

**[J-55-2022] [MO:Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

THE MARCELLUS SHALE COALITION,	:	No. 69 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court at No. 573
	:	MD 2016 dated August 12, 2021.
v.	:	
	:	ARGUED: September 15, 2022
	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION OF THE	:	
COMMONWEALTH OF PENNSYLVANIA	:	
AND ENVIRONMENTAL QUALITY BOARD	:	
OF THE COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	
Appellants	:	

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

DECIDED: April 19, 2023

I join Parts I-V as well as Part VI(C)(2) of the Opinion of the Court. I agree that the Agencies did not exceed their rulemaking powers by enacting 25 Pa. Code §78a.1, which defines “[o]ther critical communities.” Like Justice Wecht, however, I would assess the rulemaking authority of the Agencies “through ordinary principles of statutory construction[,]” including use of an *ejusdem generis* analysis. Concurring and Dissenting Opinion at 2 (Wecht, J.). As such, I concur only in the result as to this issue. An *ejusdem generis* analysis also leads me to agree with Justice Mundy that the Agencies exceeded their rulemaking power by enacting 25 Pa. Code §78a.15(f)(1)(vi), which includes “common areas on a school’s property or a playground” as public resources because “they ‘do not share the same attributes as the other public resources identified in [58

Pa.C.S. §3215(c).]” Dissenting Opinion at 5-6 (Mundy, J.), *quoting Marcellus Shale Coalition v. Dep’t of Environmental Protection*, 193 A.3d 447, 481 (Pa. Cmwlth. 2018). By extension, I would also hold the Agencies exceeded their rulemaking authority by including private owners of such areas in the definition of “[p]ublic resource agency” codified at 25 Pa. Code §78a.1. For these reasons, I concur in part and dissent in part.