



## The People Prevail or “Take that, you bullies!”<sup>1</sup>

***Blog post written by: Maya van Rossum, the Delaware Riverkeeper, by Attorneys Jordan Yeager and Lauren Williams and Tracy Carluccio, Deputy Director, Delaware Riverkeeper Network.***

While we are all fighting the stranglehold the oil and gas industry has on Gasland, more often than not it's difficult to claim many advances. But last week a truly historic decision was declared when the Pennsylvania Supreme Court threw out Act 13, a law crafted by the industry and their cronies in Harrisburg and signed into law by Governor Corbett in February 2012. Act 13 preempted municipal zoning and planning of oil and gas operations, established mandatory waivers of stream setbacks contained in state law, and took away the rights of local governments to protect the public trust.

But immediately a fight ensued. Never mind that everything in Pennsylvania seemed to be going the gas corporations' way, that \$23 Million has been spent by the gas industry to influence Pennsylvania (PA) politicians, that Governor Tom Corbett's election campaign has received over \$1.8 M<sup>2</sup>, and that the industry was running roughshod in a gas extraction frenzy that leaves ruined communities, destroyed natural resources and polluted water supplies in its wake. A legal challenge was essential because and it was a violation of the Constitution and if allowed to stand the law was a death knell for Pennsylvania and its people.

Seven municipalities, Delaware Riverkeeper Network, and Dr. Mehernosh Khan, a physician practicing in southwestern PA, challenged Act 13 as unconstitutional, relying heavily on Article 1, Section 27 of the PA Constitution, the Environmental Rights Amendment. The municipalities are: Township of Robinson, Washington County; Township of Nockamixon, Bucks County; Township of South Fayette, Allegheny County; Peters Township, Washington County; Township of Cecil, Washington County; Mount Pleasant Township, Washington County; and the Borough of Yardley, Bucks County.

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<sup>1</sup> Bev Braverman of Pennsylvania's Mountain Watershed Association

<sup>2</sup> <http://new.marcellusmoney.org/news/2012-07-12-new-report-natural-gas-industry-has-spent-more-23-million-influence-pa-elected-offic>

On July 26, 2012 the Commonwealth Court declared the statewide zoning provisions in Act 13 unconstitutional, null, void and unenforceable. The Court also struck down the provision of the law that required DEP to grant waivers to the setback requirements in Pennsylvania's Oil and Gas Act. Delaware Riverkeeper Network and Dr. Kahn lost standing. The Commonwealth appealed. On October 17, 2012 the Pennsylvania Supreme Court heard argument that Pennsylvania's Act 13 is unconstitutional, unjustly supersedes all local ordinances related to oil and gas operations, extinguishes municipal zoning of these operations, and exposes the public and the environment to pollution and degradation from these activities. The Court deliberated for more than a year.

On December 19, 2013 the PA Supreme Court ruled that Act 13 violates the Pennsylvania Constitution. In doing so, the Court struck down the shale gas industry's effort to force every municipality in the state to allow gas drilling and related industrial operations in every zoning district, rejected one-size-fits-all zoning, the removal of public trust obligations of government officials to local citizens, and the waivers for stream setbacks as unconstitutional. Chief Justice Castille authored the historic majority opinion. Justices Todd, McCaffrey and Baer agreed on the unconstitutionality of the provisions, resulting in a 4 to 2 decision.

Justices Castille, Todd, and McCaffrey held that the provisions violate Article I, Section 27 of the Pennsylvania Constitution – the Environmental Rights Amendment. Chief Justice Castille stated that “we agree with the citizens that, as an exercise of the police power, Sections 3215(b)(4) and (d), 3303, and 3304 are incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources.” The three Justices recognized that the Plaintiffs sought to “vindicate fundamental constitutional rights that, they say, have been compromised by a legislative determination that violates a public trust.”

In reviewing Section 3303, the three Justices affirmatively noted that the public trust obligations imposed by Section 27 run to *all* levels of government in the Commonwealth, including municipalities. As a constitutional obligation to local citizens, the Justices expressly recognized that no statute can remove such an obligation from municipalities, and likewise cannot remove the “implicitly necessary authority to carry into effect its constitutional duties.” The Court understood that local citizens made investments in their communities based on expectations created by local ordinances, including local ordinances that sought to protect local public trust resources. To the Court, Section 3303 effectively “commands municipalities to ignore their obligations under Article I, Section 27 and further directs municipalities to take affirmative action to undo existing protections of the environment in their localities” to the detriment of local citizens.

In discussing Section 3304's uniform zoning provisions, Justices Castille, Todd, and McCaffrey agreed that the provisions “sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts.” They also concluded that the Act forced some citizens to bear “heavier environmental and habitability burdens than others” in violation of Section 27's mandate that public trust resources be managed for the benefit of all the people. Further, the three Justices found similar constitutional infirmities in Section 3304 as they found in Section 3303, in that Section 3304 “removes local government's necessary and

reasonable authority to carry out its trustee obligations” because it “prohibit[ed] the enactment of ordinances tailored to local conditions.”

As for Section 3215(b)(4), which established mandatory waivers of stream setbacks, the three Justices found this provision equally infirm. Based on the Commonwealth’s argument as to Section 3215(b)(4), the Justices struck the entirety of Section 3215(b). The Justices agreed with the Commonwealth that the waivers provision in Section 3215(b)(4) could not be read independent of the rest of Section 3215(b). In reviewing the entirety of Section 3215(b), the Justices disapprovingly noted that “Section 3215(b) appears to provide for nothing more than a set of voluntary setbacks or, as an alternative, the opportunity for a permit applicant to negotiate with the Department of Environmental Protection the terms or conditions of its oil or natural gas well permit,” finding it “remarkabl[e]” that the DEP had the burden of proving protective conditions to be necessary. Further, because Section 3215(d) did not require the DEP to act on local concerns raised in comments to the DEP, “Section 3215 fosters decisions regarding the environment and habitability that are non-responsive to local concerns” to the detriment of public trust beneficiaries – Pennsylvania citizens.

Justice Baer concurred in finding Act 13 unconstitutional, agreeing with the Commonwealth Court’s reasoning. Justice Baer stated that the provisions “force municipalities to enact zoning ordinances, which violate the substantive due process rights of their citizenries.” He further noted “Pennsylvania’s extreme diversity” in municipality size and topography and that zoning ordinances must “give consideration to the character of the municipality,” among other factors, which Act 13 did not. In recognizing what Act 13 meant for local municipalities, Justice Baer stated, “As Challengers point out, Act 13 makes it easier for Chevron to establish a drilling rig in the middle of a corn field than a church to build a small ten-pew worship space in the same field.”

In a reversal of the findings of the Commonwealth Court, the Pennsylvania Supreme Court found that Dr. Khan satisfies standing requirements. The court noted that “existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable.” Opinion at 25. In other words, provisions of Act 13 put Dr. Khan in the untenable and objectionable position of choosing between violating Act 13’s confidentiality agreement and “violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care.” Id. Therefore, Dr. Khan’s interests were indeed “substantial and direct...not remote,” and conferred standing. Opinion at 26. The Court remanded Dr. Kahn’s case to the Commonwealth Court for further proceedings.

The Pennsylvania Supreme Court also reversed Commonwealth Court’s finding that the Delaware Riverkeeper Network lacked standing in this case. Specifically, the court found that DRN’s members engendered “a substantial and direct interest in the outcome of the litigation premised upon the serious risk of alteration in the physical nature of their respective political subdivisions and the components of their surrounding environment. This interest is not remote.” Opinion at 21-22. Further, the court also found that Maya van Rossum, as the Executive Director

of the Delaware Riverkeeper Network, also has standing in her official capacity to represent the membership's interests." Opinion at 22. The ruling therefore sets important precedent for what immediate interest or harm environmental organizations and their members need to demonstrate in order to properly establish standing.

The Supreme Court ruling is looking like a turning point, a watershed moment, for Pennsylvania. The Petitioners knew they would win if the law was still held sacred by the state's highest Court. But how big the win is exceeds expectations. The Environmental Rights Amendment (ERA) now has new life and the application of that life has the potential to renew the potency of what should be the bottom line in environmental decisionmaking. That foundation is the health of our communities and the environment that sustains us and future generations. By recognizing the power of ERA, the Court upholds the right of citizens and reaffirms the responsibility of our elected officials to protect the public trust, to fight for people and our natural world to be the priority, not greedy corporations and their skills.

It is inspiring to read that the Court stated, "As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects [life, health, and liberty: surface and ground water, ambient air, etc.] of Pennsylvania's environment, which are part of the public trust." Opinion at 117.

Additionally, the Court stated, "By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction." Opinion at 118.

These findings apply beyond Pennsylvania and support the truth we all know about Gasland. That the highest Court in the most recently intensely drilled state in the Nation has declared gas extraction operations to be undeniably harmful to the environment and a threat to future generations and potentially the public purse, puts wind under our sails everywhere we are struggling to take back what the industry has stolen.

The Decision and concurring opinion can be found at:

<http://www.delawariverkeeper.org/resources/Reports/Opinion%20J-127A-D-2012oajc.pdf>