

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

 73 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 KHAN, M.D.

Appellees/Cross-Appellants

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

Appellants/Cross-Appellees

Commonwealth of Pennsylvania; Office of the Attorney General of Pennsylvania; and Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth Of Pennsylvania: Cross-Appellees at Docket No. 73 MAP 2012.

BRIEF FOR CROSS-APPELLEES COMMONWEALTH OF PENNSYLVANIA;
OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA; AND
LINDA L. KELLY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA

CROSS-APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED
ON JUNE 26, 2012 AT NO. 284 M.D. 2012

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STATEMENT OF JURISDICTION

This is a cross-appeal from a final order of the Commonwealth Court in a matter which was originally commenced in that court. The order appealed from was issued on July 26, 2012. The Cross-Appellants filed a timely notice of appeal on August 16, 2012. This Court has jurisdiction pursuant to 42 Pa.C.S. § 723(a).

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Scope of review: This appeal involves the review of a determination (order granting preliminary objections) regarding standing and the constitutionality of a statute. As such, it involves questions of law for which the scope of review is plenary. *Johnson v. American Standard*, 607 Pa. 492, 505, 8 A.3d 318, 326 (2010); In reviewing the granting of preliminary objections, the Court may examine the complaint and any accompanying exhibits, the preliminary objections to the complaint, and the response thereto, if any. *Com. Office of Atty. Gen. ex rel. Corbett v. Locust Township*, 600 Pa. 533, 542, 968 A.2d 1263, 1269 (2009).

Standard of review: The standard of review is de novo. The Court should accept all well pleaded facts in the petition for review as true. Furthermore, the Court should sustain the granting of preliminary objections only where it is certain and without any doubt that the law will not permit the petitioner to recover. *Com. Office of Atty. Gen. ex rel. Corbett v. Locust Township*, 600 Pa. 533, 542, 968 A.2d 1263, 1269 (2009); *Allegheny County Sportsmen's League v. Rendell*, 580 Pa. 149, 154-55, 860 A.2d 10, 14 (2004).

STATEMENT OF THE QUESTIONS INVOLVED

- I. WHETHER THE COMMONWEALTH COURT ERRED IN DISMISSING THE CLAIMS OF DR. MEHERNOSH KHAN, THE DELAWARE RIVERKEEPER NETWORK, AND MAYA VAN ROSSUM FOR LACK OF STANDING?**

Suggested Answer: No.

- II. WHETHER THE COMMONWEALTH COURT ERRED IN GRANTING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS AS TO COUNT IV OF THE PETITION FOR REVIEW BECAUSE ACT 13 IS NOT A SPECIAL LAW FOR PURPOSES OF ARTICLE III, SECTION 32 OF THE PENNSYLVANIA CONSTITUTION?**

Suggested Answer: No.

- III. WHETHER THE COMMONWEALTH COURT ERRED IN GRANTING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS AS TO COUNT V OF THE PETITION FOR REVIEW BECAUSE ACT 13 DOES NOT AUTHORIZE THE UNCONSTITUTIONAL TAKING OF PROPERTY FOR PRIVATE PURPOSES IN VIOLATION OF ARTICLE I, SECTIONS 1 AND 10 OF THE PENNSYLVANIA CONSTITUTION?**

Suggested Answer: No.

IV. WHETHER THE COMMONWEALTH COURT ERRED IN GRANTING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS AS TO COUNT VI OF THE PETITION FOR REVIEW BECAUSE ACT 13 WAS ENACTED PURSUANT TO THE LEGISLATURE'S POWERS TO REGULATE AND CONTROL NATURAL RESOURCES AND PREEMPTS ANY CONFLICTING OBLIGATIONS OF MUNICIPALITIES UNDER ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION?

Suggested Answer: No.

V. WHETHER THE COMMONWEALTH COURT ERRED IN GRANTING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS AS TO COUNT VII OF THE PETITION FOR REVIEW BECAUSE ACT 13 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE BY PROVIDING FOR THE PUC TO ISSUE NON-BINDING, ADVISORY OPINIONS REGARDING THE LEGALITY OF LOCAL ORDINANCES AND WHERE COMMONWEALTH COURT HAS DE NOVO REVIEW OF ANY FINAL ORDERS ISSUED BY THE PUC?

Suggested Answer: No.

STATEMENT OF THE CASE

The Commonwealth and Attorney General Linda L. Kelly have appealed the Commonwealth Court's order (dated July 26, 2012) granting summary relief in favor of the Municipalities on Counts I-III and VIII of the Complaint at No. 64 MAP 2012. The Municipalities, and the other Petitioners below,¹ have filed a cross-appeal from the same order at No. 73 MAP 2012.² They appeal the Commonwealth Court's decision to the extent that it granted the Commonwealth and Attorney General Kelly's preliminary objections as to Counts IV-VII of the Complaint. Mehernosh Khan, M.D.; the Delaware Riverkeeper Network; and Maya Van Rossum also seek review of the Commonwealth Court's decision to dismiss their claims for lack of standing. The Municipalities previously submitted their initial brief in support of their cross-appeal at No. 73 MAP 2012. This brief is being submitted by the Commonwealth and Attorney General Kelly in opposition to the Municipalities' cross-appeal.

¹ The petitioners included seven municipalities from Pennsylvania (Robinson Township, Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, and the Borough of Yardley); two officials from these municipalities (Brian Coppola, Supervisor of Robinson Township; and David M. Ball, Councilman of Peters Township); the Delaware Riverkeeper Network, a non-profit organization which has as its primary mission the maintenance and restoration of the Delaware River; Maya Van Rossum, a privately funded ombudsman who advocates for the protection and restoration of the Delaware River Basin; and Dr. Mehernosh Khan, M.D., a medical doctor practicing in Monroeville, Allegheny County. For the sake of simplicity, the petitioners in Commonwealth Court will collectively be referred to as the "Municipalities" unless greater specificity is required.

² The Public Utility Commission (PUC); Robert F. Powelson, Chairman of the PUC; Pennsylvania Department of Environmental Protection (DEP); and Michael L. Krancer, Secretary of the DEP were additional respondents in Commonwealth Court. They are Appellants at No. 63 MAP 2012. They have separate counsel and are not represented by the Office of Attorney General for purposes of this case. The Municipalities have also filed a cross-appeal in No. 63 MAP 2012. This cross-appeal is docketed at No. 72 MAP 2012 and raises the same issues as in the cross-appeal at No. 73 MAP 2012.

Procedural History.

The Municipalities filed a petition for review in the original jurisdiction of Commonwealth Court on March 29, 2012. (Petition for Review & Exhibits 1-47; R.R. 54a-604a) They seek a declaratory judgment that Act 13 of 2012, 58 Pa. C.S. §§ 2301-3504, is unconstitutional and request that Act 13 be permanently enjoined. The Municipalities raise twelve separate claims in which they assert that Act 13 violates the Pennsylvania Constitution. (Petition at ¶ 20; R.R. 61a-63a) They specifically allege that Act 13 violates the following provisions of the Pennsylvania Constitution: Article I, Section 1; Article I, Section 10; Article I, Section 27; Article II, Section 1; Article III, Section 3; and Article III, Section 32. They further allege that it authorizes the PUC to perform legislative and judicial functions in violation of the separation of powers doctrine and that some of its provisions are unconstitutionally vague in violation of the Due Process Clause of the United States Constitution. (Petition at ¶ 20; R.R. 61a-63a)

The Commonwealth, the Office of Attorney General, and Attorney General Linda L. Kelly filed preliminary objections in which they maintained that the Municipalities lack standing, the Municipalities' claims involve nonjusticiable political questions which are properly decided by the Legislature through the democratic process and not through the courts, and the Municipalities failed to state a claim for which relief may be granted. (Preliminary Objections of Respondents Commonwealth of Pennsylvania; Office of the Attorney General; and Linda L. Kelly, Attorney General of the Commonwealth Of Pennsylvania, filed 4/30/2012; R.R. 631a-637a)

On May 7, 2012, the Municipalities filed a motion for summary judgment which was subsequently converted to a motion for summary relief pursuant to Pa. R.A.P. 1532(b) by order

of Commonwealth Court. (Order, 5/10/2012) In support of their motion, the Municipalities filed a supporting brief along with evidentiary materials. (R.R. 700a-984a)

On July 26, 2012, the Commonwealth Court issued a decision in which it granted in part (as to Counts IV, V, VI, VII, IX, X, XI and XII of the Complaint), and denied in part (as to Counts I, II, III, and VIII) the Commonwealth parties' preliminary objections. In addition, it granted the Municipalities' motion for summary relief as to Counts I, II, III and declared Section 3304 of Act 13 (providing for uniformity of local ordinances) to be unconstitutional. The Commonwealth Court also granted summary relief as to Count VIII and declared Section 3215(b)(4) of Act 13 (providing for DEP to grant waivers from the setback requirements for oil and gas wells from certain water sources) to be unconstitutional. (Opinion and Order, ___ A.3d at ___, 2012 WL 3030277 (Pa. Cmwlth., July 26, 2012); Com. Appellants' Brief, Attachment A)

Names of Judges Whose Decision Is To Be Reviewed.

The Commonwealth Court, sitting *en banc*, issued a decision (4-3) in this case pursuant to Section 256(b) of its Internal Operating Procedures. The decision is reported at ___ A.3d ___, 2012 WL 3030277 (Pa. Cmwlth., July 26, 2012) (*See* Brief for Appellants Commonwealth of Pennsylvania; Office of the Attorney General of Pennsylvania; and Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania at No. 64 MAP 2012, Attachment A). The opinion was authored by President Judge Dan Pellegrini, joined by Judge Bernard L. McGinley, Judge Bonnie Brigance Leadbetter, and Judge Patricia A. McCullough. Judge P. Kevin Brobson wrote a dissenting opinion, joined by Judge Robert Simpson and Judge Anne E. Covey. However, the decision to grant the preliminary objections as to Counts IV-VII and to dismiss the claims of Dr. Khan, the Delaware Riverkeeper Network,

and Maya Van Rossum for lack of standing was unanimous (7-0). Judge M. Hannah Leavitt recused herself in this case and Judge Renee Cohn Jubelirer did not participate in the decision.

Statement of Facts

A. Overview of Act 13 of 2012

Act 13 of 2012 (Act 13), 58 Pa. C.S. §§ 2301-3504, was signed into law on February 14, 2012. It is a comprehensive revision of Pennsylvania's Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605. The Oil and Gas Act was enacted in 1984 and has been in effect for almost 30 years without being substantially changed. Among other things, Act 13 revises and updates the Commonwealth's environmental regulation of the oil and natural gas industries, promotes economic development and energy self-sufficiency in Pennsylvania, provides for drilling impact fees which are targeted to benefit municipalities where oil and gas operations occur, and creates uniformity with respect to the development and operation of oil and gas operations in different municipalities throughout Pennsylvania while preventing individual municipalities from unreasonably excluding or hampering development of an important and growing industry.

Act 13 consists of the following six chapters:

- Chapter 23 (Unconventional Gas Well Fee) authorizes counties to impose an impact fee to benefit, in part, municipalities which are impacted by unconventional natural gas wells. The administration of the collection and distribution of the impact fee is performed by the PUC. 58 Pa. C.S. §§ 2301-2318.
- Chapter 25 (Oil and Gas Lease Fund) provides for the distribution of money from the Commonwealth's Oil and Gas Lease Fund to the Environmental Stewardship Fund and the Hazardous Sites cleanup Fund. In 2013, Act 13 requires the transfer of 20 Million Dollars. In 2014, Act 13 requires the transfer of 35 Million Dollars. In

2015, Act 13 requires the transfer of 40 Million Dollars. In 2016 and subsequent years, Act 13 requires the transfer of 50 Million Dollars. 58 Pa. C.S. §§ 2501-2505.

- Chapter 27 (Natural Gas Energy) provides funding to encourage the purchase of (or conversion to) fleet vehicles which use compressed or liquefied natural gas by a Commonwealth authority, a municipal authority, the Pennsylvania Turnpike, a local transportation organization, a nonprofit entity, a state-owned or state-related university, and qualifying companies doing business in Pennsylvania. 58 Pa. C.S. §§ 2701-2704.
- Chapter 32 (Development) provides for the “development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.” It further provides for the safety of personnel and facilities as well as the “safety and property rights of persons residing in areas where mining, exploration, development, storage, or production occurs.” Finally, it is intended to “protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.” 58 Pa. C.C. §§ 3201-3274.
- Chapter 33 (Local Ordinances Relating to Oil and Gas Operation) provides for the express preemption of local ordinances which impose conditions or limitations on oil and gas operations which are regulated by Chapter 32 (Development). It further provides that state environmental laws, to the extent they regulate oil and gas operations, preempt any local environmental laws. 58 Pa. C.S. §§ 3301-3309.
- Chapter 35 (Responsibility for Fee) provides that any fee owed pursuant to Chapter 23 is the responsibility of producers and cannot be made an obligation of a landowner

or leaseholder of real property regardless of any pre-existing or future contractual agreements. 58 Pa. C.S. §§ 3501-3504.

The requirements and provisions contained in Chapter 32 (Development) and Chapter 33 (Local Ordinances Relating to Oil and Gas Operation) of Act 13 are the focal point of the Municipalities' claims in the present case. It is these two chapters which contain the statutory provisions which establish uniform standards governing the production of oil and gas in Pennsylvania and preempt local ordinances which attempt to limit or regulate oil and gas operations to the extent those features are regulated by Chapter 32.

B. Chapter 32 (Development)

Chapter 32 provides a detailed and extensive scheme for granting well permits and regulating oil and gas activities in Pennsylvania while insuring a uniform state-wide system for protecting the environment from the potential harms caused by oil and gas operations. It provides, *inter alia*, for the following:

- Well Permits approved by DEP. This includes provisions regarding the scope of such permits, notice requirements, the plugging of abandoned and orphan wells, permit fees, and water management. Section 3211 of Act 13, 58 Pa. C.S. § 3211.
- Objections to permit applications by interested landowners and leaseholders. Section 3212 of Act 13, 58 Pa. C.S. § 3212.
- Comments by municipalities which may be considered by DEP in issuing permits. Section 3212.1 of Act 13, 58 Pa. C.S. § 3212.1.
- Well location restrictions. Act 13 establishes minimum setback requirements for establishing new wells. For unconventional gas wells, the setback requirements normally require at least a minimum distance of 500 feet from any building. There is

a 1,000 foot minimum distance for unconventional gas wells from water wells, reservoirs and other water supply extraction points without consent from the water purveyor. Section 3215 of Act 13, 58 Pa. C.S. § 3215.

- Impact on public resources shall be considered in granting permits. DEP shall consider the impact of proposed wells on (1) publicly owned parks, forests, game lands; (2) National or State scenic rivers; (3) National natural landmarks; (4) Habitats of rare and endangered flora and fauna; (5) Historical and archaeological sites listed on the Federal or State list of historic places; and (6) Sources used for public drinking supplies. Section 3215(c) of Act 13, 58 Pa.C.S. § 3215(c).
- Restrictions on the placement of wells in Floodplains. Section 3215(f) of Act 13, 58 Pa. C.S. § 3215(f).
- Requirements for the restoration of land area disturbed in siting, drilling, completing and producing a well. Section 3216 of Act 13, 58 Pa. C.S. § 3216.
- Requirements placed on well operators for the protection of fresh groundwater and water supplies. Sections 3217 and 3218 of Act 13, 58 Pa. C.S. §§ 3217-3218.
- Corrosion control requirements for pipelines, storage tanks, well casings and other structures used by oil and gas producers. Section 3218.4 of Act 13, 58 Pa. C.S. § 3218.4.
- Plugging requirements for abandoned wells. Section 3220 of Act 13, 58 Pa. C.S. § 3220.
- Well reporting requirements. Well operators are required to collect and report specified data to DEP. Section 3222 of Act 13, 58 Pa. C.S. § 3222.

- Reporting of information which is claimed to be a trade secret or confidential proprietary information to health care professionals. Vendors, service companies and operators are required to identify the amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests it provided the health professional executes a confidentiality agreement. Under ordinary circumstances, the request must be made in writing and the confidentiality agreement signed prior to providing the information. However, in an emergency, the information must be provided immediately upon the verbal acknowledgement that it may not be used for purposes other than for the medical purposes asserted subject to the subsequent execution of a written statement of need and a confidentiality agreement. Sections 3222.1(10) - (11) of Act 13, 58 Pa. C.S. §§ 3222.1(10) – (11).
- Requirements for coal operators engaged in operations in the vicinity of oil or gas wells. Section 3224 of Act 13, 58 Pa. C.S. § 3224.
- Requirements for the posting of a bond by the owner or operator of an oil or gas well with DEP. Section 3225 of Act 13, 58 Pa. C.S. § 3225.
- Creation of Oil and Gas Technical Advisory Board to provide technical advice to DEP in promulgating appropriate regulations under the Act. Section 3226 of Act 13, 58 Pa. C.S. § 3226.
- Requirements for underground gas storage. Sections 3231-3237 of Act 13, 58 Pa. C.S. §§ 3231-3237.
- Authorization of limited use of eminent domain powers by public utilities to acquire real property which is presently, or previously has been used, for the commercial production of natural gas. Section 3241 of Act 13, 58 Pa. C.S. § 3241.

- Enforcement by DEP of the requirements under Act 13, including the revocation of permits, the assessment of civil fines and penalties, and obtaining an injunction in state court. Sections 3251-3262 of Act 13, 58 Pa. C.S. §§ 3251-3262.
- Preserving existing rights and remedies of the Commonwealth and District Attorneys. Act 13 expressly preserves any existing rights and remedies of the Commonwealth under the common law and other statutes relating to the drilling for and production of oil and gas. The right to seek judicial relief, including the right to suppress a nuisance, abate pollution and enforce rights under the common law or statute are retained. Section 3257 of Act 13, 58 Pa. C.S. § 3257.
- Preserving existing requirements under the Solid Waste Management Act, Clean Streams Law, Dam Safety Encroachments Act, and Air Pollution Control Act. Section 3273 of Act 13, 58 Pa. C.S. § 3273.

C. Chapter 33 (Local Ordinances Relating to Oil and Gas Operations)

Chapter 33 provides for the express preemption of local ordinances which impose conditions or limitations on oil and gas operations which are regulated by Chapter 32 (Development). It further provides that state environmental laws, to the extent they regulate oil and gas operations, preempt any local environmental laws. It provides, *inter alia*, for the following:

- Preemption of local ordinances regulating oil and gas operations governed by Chapter 32 of Act 13. Section 3302 of Act 13, 58 Pa. C.S. § 3302.
- Preemption by state environmental laws of local ordinances to the extent they regulate oil and gas operations. Section 3303 of Act 13, 58 Pa. C.S. § 3303.

- Uniformity of local ordinances. Local ordinances shall allow for reasonable development of oil and gas resources and cannot impose conditions, requirements or limitations on oil and gas operations which are more stringent than those imposed on other industrial uses. Section 3304 of Act 13, 58 Pa. C.S. § 3304.
- Allowing for oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all local zoning districts (provided necessary setback provisions and other requirements under the Act are satisfied). Section 3304(b)(5) of Act 13, 58 Pa. C.S. § 3304(b)(5).
- Special requirements and restrictions for locating impoundment areas, compressor stations, and natural gas processing plants. Sections 3304(b)(6)-(8) of Act 13, 58 Pa. C.S. §§ 3304(b)(6)-(8).
- Authorizing the PUC to provide advisory opinions to municipalities regarding whether a proposed local ordinance complies with the MPC or Act 13. Section 3305(a) of Act 13, 58 Pa. C.S. § 3305.
- Authorizing the PUC to review requests by oil or gas operators and individuals within a municipality who are aggrieved by the enactment or enforcement of a local ordinance to determine whether it violates the Municipalities Planning Code (MPC), 53 P.S. §§10101 – 11107, or Act 13. An order issued by the PUC is subject to a de novo appeal to Commonwealth Court. Aggrieved parties are not required to obtain review from the PUC and have the right to seek immediate redress through a civil action brought in Commonwealth Court. Sections 3305(b) and 3306 of Act 13, 58 Pa. C.S. §§ 3305(b) and 3306.

- Providing for payment of reasonable attorney fees and costs to a plaintiff by a municipality where a court finds that the enforcement or enactment of a local zoning ordinance was done with willful or reckless disregard of the requirements of the MPC, or Act 13. Section 3307(1) of Act 13, 58 Pa. C.S. § 3307(1).
- Providing for payment of reasonable attorney fees and costs to a municipality by a plaintiff where a court finds that an action was frivolous or brought without substantial justification. Section 3307(2) of Act 13, 58 Pa. C.S. § 3307(2).
- Making a municipality ineligible to receive funds collected under Chapter 23 (relating to unconventional gas well fee) of the Act where the Commonwealth Court or Supreme Court have declared that the municipality has enacted or enforced a local ordinance which violates the Act. The municipality remains ineligible to receive funds under Chapter 23 until it amends or repeals the invalid ordinance. Section 3308 of Act 13, 58 Pa. C.S. § 3308.
- Providing a safe harbor provision for municipalities in which they have 120 days from the effective date of Chapter 33 in which to amend a pre-existing local ordinance in order to come into compliance with the requirements of Act 13. Municipalities would not be subject to the imposition of attorney fees and would not be rendered ineligible to receive their share of impact fees under Chapter 23 even if they had not yet amended their local ordinance before the end of the grace period. Section 3309 of Act 13, 58 Pa. C.S. § 3309.

Statement of the Determinations Under Review.

The Municipalities, in this cross-appeal, seek review of the unanimous decision (7-0) of Commonwealth Court (*en banc*), which granted the preliminary objections of the

Commonwealth as to Counts IV-VII of the Complaint and which dismissed the claims of Dr. Khan; the Delaware Riverkeeper Network; and Maya Van Rossum for lack of standing.

As to Count IV, the Court determined that there are real differences between the oil and gas industry, and other extraction industries which justify treating it differently under Act 13. Accordingly, it found that Act 13 does not constitute special legislation in violation of Article III, Section 32 of the Pennsylvania Constitution. (Opinion at *15-*16, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 15-16) As to Count V, the Court determined that the Municipalities had failed to allege any facts to demonstrate that their property had been taken for a private purpose in violation of Article I, Section 10 of the Pennsylvania Constitution. (Opinion at *16-*17, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 16) As to Count VI, the Court determined that Act 13 preempted any obligations which Municipalities might otherwise have to plan for environmental concerns relating to oil and gas. Accordingly, it dismissed all claims relating to the Commonwealth's responsibility to conserve and maintain natural resources under Article I, Section 27 of the Pennsylvania Constitution. (Opinion at *17-*18, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 16-17) As to Count VII, the Court determined that Act 13 only gives the PUC the power to issue non-binding advisory opinions and reserves to Commonwealth Court *de novo* review of any final orders of the PUC. Accordingly, it found that Act 13 is not unconstitutional under the separation of powers doctrine. (Opinion at *19-*20, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 17-18) In addition, the Court determined that Dr. Khan; the Delaware Riverkeeper Network; and Maya Van Rossum failed to plead a direct, immediate or substantial harm as a result of Act 13. Accordingly, it dismissed their claims for lack of standing. (Opinion at *8-*10, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 9-11)

Statement of Place of Raising or Preservation of Issues.

The Municipalities raised the question of the constitutionality of Act 13 of 2012 in their petition for review and their motion for summary relief. The Commonwealth and Attorney General Kelly filed preliminary objections in which they maintained that the Municipalities lack standing, the Municipalities' claims involve nonjusticiable political questions which are properly decided by the Legislature through the democratic process and not through the courts, and the Municipalities failed to state a claim for which relief may be granted. (Preliminary Objections of Respondents Commonwealth of Pennsylvania; Office of the Attorney General; and Linda L. Kelly, Attorney General of the Commonwealth Of Pennsylvania, filed 4/30/2012; R.R. 631a-637a). The Commonwealth and Attorney General Kelly filed a brief in support of their preliminary objections and a brief in opposition to the Municipalities' motion for summary relief.

SUMMARY OF ARGUMENT

The Municipalities, in this cross-appeal, seek to overturn the Commonwealth Court's (1) determination that the Delaware Riverkeeper Network; Maya Van Rossum, the Delaware Riverkeeper; and Dr. Mehernosh Khan lack standing; and (2) dismissal of Counts IV, V, VI, and VII of the Petition for Review for failure to state a claim. For the reasons explained below, the Commonwealth Court's decision on these issues is correct and should be affirmed.

1. For a party to be aggrieved so as to have standing, it must have a substantial, direct, immediate and not remote, interest in the subject-matter of the litigation. A substantial interest is an interest which surpasses the common interest of all citizens. While the Delaware Riverkeeper Network and Maya Van Rossum (the Delaware Riverkeeper) assert a general interest in protecting and maintaining the Delaware River Basin watershed, the Commonwealth Court correctly determined that this interest was insufficient to establish the type of substantial, direct or immediate interest in the litigation to confer standing. Likewise, the Commonwealth Court correctly determined that Dr. Khan lacked standing because he could not show that he was, or would be, negatively affected by the confidentiality provisions for medical providers established under Act 13.

2A. In Count IV of the Petition for Review, the Municipalities allege that Act 13 is a "special law" which violates Article III, Section 32 of the Pennsylvania Constitution. However, Commonwealth Court correctly determined that Act 13 promotes legitimate state interests and makes distinctions based on real differences between the oil and gas industry, and other industries. As such, it does not violate Article III, Section 32 of the Constitution and Count IV of the Petition was properly dismissed.

B. In Count V of the Petition for Review, the Municipalities allege that Section 3241 of Act 13 allows for the taking of private property through the power of eminent domain for a non-

public purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. However, Section 3241 - which provides a limited power of eminent domain to public utilities - does serve an important public purpose. The ability to provide oil and gas to the public would be impaired if public utilities did not have the powers conferred by this section. Accordingly, the Commonwealth Court correctly determined that Section 3241 does not violate Article I, Sections 1 and 10 of the Pennsylvania Constitution.

C. In Count VI of the Petition for Review, the Municipalities allege that Act 13 denies them the ability to carry out their constitutional obligation to protect public natural resources in violation of Article I, Section 27 of the Pennsylvania Constitution. However, Act 13 is a proper exercise of the Legislature's power to regulate and control natural resources. Accordingly, it supersedes any duties or responsibilities which municipalities might otherwise have in regards to the environment. Accordingly, the Commonwealth Court correctly determined that Act 13 does not prevent the Municipalities from exercising their responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

D. In Count VII of the Petition for Review, the Municipalities allege that Section 3305(a) of Act 13 violates the doctrine of Separation of Powers because it allows the PUC to provide advisory opinions regarding zoning ordinances to municipalities. However, the PUC's determinations are non-binding, and do not infringe on the powers of the judiciary or the legislative functions of Municipalities. Regardless of who brings a matter before the PUC, all interested parties retain the right to have a final, *de novo*, adjudication before Commonwealth Court. Accordingly, the Commonwealth Court correctly determined that Section 3305 does not violate the Separation of Powers Doctrine.

ARGUMENT

I. COMMONWEALTH COURT CORRECTLY CONCLUDED THAT DR. MEHERNOSH KHAN, THE DELAWARE RIVERKEEPER NETWORK, AND MAYA VAN ROSSUM'S LACK STANDING TO RAISE A CHALLENGE TO THE PASSAGE OF ACT 13 OF 2012.

As a pre-requisite to obtaining judicial relief in this case, Dr. Khan, the Delaware Riverkeeper Network, and Maya Van Rossum (the Delaware Riverkeeper) must first satisfy the requirement of standing. *Sierra Club v. Hartman*, 529 Pa. 454, 605 A.2d 309 (1992). In discussing principles of standing, it is necessary to consider both the nature of the particular claims raised, and the alleged injury or impact on a particular individual, business or organization. For a party to be aggrieved, it must have a substantial, direct, immediate and not remote, interest in the subject-matter of the litigation. *Philadelphia Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203-04, 888 A.2d 655, 659-60 (2005). A substantial interest is an interest which surpasses the common interest of all citizens in seeking obedience to the law. *Id.* See also *Sierra Club*, 529 Pa. at 456, 605 A.2d at 310; *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 168, 507 A.2d 323, 328 (1986) (petitioner's interest must be greater than, and distinguishable from, the common interest shared by all taxpayers). Likewise, an interest is sufficiently "direct" only when the aggrieved person can show a causal connection between the alleged harm to his or her interest and the matter complained of. *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 559-60, 838 A.2d 566, 577 (2003).

A. The Delaware Riverkeeper Network and Maya Van Rossum Lack Standing.

The Commonwealth Court correctly determined that The Delaware Riverkeeper Network and Maya Van Rossum (the Delaware Riverkeeper) lack standing. Although they assert a general interest in protecting and maintaining the Delaware River Basin watershed (Petition for Review at ¶¶32-34; R.R. 64a-65a), this is insufficient to establish standing. There are simply no

allegations in the petition for review which directly relate to these particular petitioners or which indicate that they have a substantial, direct or immediate interest in this litigation beyond a general interest in the environment and the Delaware River.³

In *Sierra Club v. Hartman*, 529 Pa. 454, 605 A.2d 309 (1992), the Sierra Club and various other environmental organizations brought suit challenging the failure by the Legislature to adopt a proposed air pollution regulation. The Supreme Court held that they lacked standing because their interest in upholding a constitutional right to a clean environment was no greater than the common interest of all citizens. *Id.*, 529 Pa. at 457, 605 A.2d at 311. For the same reasons, the Delaware Riverkeeper Network and Van Rossum lack standing in this case and their claims were properly dismissed.⁴

B. Mehernosh Khan, M.D. Lacks Standing

The Commonwealth Court also correctly determined that Dr. Mehernosh Khan lacks standing. In Counts XI and XII of the Petition for Review, Dr. Khan raises two specific

³ There are no allegations in the Petition to suggest that the Non-Municipal Petitioners (i.e. the Delaware Riverkeeper Network, Maya Van Rossum, and Dr. Mehernosh Khan) share the same legal interests as the Municipal Petitioners or anything else in common beyond a desire to have Act 13 declared invalid. Assuming *arguendo* that the Municipal Petitioners have standing, this would in no way provide a basis for conferring standing upon the other petitioners.

⁴ For the same reasons explained previously in the Commonwealth's initial brief in regards to the standing of the Municipal Petitioners, there are numerous individuals, businesses, and organizations which will be in the position to raise appropriate challenges to Act 13 in the future. Therefore, there is no basis for granting standing to the Delaware Riverkeeper Network so that it can litigate claims as a "representative" of others who might believe that they are aggrieved by Act 13's alleged failure to adequately protect the environment. In addition, the fact that there are others who will be more directly affected and better situated to challenge Act 13 as actual controversies arise as it is implemented makes it inappropriate to grant taxpayer standing to Van Rossum or any of the other individual petitioners. *See Stilp v. Commonwealth*, 927 A.2d 707, 710 (Pa. Cmwlth. 2007) (setting forth the five narrow requirements for obtaining taxpayer standing).

challenges to Section 3222.1(b)(11) of Act 13.⁵ This provision is part of Section 3222's general well reporting requirements, and provides for the reporting of trade secrets and confidential proprietary information to health care professionals. While allowing for the use of such information for the treatment of individuals who may have been exposed to dangerous or toxic substances, it establishes rules to protect the confidentiality of this type of information to protect the economic interests of the oil and gas industry.

Although initially it might appear that as a doctor he would be directly affected by this provision so as to have standing, on closer examination he does not. While Dr. Khan alleges that he will be unable to properly practice medicine under Section 3222.1(b)(11), this claim is not supported by the language of the statute which states only that "information may not be used for purposes other than the health needs asserted." It is unclear why he believes he has an interest to disclose proprietary information of this kind for non-medical purposes or that his non-medical interest in this information is greater than that of the general public.

Assuming *arguendo* that Dr. Khan does have a sufficient direct interest in the application of Section 3222.1(b)(11), his claim seems premature. First, the Department has not yet promulgated regulations relating to the confidentiality provisions as provided for under the Act. *See* 58 Pa. C.S. §3222.1(b)(11). Second, and more importantly, if Dr. Khan were in the position in the future where he actually had information subject to the confidentiality provisions of

⁵ Dr. Khan alleges that Section 3222.1(b)(11) is a "special law" which violates Article III, Section 32 of the Pennsylvania Constitution because it relates only to proprietary information of the natural gas industry. (Petition at ¶¶ 249-272; R.R. 151a-158a) He also alleges that this section violates the single subject requirement of Article III, Section 3 of the Pennsylvania Constitution because the regulation of medical providers falls outside the scope of a law governing oil and gas development in Chapter 58 of the Pennsylvania Consolidated Statutes. Although Dr. Khan joins in the other counts raised by the other petitioners, he does not allege any additional facts which would support standing as to those claims. Accordingly, he lacks standing as to Counts I through X of the Petition for Review for the same reasons given in regards to the Delaware Riverkeeper Network and Van Rossum above.

Section 3222.1(b)(11), he could raise a challenge to the restrictions based on his rights under the Constitution at that time.⁶

II. COMMONWEALTH COURT CORRECTLY CONCLUDED THAT COUNT IV OF THE PETITION FOR REVIEW SHOULD BE DISMISSED BECAUSE ACT 13 IS NOT A SPECIAL LAW FOR PURPOSES OF ARTICLE III, SECTION 32 OF THE PENNSYLVANIA CONSTITUTION.

In Count IV of the Petition for Review, the Municipalities allege that Act 13 is a “special law” because it distinguishes between the oil and gas industry, and other industries in Pennsylvania in violation of Article III, Section 32 of the Pennsylvania Constitution. (Petition at ¶¶ 126-166; R.R. 103a-166a) However, Act 13 is not a “special law” which violates Article III, Section 32 of the Pennsylvania Constitution because it is uniform in its regulation of the oil and gas industry and does not benefit, or apply solely to, a single group or entity.

Article III, Section 32 of the Pennsylvania Constitution prohibits the Legislature from enacting “special laws.” However, Act 13 is not a special law and thus, this particular constitutional provision does not apply. Special laws are only those laws which grant special privileges to an individual person, company or municipality. *See Wings Field Preservation Associates v. Dept. of Transp.*, 776 A.2d 311 (Pa. Cmwlth. 2001). The Legislature has made a valid classification in providing for the regulation of the oil and gas industry. Moreover, its provisions are uniform and establish strict environmental requirements for participants in the oil and gas industry. Act 13 also establishes protections for landowners who may live or own land

⁶ To the extent Dr. Khan is alleging that his ability to treat patients will be impaired because he will not be able to obtain necessary proprietary information from those in the oil and gas industry, this argument is meritless and does not support finding that he has standing. Act 13 itself requires members of the industry to provide required information for medical purposes. Absent any evidence to the contrary, it should be presumed that members of the industry will follow the requirements of the law. In any case, Dr. Khan cannot challenge the constitutional validity of Act 13 based on his purely speculative belief that the law will be violated.

in proximity to oil and gas operations. In sum, Act 13 furthers the economic and environmental interests of the Commonwealth rather than benefitting a single group or entity. For these reasons, among others, Act 13 does not qualify as a “special law” which is prohibited under Article III, Section 32 of the Constitution.⁷ See *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975); *Pennsylvania Turnpike Commission v. Commonwealth*, 855 A.2d 923 (Pa. Cmwlth.), *aff’d*, 587 Pa. 347, 899 A.2d 1085 (2004).

III. COMMONWEALTH COURT CORRECTLY CONCLUDED THAT COUNT V OF THE PETITION FOR REVIEW SHOULD BE DISMISSED BECAUSE ACT 13 DOES NOT AUTHORIZE THE UNCONSTITUTIONAL TAKING OF PROPERTY FOR PRIVATE PURPOSES IN VIOLATION OF ARTICLE I, SECTIONS 1 AND 10 OF THE PENNSYLVANIA CONSTITUTION.

In Count V of the Petition for Review, the Municipalities allege that Section 3241 of Act 13 allows for the taking of private property through the power of eminent domain for a non-public purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.⁸ (Petition at ¶¶ 167-173; R.R. 115a-117a) However, Section 3241, which entitles certain corporations to acquire an interest in real property under Act 13, is a proper exercise of the

⁷ The Municipalities argue in their brief that the Commonwealth Court erred in finding a rational justification for distinguishing between the oil and natural gas industries and other industries. While the reasons for the distinctions made by the Legislature seem apparent on their face, the Municipalities seek to establish a heightened standard of review for the Legislature which includes a fact finding requirement. However, this level of proof is simply not required to meet the rational basis standard which governs challenges to legislation under Article III, Section 32 of the Constitution. *Harrisburg School Dist. v. Hickok*, 563 Pa. 391, 397, 761 A.2d 1132, 1136 (2000) (“The judicial function, then, with respect to classifications, is ‘to see that the classification at issue is founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition.’”); see also *Martin v. Unemployment Compensation Board of Review*, 502 Pa. 282, 292, 466 A.2d 107, 111-12 (1983) (Court is free to hypothesize any reason the legislature might have for its actions.).

⁸ It should be noted that Section 3241 does not represent a new power which did not previously exist prior to the enactment of Act 13. Instead, it is a recodification of the authority established under Section 601.401 of the prior Oil and Gas Act, 58 P.S. §601.401, which was first enacted almost 30 years ago.

Commonwealth's power of eminent domain for public purposes and does not violate Article I, Sections 1 and 10 of the Pennsylvania Constitution.

First and most importantly, there are absolutely no allegations and no facts offered to demonstrate that any of the Municipalities' property has been or is in imminent danger of being taken, let alone taken without just compensation. Without such affirmative action, the Municipalities' claim is speculative and conjectural and, therefore, not ripe for consideration. *See Borough of Centralia v. Commonwealth*, 658 A.2d 840 (Pa. Cmwlth. 1995). In addition, Act 13 provides protections to and an appropriate mechanism of review for land owners. Section 3241(d) states that before appropriating an interest in real property under the Act, a person "shall attempt to agree with owners of interests in the real property involved as to damages payable for rights and interests to be appropriated." 58 Pa. C.S. § 3241(d). If not satisfied by this process, a property owner may petition the court for the appointment of a board of neutral viewers, who will file a report and assess damages. 58 Pa. C.S. § 3241(e). The parties also have the right to appeal the viewers' report and proceed to a jury trial. 58 Pa. C.S. § 3241(f). These avenues are available to the Municipalities if, in the future, they can allege facts that demonstrate their property has been taken without just compensation.

Second, the Municipalities' claim that Section 3241 provides for the taking of property for a non-public purpose is blatantly untrue. Both the United States and Pennsylvania Constitutions mandate that private property may only be taken to serve a public purpose. *In re Opening Private Rd. for Benefit of O'Reilly*, 607 Pa. 280, 299, 5 A.3d 246, 258 (2010). Furthermore, the Pennsylvania Supreme Court has maintained that "to satisfy this obligation, the public must be the primary beneficiary of the taking." *Id.* However, it is clear that Act 13 contemplates takings only where the public is the primary beneficiary.

Section 3241(a) specifically limits the entities which may appropriate an interest in real property under Act 13 and, in doing so, necessarily limits the purpose of permissible takings. Section 3241(a) states that, “[e]xcept as provided in this subsection, a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may appropriate an interest in real property located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.” 58 Pa. C.S. § 3241(a). Through the specific language used, the Legislature limited the entities which may appropriate an interest in real property under Act 13 solely to corporations which are “empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth.” *Id.* The only corporate entities within the Commonwealth which have the authority to transport, sell, or store natural gas or manufactured natural gas are public utilities holding valid certificates of public convenience issued by the Pennsylvania Utility Commission. 66 Pa. C.S. §§ 102 & 1101. As these are the only corporations which are authorized to use the power of eminent domain under Section 3241, the suggestion that this provision does not serve a public purpose or is intended to allow oil and gas production companies to appropriate land for the benefit of private interests is not just misleading, but an incorrect interpretation of Act 13’s provisions.⁹

⁹ The Municipalities argue that Section 3241 conflicts with the Property Rights Protection Act, 26 Pa. C.S. § 204(a), which prohibits the use of eminent domain to take private property in order to use it for private enterprise. This argument fails for at least two reasons. First, the Property Rights Protection Act contains an exemption for public utilities. 26 Pa. C.S. § 204(b)(2)(i). Second, just as it is improper for the Municipalities to argue that Act 13 is unconstitutional because its provisions conflict with the MPC, it is improper for them to argue that Section 3241 is invalid because it conflicts with another statute (i.e. Property Rights Protection Act).

IV. COMMONWEALTH COURT CORRECTLY CONCLUDED THAT COUNT VI OF THE PETITION FOR REVIEW SHOULD BE DISMISSED BECAUSE ACT 13 WAS ENACTED PURSUANT TO THE LEGISLATURE'S POWERS TO REGULATE AND CONTROL NATURAL RESOURCES AND PREEMPTS ANY CONFLICTING OBLIGATIONS OF MUNICIPALITIES UNDER ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION.

In Count VI of the Petition for Review, the Municipalities allege that Act 13 denies them the ability to carry out their constitutional obligation to protect public natural resources in violation of Article I, Section 27 of the Pennsylvania Constitution. (Petition at ¶¶ 174-199; R.R. 117a-136a) However, Act 13 is a proper exercise of the Legislature's power to regulate and control natural resources. Therefore, Act 13 supersedes any duties or responsibilities which municipalities might otherwise have in regards to the environment.¹⁰ Accordingly Act 13 does not, and could not, violate Article I, Section 27 of the Pennsylvania Constitution.

Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the **Commonwealth** shall conserve and maintain them for the benefit of all the people.

Id. (emphasis added). This constitutional provision provides specific constitutional authority for the Legislature to enact laws like Act 13 which serve to manage and protect the environment while allowing for the development of Pennsylvania's valuable natural resources.

The Municipalities improperly assert that Article I, Section 27 of the Constitution grants municipalities the power to protect public natural resources as against the Legislature. However,

¹⁰ We are not arguing that municipalities never have duties or responsibilities pursuant to Article I, Section 27 of the Constitution. Rather, we are simply stating that the Commonwealth's authority supersedes that of local governments. Therefore, where the Commonwealth is properly exercising its legislative powers under Article I, Section 27, its powers are not limited by any powers which local governments might otherwise have and the Commonwealth's power in this regard cannot be abrogated or limited by previous statutory requirements.

Article I, Section 27 is more appropriately viewed as a grant of authority to the Commonwealth to conserve and maintain Pennsylvania's natural resources. Pa. Const. Art. I, §27 ("As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.") Article I, Section 27, on its face, names the Commonwealth as trustee of Pennsylvania's public natural resources. "Constitutional provisions are not to be read in a strained or technical manner. Rather, they must be given the ordinary, natural interpretation the ratifying voter would give them." *Com. ex rel. Paulinski v. Isaac*, 397 A.2d 760, 765 (Pa. 1979). Here, Article I, Section 27 plainly places the authority and the obligation to control Pennsylvania's natural resources on the Commonwealth.

This reading of Article I, Section 27 is consistent with our courts recognition that municipalities are creatures of the state. *See Knauer v. Commonwealth*, 332 A.2d 589, 590 (Pa. Cmwlth. 1975). Municipalities do not have powers independent and superior to the Commonwealth. *See Appeal of Gagliardi*, 401 Pa. 141, 143, 163 A.2d 418, 419 (1960); *see Knauer*, 332 A.2d at 590. The Municipalities' argument is ultimately based on the false premise that Article I, Section 27 grants municipalities power as against the Legislature. Because Article I, Section 27 grants only the Commonwealth the power to conserve and maintain Pennsylvania's public natural resources, and because municipalities' power is limited to that granted by the Legislature, no power of municipalities as against the Legislature may be inferred. Therefore, the Municipalities' claim pursuant to Article I, Section 27 of the Constitution must fail.

V. COMMONWEALTH COURT CORRECTLY CONCLUDED THAT COUNT VII OF THE PETITION FOR REVIEW SHOULD BE DISMISSED BECAUSE ACT 13 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE BY PROVIDING FOR THE PUC TO ISSUE NON-BINDING, ADVISORY OPINIONS REGARDING THE LEGALITY OF LOCAL ORDINANCES AND WHERE COMMONWEALTH COURT HAS DE NOVO REVIEW OF ANY FINAL ORDERS ISSUED BY THE PUC?

In Count VII of the Petition for Review, the Municipalities allege that Section 3305(a) of Act 13 violates the doctrine of Separation of Powers because it allows the PUC to provide advisory opinions regarding zoning ordinances to municipalities. (Petition at ¶¶ 200-216; R.R. 136a-141a) The Municipalities allege that Section 3305(a) of Act 13 effectively allows the PUC¹¹ to engage in the legislative function of enacting ordinances in violation of the doctrine of Separation of Powers. The Municipalities additionally allege that Section 3305(b) of Act 13 violates the doctrine of Separation of Powers by allowing the PUC to make a determination regarding the constitutionality of a local zoning ordinance. They allege that this effectively allows the PUC to engage in a judicial function in violation of the doctrine of Separation of Powers.

However, contrary to the assertions of the Municipalities, the authority given by Act 13 to the PUC to issue non-binding, advisory opinions regarding zoning ordinances does not confer legislative authority nor judicial authority on the executive branch in violation of the principle of separation of powers. Act 13 confers on the PUC the authority to issue non-binding advisory opinions regarding the compliance of a local zoning ordinance with the requirements of Act 13. Executive agencies are often called upon to provide advice or give an opinion regarding the validity of statutes and other legislative pronouncements. For example, the Office of Attorney General provides advisory opinions to the Governor and other executive agencies under the

¹¹ The PUC is an independent administrative agency which is not subject to the authority of the Governor or other officials of the Executive Branch. 66 Pa. C.S. § 301(a).

Commonwealth Attorneys Act without intruding into the authority of the legislature or the judiciary. Commonwealth Attorneys Act, 71 P.S. §§ 732-204. According to the position adopted by the Municipalities, however, opinions of this kind by the Attorney General would themselves be unconstitutional.

The judiciary itself is prohibited from rendering advisory opinions. Apparently, under the Municipalities' view, the rendering of advisory opinions by any branch of government is unconstitutional. Of course, this is not true. The key is that the PUC is only rendering an opinion and not making a binding, judicial determination which can only be made by the judicial branch. The Municipalities' contention that legislative bodies cannot use or otherwise rely on the expertise of executive agencies in enacting legislation is absurd. So long as the executive branch does not tie the hands of a municipality in enacting local zoning ordinances, it does not infringe on the independence of the legislative process.

Act 13 establishes a resource to assist municipalities in complying with its requirements. However, municipalities are not required to ask the PUC for its advice and the judiciary remains the final arbiter of whether a particular ordinance is lawful. Moreover, an order by the PUC resulting from a request by an owner or operator of an oil or gas operation, or a person aggrieved by the enactment or enforcement of an ordinance, allows an aggrieved party the right to a *de novo* appeal to Commonwealth Court. *See* 58 Pa. C.S. § 3305(b). Regardless of who brings a matter before the PUC, all interested parties retain the right to have any matter decided by the courts. Accordingly, the PUC is not usurping the authority of the courts.

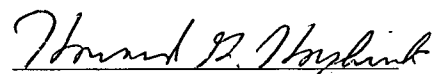
CONCLUSION

For the reasons set forth above, the order of the Commonwealth Court granting the preliminary objections of the Commonwealth and Attorney General Linda L. Kelly as to Counts IV, V, VI, and VII of the Petition for Review and dismissing Dr. Mehernosh Khan, the Delaware River Network, and Maya Van Rossum (the Delaware Riverkeeper) for lack of standing, should be affirmed.

Respectfully submitted,

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Date: September 18, 2012

CERTIFICATE OF SERVICE

I, **Howard G. Hopkirk**, Senior Deputy Attorney General, hereby certify that on September 18, 2012, I caused to be served the foregoing **BRIEF FOR CROSS-APPELLEES COMMONWEALTH OF PENNSYLVANIA; OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA; AND LINDA L. KELLY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA** by depositing two copies of same in the United States Mail, first class, postage prepaid, in Harrisburg, Pennsylvania upon the following:

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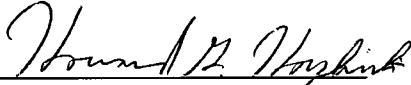
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