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MEMORANDUM

To: Interested Parties

From: Jordan B. Yeager & Lauren M. Williams, Curtin & Heefner LLP

Re: Proposed Amendments to Oil & Gas Act Eliminating the Role of Local Zoning

Date: November 3, 2011

Last week, the Corbett Administration released its proposed amendments to the Oil & Gas Act (“Act”) that would both revise the Act’s current environmental protection requirements, and create a county-based drilling impact fee. House Bill 1950 that passed out of committee on Wednesday contains similar, if not identical, language. Most notably for municipalities, the proposed amendments to the Act’s environmental protection provisions (“the amendments”) would remove oil and gas drilling and associated activities from nearly all local land use regulation, including regulation under the Municipalities Planning Code (“MPC”). The provisions would go beyond prior court decisions regarding the current Act’s preemptive scope, and would effectively relegate a municipality to an irrelevant advisory role to the Pennsylvania Department of Environmental Protection (“PADEP”) in the oil and gas permitting process, with no right of review under the Act.

Express preemption of local land use regulation

The amendments would fully revise the Act in an attempt to block local regulation in any form of “oil and gas operations,” except under the Flood Plain Management Act. Specifically, the amendments state that the Act and “any other environmental law,” as defined in the amendments, “are of Statewide concern and occupy the entire field of regulation regarding oil and gas operations, to the exclusion of” a list of various forms of local rules, laws, and regulations that a municipality might otherwise enact. The amendments would remove the current Act’s reference to the MPC, and only the Flood Plain Management Act would remain outside of the revised Act’s preemptive scope.

Further, the amendments' new term and definition of "[o]il and gas operations" would likely remove doubt about a municipality's inability to regulate oil and gas drilling through its land use authority. Under the revisions, "[o]il and gas operations" would include the "[s]iting and locating of oil and gas wells;" "treatment [and] storage," among other activities, "of fresh water, wastewater, wastes, chemicals and other materials directly associated with" oil and gas well drilling, fracturing, and completion; "[c]ompression . . . of oil or gas;" and even the "[c]onstruction and use of drilling rigs and pipelines." The "[c]onstruction and use of access roads, well sites, . . . impoundments" and other "structures" would also be included. These are only some of the activities specified, and a full reading of the definition reveals that it would include practically all aspects of natural gas drilling from well construction and hydraulic fracturing to gas processing, compression, and transmission. On one hand, the amendments only expressly mention location when dealing with wells, which might, on its own, suggest that municipalities would still retain some land use authority over the siting of compressor stations or gathering lines, for example. On the other hand, the entirety of the Corbett amendments strongly suggest that a municipality would not be able to regulate under the MPC the location of components such as compressor stations. Given these provisions, the amendments would clearly aim to remove the land use authority left to a municipality under the current Act, except for authority under the Flood Plain Management Act.

Other barriers to municipal regulation under the amendments

In addition to these revisions, the amendments would change the Act to regulate certain parts of the drilling process that a municipality could currently control through land use regulation. As a result, State authority in these areas could implicitly preempt some local land use authority.

Most notably, a proposed section would specify security fencing, warning signs, and lighting requirements, as well as provisions on noise and odors. The amendments also would more extensively regulate the siting of operations in floodplains and similar areas. Further, the amendments would expressly authorize the Environmental Quality Board ("EQB") to issue regulations specifying "criteria" that the PADEP would use to "condition[] a well permit based on its impact to the public resources identified under subsection (c)." Subsection (c) would remain unchanged from the current Act, and it currently requires the PADEP that, "on making a determination on a well permit, consider [its] impact . . . on public resources to include, but not be limited to . . . [p]ublicly owned parks, forests, gamelands, and wildlife areas" as well as "scenic rivers," historic sites, and other features. To the extent that municipal land use regulation would have sought to address these issues, the grant of authority to the EQB could serve as one more indication that the State intends to occupy this area of oil and gas regulation to the exclusion of local municipalities.

Lastly, the amendments would revise the Act to include additional setbacks from certain water sources where an "unconventional well," as defined in the amendments, is involved. For

instance, for these types of wells, the revised Act would require a 1,000 foot setback from not only a water well, but also a “surface water intake, reservoir or other source used by a water purveyor.” Under the amendments, a “[w]ater purveyor” would include an “owner or operator of a public water system as defined” under the Pennsylvania Safe Drinking Water Act. Although these changes could provide greater protection for all water sources, they also could prevent a municipality from, for instance, specifying certain setbacks from its own reservoirs based on local conditions where it might have otherwise been able to do so under the current Act. Coupled with the Act’s waiver provisions, a municipality could possibly face drilling operations in places where its own land use regulations would prohibit such activity because the PADEP would have waived the added setbacks, and the municipality would not be able to assert its own regulatory authority under the amendments.

What role would remain for a municipality?

The amendments would still provide a role for municipalities in the oil and gas permitting process, but that role would be extremely circumscribed. A municipality would retain only an advisory role in the permitting process, and would have no right of review of a permitting decision if the PADEP chose not to follow the municipality’s recommendations. Further, timing provisions in the amendments suggest that the municipality’s role in the process would not be meaningful, even though a municipality would receive more notice of a permit application under the amendments than under the current Act.

In particular, the amendments would create a section dealing with municipality comments. Specifically, the revised Act would allow a municipality to “submit written comments to the [PADEP] describing local conditions or circumstances which the municipality has determined should be considered by the department in rendering its determination on the unconventional well permit.” The revisions would specify the time frame in which the municipality had to submit its comments, and this time frame would be keyed to the municipality’s “receipt of the plat” that an operator would be required to provide to the municipality under another revision to the Act. A municipality would also have to send its comments “to the permit applicant and all other parties entitled to a copy of the plat under section 201(b),” where the applicant and others would then have a certain time frame in which to respond.

However, despite these provisions and the added notice given to a municipality, the proposed changes would not require the PADEP to consider the municipality’s comments. The amendments would specifically state that the PADEP “may” take the municipality’s comments into account. Also, “[n]otwithstanding any other law, the municipality shall have no right of appeal or other form of review from the department’s decision.” (Emphasis added). Consequently, a municipality could submit comments on local conditions to the PADEP only to have those comments ignored, after which point the municipality would have no right to appeal or to seek review of the PADEP’s decision under the Act as revised by the amendments.

Even more, the amendments' timing provisions further suggest that a municipality would have a very limited role under the revised Act. First, one provision would state that the entire municipality comment process "shall not extend the" permit review process for longer than what the Act specifies. Second, a new section would allow for an expedited permit review process based on time frames that the PADEP would develop. Expedited review could further shorten the time available to consider the municipality's comments. An additional concern with expedited permit review is that the amendments are currently unclear as to how a municipality's comments would be considered when non-"Commonwealth employees" or a county conservation district handle portions of the permit review process. Consequently, although the amendments would give the municipality a role in the permitting process, that role would likely not be a meaningful one, limiting the ability of a municipality to ensure that local conditions are accounted for in the permit review process.

As a whole, the amendments would prevent a municipality from directly asserting its land use authority to protect the health, safety, and welfare of its citizens, and would leave a municipality without recourse under the Act where the PADEP chose to ignore the municipality's concerns regarding local conditions.

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