Frequently Asked Question 7:
Do Government Officials Have an Obligation – Before Acting – to Determine
Whether the Proposed Action Will Cause an Unreasonable Degradation of Our Air and Water?

March, 2012, the Delaware Riverkeeper Network, seven municipalities, and Dr. Me hernosh Khan filed legal action challenging Act 13, which was signed into law by Governor Corbett on February 14, 2012. Act 13 amended the Pennsylvania Oil and Gas Act, and among other things, preempted municipal zoning of oil and gas development. The plaintiffs challenged the new law on the grounds it violated the Pennsylvania and Constitution and endangered public health, natural resources, communities and the environment. On December 19, 2013, the Pennsylvania Supreme Court issued a final decision declaring portions of the law unconstitutional, giving the Environmental Rights Amendment of the Pennsylvania Constitution strong substantive importance, and remanding portions of the law for additional litigation. Since issuance of the PA Supreme Court decision there have been many questions asked about the substance, meaning and application of this precedent setting decision. The Delaware Riverkeeper Network and our legal counsel are working to answer these important questions for the community in a series of FAQ information sheets.

The Pennsylvania Supreme Court’s decision in Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (2013), reinforced that municipalities can validly zone oil and gas operations like any other industrial use. If a municipality has a zoning ordinance in place that identifies specific districts where this industrial activity is allowed, the municipality cannot allow drilling to occur where it is not permitted, even if a gas drilling company has a lease and even if the company has a permit from the Pennsylvania Department of Environmental Protection (“DEP”).

In addition, when carrying out governmental functions, municipalities must comply with Article I, Section 27 of the Pennsylvania Constitution. This means that municipalities are restrained from unduly infringing on the individual environmental rights of citizens, just as municipalities may not unduly infringe on private property rights. Thus, municipalities cannot allow unchecked shale gas development at the expense of citizens’ rights to clean air, pure water and a healthy environment.

Citizens who have been trying to protect their communities from unreasonable expansion of industrial gas development have confronted opposition from those who place corporate profits above public health and welfare. We hope that this series of FAQ responses helps strengthen community understanding of the PA Supreme Court decision.
Do government officials have an obligation – before acting – to determine whether the proposed action will cause an unreasonable degradation of our air and water?

Yes. The Pennsylvania Constitution limits government officials from acting when they have not determined in advance whether the proposed activity will cause an unreasonable degradation of our environment.

Under Article I, Section 27 of the Pennsylvania Constitution, state and local government officials have an obligation to assess whether any proposed project, law, regulation or ordinance would cause unreasonable “actual or likely degradation” of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment. Robinson Twp. v. Com., 83 A.3d 901, 951-955 (Pa. 2013)(plurality). If a governmental entity fails to perform the analysis, or allows development to proceed that would cause unreasonable “actual or likely degradation,” it raises a significant risk of a Section 27 challenge by citizens. Id. (“The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”); see also id. at 951 (stating that clause 1 “implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.”)

Further, as a trustee, government officials must consider before acting whether the proposed action will lead to the “degradation, diminution, or depletion” of the people’s public natural resources either now, or in the future. Id. at 952, 957, 959 & n.46; see also id. at 959 n.45, 20 Pa.C.S. § 7203(a) & (c)(5); In re Scheidmantel, 868 A.2d 464, 492 (Pa. Super. Ct. 2005) (“trustee’s action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions”); 20 Pa.C.S. § 7773. Likewise, government officials must consider whether the proposed action places higher environmental burdens on some citizens than others, which would violate a trustee’s duty of impartiality to treat the beneficiaries “equitably in light of the purposes of the trust.” Id. at 957, 959, 980. Section 27 specifically establishes a preference for protecting the natural quality of the environment and its benefits over development and disturbance, requiring that the government officials take the same focus and care in their actions. Id. at 973 n.55.

But simply performing the analysis is not enough – it is not enough to undertake the exercise of considering environmental impacts, the court’s decision also includes an affirmative obligation to ensure protection of the public’s environmental rights. As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. Id. at 956-57, 977-78. (plurality). “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” Id. at 957. Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 prohibits government:

from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether
such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.

Id. (emphasis added). Section 27 also requires government “to act affirmatively to protect the environment, via legislative action.” Id. at 958.

Primary author of this document is attorney Jordan Yeager. Jordan Yeager is Partner and Chair of the Environmental and Public Sector Section at Curtin & Heefner LLP. Jordan was lead counsel for the Delaware Riverkeeper Network in the case: Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (2013). Jordan was lead counsel on the issues involving the Delaware Riverkeeper and the Delaware Riverkeeper Network’s standing and the Environmental Rights Amendment (Article I, Section 27) of the Pennsylvania Constitution.

Disclaimer: This information is intended to assist you in learning more about these important issues. Each situation is unique and the law is frequently changing, so you should consult with an attorney concerning your particular situation before taking any action or making any decisions.

Date: June 19, 2014