t]he legislature may certainly determine what exemptions it chooses to grant, but only within the boundaries of the Constitution.” *Id.* The Commonwealth **must** undertake an analysis to determine how the zoning regulation will benefit the local community’s health, safety, or welfare before any zoning regulation may be constitutionally justified as an enactment pursuant to the Commonwealth’s police power. This constitutional “zoning standard” applies to all levels of government alike; the Commonwealth is likewise limited by constitutional restraints. Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp., 228 A.2d 169, 182 (Pa.

activities conducted pursuant to the Mineral Leasing Act. 42 U.S.C. § 15942. The Clean Air Act requires the aggregation of smaller sources of emissions in order to determine pollution control requirements. However, the Act exempts oil and gas wells, as well as pipeline facilities, from aggregation, meaning that each site is considered an individual source of emissions and does not have to meet the more stringent emissions requirements for “major” sources. 42 U.S.C. § 7412. RCRA is a “cradle-to-grave” waste management program that requires disclosure and safe handling of hazardous waste. Although many materials in hydraulic fracturing fluid are individually considered “hazardous,” the Act exempts oil and gas exploration and production wastes from the definition of “hazardous.” 42 U.S.C. § 6921. CERCLA holds potentially responsible parties liable for clean-up costs resulting from a release or threatened release of a hazardous substance into the environment. The definition of hazardous substance under CERCLA does not include natural gas, natural gas liquids, or otherwise hazardous substances found in crude oil and petroleum. 42 USC § 9601.

1967) (concurring opinion). As the *en banc* Commonwealth Court recognized in its opinion, the state's interest in oil and gas development is simply to "promote the exploitation of oil and gas resources." Commonwealth Court Opinion Pg. 32. On the other hand, the public interest in zoning is to "foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns." Commonwealth Court Opinion Pg. 31. These conflicting goals must be balanced in favor of the local governments to protect the health, safety and welfare of citizens while allowing for the orderly development of this Commonwealth's natural resources.

Upon inspection of the plain language of 58 Pa. C.S. § 3304, it becomes apparent that this section is intended to provide stability and uniformity to the oil and gas industry and not to protect the interests of the citizens of the Commonwealth. In fact, on several occasions throughout this litigation, the Commonwealth and gas industry lawyers have admitted that Act 13 was enacted to create a uniform and stable economic climate for oil and gas developers considering doing business in Pennsylvania. Under 58 Pa. C.S. § 3304, all local ordinances must authorize oil and gas operations, which include seismic operations, well site preparation, construction, drilling, hydraulic fracturing, site restoration, and construction, installation, use, maintenance and repair of oil and gas pipelines, as a permitted use in ALL zoning districts. section 3304 also requires municipal zoning ordinances to authorize impoundment areas, which contain toxic carcinogens, in ALL zoning districts. Additionally, 58 Pa. C.S. § 3304 requires local ordinances to authorize compressor stations, which typically run 24 hours a day 365 days a year and emit unbearable noise, as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts. The final two provisions in 58 Pa. C.S. §

3304 prohibit local ordinances from increasing setback distances provided in Act 13, as well as imposing limits on hours of operation of compressor stations, processing plants, the drilling of wells, and the assembly of drilling rigs. Under section 3304's scheme, a local community could now seemingly have a compressor station, rig, or wastewater impoundment next to homes, schools, daycares, churches, and hospitals. 58 Pa.C.S. § 3304. As the Commonwealth Court concluded: section 3304 of Act 13 "does not protect the interest of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications."

Commonwealth Court Opinion Pg. 33.

Section 3304 of Act 13 in essence gives the oil and gas industry unfettered ability to drill in any zoning district, without oversight or regard for the existing local municipalities' comprehensive plans, need for orderly development or the desires and needs of the citizens of local communities. As such, 58 Pa. C.S. § 3304 was not enacted in the interest of public health, safety, or welfare, and was instead designed to provide uniformity for the oil and gas industry. Therefore, section 3304 is an unconstitutional exercise of the Commonwealth's police power and this Honorable Court should affirm the ruling of the Commonwealth Court.

B. THIS HONORABLE COURT SHOULD AFFIRM THE DETERMINATION OF THE COMMONWEALTH COURT THAT SECTION 3215(b)(4) OF ACT 13 IS UNCONSTITUTIONAL, APPLY THE SAME STANDARD TO SECTION 3215(a) AND HOLD THAT IT TOO VIOLATES ARTICLE II, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION .

1. 58 Pa. C.S. § 3215(b)(4) violates Article II, Section 1 of the Pennsylvania Constitution by authorizing the Department of Environmental Protection to waive setback requirements to oil and gas operators without providing sufficient standards to guide and restrain the exercise of the delegated authority.

Article II, Section 1 of the Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” The Legislature may confer authority and discretion upon another body in connection with the execution of a law, but that “legislation *must contain adequate standards which will guide and restrain* the exercise of the delegated administrative functions.” Eagle Envt. II, L.P. v. Commonwealth, 584 Pa. 494, 515, 884 A.2d 867, 880 (2005) (emphasis added) *quoting* Gilligan v. Pa. Horse Racing Comm'n, 492 Pa. 92, 94, 422 A.2d 487, 489 (1980). *See also* Commonwealth of Pa. v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (1986). Fundamentally, the basic policy choices must be made by the General Assembly. Blackwell v. State Ethics Comm'n, 523 Pa. 347, 567 A.2d 630 (1989). Although the Legislature may confer authority and discretion in connection with the execution of the law, “[t]he principal limitations on this power are twofold: (1) the basic policy choices must be made by the Legislature; and (2) the legislature must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.” Eagle Envt. II, L.P., 584 Pa. 494, 517, 884 A.2d 867, 880 (2005).

Section 3215(b) purports to provide minimum setbacks for well sites and disturbed areas from a “solid blue lined stream, spring or body of water” and from “wetlands.” 58 Pa. C.S. §§ 3215(b)(1)-(3). However, section 3215(b)(4) then provides: “The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth. The waiver shall include additional terms and conditions required by the Department necessary to protect the waters of this Commonwealth.”

Id. at § 3215(b)(4). That is, the Department may substitute a site-specific determination for the setbacks imposed by sections 3215(b)(1)-(3). Section 3215(b)(4) grants operators *the right* to obtain a waiver from the distance restrictions (e.g. “*shall* be granted a variance....” and “[t]he department shall waive the distance requirements” *See supra.*).

However, despite the fact that the Department has *no choice but to grant* the waiver from these distance restrictions, Act 13 fails to specify how far into these minimum distance requirements the Department can allow an operator to encroach and what specific safeguards or standards must be met. The plain reading of section 3215(b)(4) of Act 13 is clear; as long as an operator says it will protect the waters of the Commonwealth, the Department *must* allow the operator to encroach upon the minimum setback distance requirements and can conceivably allow the operator to encroach upon the setback to the point of nullifying it.

The Commonwealth Court followed the precedent set by this Honorable Court in *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (PAGE) to examine section 3215(b)(4) of Act 13, and found that this section violated the non-delegation doctrine because it lacked adequate standards for the Department to follow in granting waivers. The Commonwealth Court succinctly stated:

“In authorizing a waiver, section 3215(b)(4) gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an operator's “plan identifying additional measures, facilities or practices to be employed ... necessary to protect the waters of this Commonwealth.” 58 Pa.C.S. § 3215(b)(4). “Just as in *PAGE*, some general goals contained in other provisions are insufficient to give guidance to permit DEP to waive specific setbacks. Given the lack of guiding principles as to how DEP is to judge operator submissions, section 3215(b)(4) delegates the authority to DEP to disregard the other subsections and allow setbacks as close to the water source it deems

feasible.” “Because the General Assembly gives no guidance when the other subsections may be waived, section 3215(b)(4) is unconstitutional because it gives DEP the power to make legislative policy judgments otherwise reserved for the General Assembly.”

Commonwealth Court Opinion, Pgs 51–52.

Consequently, the General Assembly’s failure to provide adequate standards to the Department has resulted in the Department having *de facto* legislative power and the ability to make basic policy choices regarding distance requirements related to granting waivers. Therefore, because section 3215(b)(4) of Act 13 provides insufficient guidance to the Department of Environmental Protection when to grant a waiver from the setback requirements established by the Legislature, this Honorable Court should affirm the Commonwealth Court’s holding that section 3215(b)(4) is unconstitutional under Article II, Section 1 of the Pennsylvania Constitution.

2. 58 Pa. C.S. § 3215(a) is an unconstitutional delegation of power by the General Assembly to the Department of Environmental Protection to grant variances from the distance restrictions without providing sufficient standards to guide and restrain the exercise of the delegated authority.

This Honorable Court should also apply the standards for Article II, Section 1 it articulated in *PAGE* to section 3215(a) of Act 13. Act 13 *mandates* that the Department of Environmental Protection grant setback variances to any well operator that applies. 58 Pa. C.S. § 3215(a). Section 3215(a) provides in relevant part:

“... If consent is not obtained and the distance restriction would deprive the owner of the oil and gas rights of the right to produce or share in the oil or gas underlying the surface tract, the well operator **shall be granted a variance from the distance restriction upon submission of a plan identifying the additional measures, facilities or practices as prescribed by the department** to be employed during well site construction, drilling and operations....” (Emphasis added).

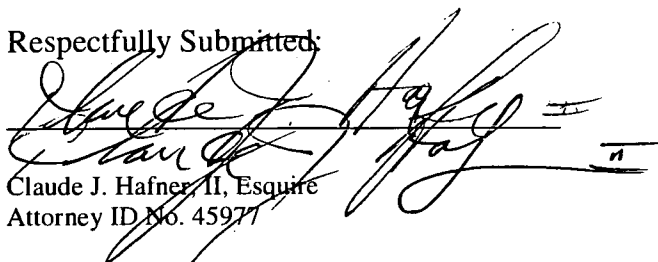
The plain reading of section 3215(a) shows that the Legislature conferred expansive authority and discretion upon the Department in connection with its execution of Act 13 and the granting of a variance from the distance restriction upon submission of "a plan," "as proscribed by the department." Like section 3215(b)(4), section 3215(a) lacks adequate standards to guide and restrain the Department in the exercise of the delegated administrative functions. The General Assembly's failure to provide adequate standards to the Department in section 3215(a) of Act 13 has resulted in the Department having *de facto* legislative power and the ability to make basic policy choices regarding distance requirements related to granting variances.

Therefore, this Honorable Court should hold that section 3215(a) is unconstitutional under Article II, Section 1 of the Pennsylvania Constitution because it fails to provide adequate guidance to the Department of Environmental Protection when to grant a variance from the setback requirements established by the Legislature.

VI. CONCLUSION

For the reasons expressed above, *Amici Curiae* respectfully request that this Honorable Court affirm the Commonwealth Court's July 26th Opinion and Order regarding Counts I-III and Count VIII of the Petition for Review, and additionally hold that section 3215(a) is unconstitutional as a violation of Article II, Section 1 of the Pennsylvania Constitution.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of September, 2012, true and correct copies of the foregoing Brief of *Amici Curiae*, Members of the Democrat Caucus of the Senate of Pennsylvania, in Support of Appellees' Brief were served upon the following:

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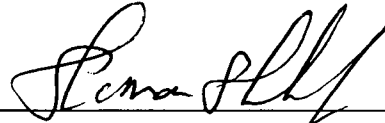
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