Message from the Co-editors

Dear fellow members of the Shale Energy Law Committee:

For quite some time, we have not received any articles from the membership to include in our newsletter. If you have any article that you would like to have included in the newsletter, please forward it to us. It only makes the newsletter better. We hope that you enjoy this edition of the newsletter.

Best regards,

Paul R. Yagelski  Brian Pulito

Ethics Opinions for PBA Members

Ethics opinions are issued by the PBA Legal Ethics and Professional Responsibility Committee.

The committee responds to requests from any PBA member concerning the impact of the provisions of the Pennsylvania Rules of Professional Conduct upon the member’s prospective conduct. The committee does not address questions about a lawyer’s past conduct, disciplinary matters, matters in litigation or questions of law.

Any PBA member with an ethical question concerning his or her own prospective conduct may call the PBA Ethics Hotline at 800-932-0311, ext. 2214, or 717-238-6715. The PBA Ethics Hotline is not available to non-PBA members or members of the public. For more information, go to www.pabar.org/site/For-Lawyers/Ethics-Opinions.

Upcoming PBA Events


Nov. 1 — PBA Minority Bar Committee Central PA Minority Law Day, Widener University Commonwealth Law School, Harrisburg.

Nov. 9-10 — PBA 2018 Women in the Profession Retreat, The Hershey Hotel, Hershey

Nov. 12-13 — PBA Judicial Evaluation Commission Retreat, PBA Headquarters, Harrisburg

Nov. 15 — PBA Committee/Section Day, Red Lion Hotel, Harrisburg

Nov. 15 — Pennsylvania Bar Foundation NightOUT, Sheraton Harrisburg Hershey Hotel, Harrisburg

Details at www.pabar.org

Background: Religious order and its members brought action alleging that the Federal Energy Regulatory Commission (FERC) order granting a pipeline company a certificate of public convenience and necessity to construct and operate a natural gas pipeline through the order’s property violated the Religious Freedom Restoration Act (RFRA).

Holding: The Natural Gas Act provided the exclusive means for the religious order to challenge the FERC order granting the pipeline company a certificate of public convenience and necessity to construct and operate a natural gas pipeline through the order’s property, and thus the federal district court lacked subject matter jurisdiction over the order’s claim that the FERC’s order violated the RFRA.


Background: Plaintiffs commenced an action against SWN Production Company, LLC (“SWN”) in the Court of Common Pleas of Tioga County. SWN removed the case to federal court on diversity grounds. Plaintiffs filed an amended complaint, seeking to quiet title under Pa. R.C.P. No. 1061(b)(3) (Count I) and for a declaratory judgment under 28 U.S.C. § 2201 and Fed. R.C.P. 57 (Count II). SWN moved to dismiss plaintiffs’ amended complaint pursuant to Fed. R.C.P. 12(b)(6).

The action centered upon a dispute concerning the continuing validity of two oil and gas leases. Plaintiffs asserted that SWN failed to prosecute drilling operations continuously and with due diligence on the subject properties and that the leases therefore expired on Dec. 8, 2015.

In Count I, plaintiffs requested that the court: (1) find that plaintiffs own in fee simple the hydrocarbon formations underlying the subject properties and (2) direct SWN to relinquish the leases and record a release or surrender document with the appropriate state entity.

In Count II, plaintiffs sought a declaratory judgment that: (1) the leases terminated on Dec. 8, 2015 and (2) SWN must surrender and release all hydrocarbon formations underlying the subject properties and the leases governing the same.

SWN contended that the plaintiffs’ quiet title claim must be dismissed because the plaintiffs do not actually possess the subject properties. As to plaintiffs’ declaratory judgment claim, SWN argued that: (1) the action was premature because the leases’ notice clause required plaintiffs to provide written demand for performance to SWN and a period of one year to cure before commencing judicial proceedings and (2) the leases were extended as a matter of law because SWN commenced and continued “drilling operations” as defined in the leases.

Holdings: SWN’s motion to dismiss Count I was denied. Plaintiffs adequately pled ownership of the subterranean oil and gas rights on the subject properties or a sufficient interest in the conveyances at issue. As to Count II, SWN’s motion to dismiss plaintiffs’ amended complaint as premature was denied. The court interpreted the leases to mean that the notice clause did not apply to the habendum clause. In addition, plaintiff’s pled sufficient facts to support their allegations that SWN failed to conduct drilling operations on the subject properties with due diligence as of the date of the leases’ primary terms expired, Dec. 8, 2015. Whether a lessee prosecuted drilling operations continually with due diligence is a question reserved for the fact finder. Plaintiff’s allegations raised a plausible claim that SWN failed to conduct drilling operations continuously with due diligence prior to and through expiration of the leases’ primary terms.


Background: After an oil and gas lessor, who purchased the rights to oil and gas leases and received royalties from the sale of natural gas from the oil and gas lessee pursuant to leases, filed an arbitration demand against lessee on behalf of itself and similarly situated lessors, alleging that lessee paid insufficient royalties, lessee filed declaratory judgment action against lessor, seeking judgment declaring that the leases did not per-
mit class arbitration. The United States District Court for the Middle District of Pennsylvania granted lessee’s motion for summary judgment and denied lessor’s cross-motion to dismiss. Lessor appealed.

**Holding:** The oil and gas leases did not permit class arbitration, but rather only permitted individual or bilateral arbitration. The arbitration clauses in the leases specifically authorized arbitration in the event of a disagreement between the lessor and the lessee, but the leases were silent with regard to an express agreement to permit class arbitration, and the arbitration clause did not imply the parties’ intent to authorize class arbitration.

**EQT Production Company v. Department of Environmental Protection, 181 A.3d 1128 (Pa. 2018).**

**Background:** Operator of natural gas wells filed an action seeking a declaration that the calculation of civil penalties under the Clean Streams Law proposed by the Department of Environmental Protection (DEP) was unlawful. The Commonwealth Court dismissed the complaint. Operator appealed. The Supreme Court reversed and remanded. Operator filed an application for summary relief, challenging DEP’s interpretation of the Clean Streams Law. The Commonwealth Court granted the application. DEP appealed.

**Holdings:** The Supreme Court held that: (1) sua sponte aspects of Commonwealth Court’s decision would be vacated; (2) Commonwealth Court should not have credited one party’s statement of disputed facts in considering the application for summary relief filed by the operator of natural gas well following dismissal of its complaint seeking declaration that the calculation of civil penalties under Clean Streams Law proposed by Department of Environmental Protection (DEP) was unlawful; (3) provision of the Clean Streams Law prohibiting the unpermitted release of industrial waste and other contaminants into any of the waters of the commonwealth focuses on protecting the waters of the commonwealth with reference to the places of initial entry; (4) the Clean Streams Law is designed as a mechanism to vindicate the constitutional entitlement of the citizenry to a clean environment.

See Oil and Gas Regulatory Update.


**Background:** The daughter of decedent, after a court-approved private sale of the estate’s property, filed objections to the first and final account of the decedent’s estate. The Court of Common Pleas of Clearfield County, Orphans Court, determined that natural-gas payments received by the estate belonged to the daughter. The executor appealed and the daughter cross-appealed. The Superior Court affirmed in part vacated in part and remanded.

**Holdings:** (1) the daughter’s failure to appeal the order approving the private sale resulted in a waiver; (2) the estate bore the taxable gain from the private sale of the estate’s real property; and (3) the trial court could not conclude that the daughter was entitled to $39,537 in natural-gas revenues without first allowing the estate’s executor to be heard as to the propriety of taking judicial notice of the deed that purportedly transferred the oil and gas rights to the daughter.
Case Summaries

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Background: Operator of proposed natural gas compressor station sought review of decision of the township’s zoning hearing board’s denial of application for a special exception to operate a station. The Court of Common Pleas of Washington County affirmed. Owner appealed. Commonwealth Court affirmed in part and reversed in part. Following remand, operator appealed the board’s grant of a special exemption subject to conditions. Court of Common Pleas affirmed. Operator appealed. Commonwealth Court affirmed in part and reversed in part.

Holdings: (1) the authority of a township hearing board was defined by the Pennsylvania Municipalities Planning Code and the township’s unified development ordinance; (2) conditions on a special exception to the use of property must be reasonable and must have support in the record warranting the imposition of such conditions; otherwise, the imposition of conditions constitutes an abuse of discretion; (3) a zoning board is not required to support the imposition of conditions on a special exception to use of property; rather, the opposite is true – property owners are required to show that the imposition of conditions was an abuse of discretion; (4) imposition of a condition on a special exception to the use of property when there is no evidence in the record to support the conditions is manifestly unreasonable and in abuse of discretion; (5) a reasonable condition on a special exception to the use of property must (i) relate to a standard in the applicable zoning ordinance or in the Municipal Planning Code and (ii) be supported by evidence in the record before the zoning hearing board; if the condition does not satisfy these requirements, then the landowner proves an abuse of discretion; (6) a ‘special exception” is neither special nor an exception, but a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with health, safety and welfare of the community; (7) it is not the role of the zoning hearing board in adjudicating special exception application, let alone for the courts, to second guess the legislative decision underlying the ordinance; (8) if the zoning ordinance’s objective and the special exception criteria are met, it is presumed that the use is consistent with the health, safety and general welfare of the community; (9) to overcome the presumption that an ordinance’s special exception criteria is consistent with the health, safety, and general welfare of the community, objectors’ evidence must show, to a high probability, that the proposed use would generate adverse impact not normally generated by the type of use and that those impacts would pose a substantial threat to the health and safety of the community; (10) a zoning board is required to apply the terms of a zoning ordinance as written rather than deviating from those terms based on an unexpressed policy.

Wayne Land and Mineral Group, LLC v. Delaware River Basin Commission, 894 F.3d 509 (3rd Cir. 2018)

Background: The owner of property in the Delaware river basin brought an action against the Delaware River Basin Commission, seeking a declaratory judgment that the commission lacked authority under the Delaware River Basin Compact, which was an agreement between the United States, New York, Pennsylvania, New Jersey and Delaware, to require the owner to apply for and obtain project approval for a natural gas well pad, gas well and related facilities and associated hydraulic fracturing activities for natural gas development on the owner’s property. The United States District Court for the Middle District of Pennsylvania dismissed the action. Owner appealed. Third Circuit vacated and remanded.

Holdings: (1) the owner faced a real and substantial threat of harm, and therefore adversity of legal interests existed between the owner and the commission, as required for the owner’s declaratory judgment claim against the commission to be ripe for adjudication; (2) the claim by the owner presented sufficiently concrete facts to allow for conclusive legal judgment, as required for the claim to be ripe for adjudication; (3) the ruling on the property owner’s request for declaratory relief would have particular utility, as required for the claim to be ripe for adjudication; (4) the owner had standing to bring the claim; (5) final agency action and exhaustion of administrative remedies requirements for judicial review were not implicated by the owner’s complaint; and (6) the compact was ambiguous as to whether hydraulic fracturing-related activities constituted a “project” subject to the commission’s project review authority, and therefore the owner’s claim could not be dismissed at the pleading stage.

See Oil and Gas Regulatory Update

Background: A property owner brought a quiet title action against a purported mineral interest owner. The Court of Common Pleas of Tioga County summarily quieted title in favor of the property owner. The purported mineral interest holder appealed. The Superior Court affirmed.

Holdings: (1) the evidence was sufficient to support finding that particular treasurer’s deed to property had been issued; (2) tax sale of unseated lands extinguishes subsurface oil and gas rights, as the owner has the duty to notify the taxing authority of their separate interest in oil and gas, regardless of the development of that interest; (3) a former property owner may not raise tax sale defects as a defense to a quiet title action outside of the redemption period.

Join the Shale Energy Law Committee Listserv

Members of the PBA Shale Energy Law Committee have access to its Listserv that allow them to pose questions and offer answers to other members practicing within their areas of interest.

Each Listserv allows its members to distribute emails to its list of other members of the committee or section who subscribe to the Listserv. Discussions are accomplished through the use of email. By sending (“posting”) an email comment or question to the Listserv, you are actually sending it to the inbox of everyone who subscribes to the Listserv, without having to know or use their individual email addresses.

To join a Listserv, a PBA member must first be member of the committee or section offering the Listserv.

Join the Shale Energy Law Committee Listserv by completing the form at www.pabar.org/public/listservform.asp.
Oil & Gas Legislative Update: Regular Session 2017-18

PENDING LEGISLATION
Regular Session 2017-18

House Bill 557

Short Title: An Act amending the act of July 20, 1979 (P.L. 183, No. 60), known as the Oil and Gas Lease Act, further providing for definitions; and providing for minimum royalty for unconventional oil or gas well production and for remedy for failure to pay the minimum royalty on unconventional oil or gas wells.
Prime Sponsor: Representative EVERETT
Last Action: Resolution to discharge committee from further consideration of this bill presented. June 28, 2107 [House]
Memo: Guaranteed Minimum Royalty Act (Act 60 of 1979)
Printer's No.: 580

House Bill 696

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well location restrictions.
Prime Sponsor: Representative MATZIE
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 3, 2017 [House]
Memo: Legislation Providing for Increased Setback Requirements for Unconventional Gas Wells (House Bill 2366 of 2015-2016)
Printer's No.: 747

House Bill 1103

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well reporting requirements.
Prime Sponsor: Representative SONNEY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, April 7, 2017 [House]
Memo: Exempt Reporting for Existing Conventional Well Owners
Printer's No.: 1297

House Bill 1350

Short Title: An Act amending the act of July 20, 1979 (P.L. 183, No. 60), known as the Oil and Gas Lease Act, further providing for definitions.
Prime Sponsor: Representative DUSH
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, May 8, 2017 [House]
Memo: Defining Royalties and Wellheads
Printer's No.: 1675

House Bill 1401

Short Title: An Act amending the act of March 4, 1971 (P.L. 6, No. 2), known as the Tax Reform Code of 1971, providing for volumetric severance tax; and making a related repeal.
Prime Sponsor: Representative DIGIROLAMO
Last Action: Removed from table, June 25, 2018 [House]
Memo: Proposal to Add a 3.2 percent Drilling Tax to Act 13 Impact Fee
Printer's No.: 2610

House Bill 1530

Short Title: An Act amending the act of July 11, 2006 (P.L. 1134, No. 115), known as the Dormant Oil and Gas Act providing for oil and gas estate abandonment, for preservation of interests in oil and gas and for applicability.
Prime Sponsor: Representative EVERETT
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 12, 2017 [House]
Memo: Preservation of Interests in Oil and Gas (former HB 67 of 2015-16)
Printer's No.: 1977

House Bill 1708

Short Title: An Act amending the act of July 20, 1979 (P.L. 183, No. 60), known as the Oil and Gas Lease Act, further providing for definitions and for royalty guaranteed, and providing for written summary of unconventional gas well deductions and for inspection of records for unconventional gas wells.
Prime Sponsor: Representative ORTITAY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 16, 2017 [House]
Memo: The Landowner Protection Act
Printer's No.: 2293

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Legislative Update

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House Bill 1729

Short Title: An Act providing for the establishment of response teams relating to certain well operations and for the powers and duties of the Secretary of Labor and Industry.

Prime Sponsor: Representative CONKLIN

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 18, 2017 [House]

Memo: Well Operation Response Team Act (Former HB 524)

Printer’s No.: 2314

House Bill 2502

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, further providing for well permits.

Prime Sponsor: Representative OBERLANDER

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 18, 2018 [House]

Memo: Reducing Surface Impact from Unconventional Gas Wells

Printer’s No.: 3719

House Bill 2154

Short Title: An Act relating to conventional wells and the development of oil, gas and coal; imposing powers and duties of the Department of Environmental Protection; and providing for preliminary provisions, for general requirements, for underground gas storage, for enforcement and remedies, for related funds, parties and activities and for miscellaneous provisions.

Prime Sponsor: Representative CAUSER

Last Action: First consideration, Sept. 25, 2018 [Senate]

Memo: Conventional Oil and Gas Act

Printer’s No.: 3477

Senate Bill 138

Short Title: An Act amending the act of July 20, 1979 (P.L. 183, No. 60), known as the Oil and Gas Lease Act, further providing for definitions, for payment information to interest owners, for accumulation of proceeds from production and for conflicts and providing for joint ventures and for inspection of records.

Prime Sponsor: Senator YAW

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 2, 2017 [House]

Memo: Oil and Gas Lease Protection Package

Printer’s No.: 92

Senate Bill 139

Short Title: An Act providing for protection for a lessor of natural gas rights who reports a violation or suspected violation of a contractual agreement and for remedies and penalties.

Prime Sponsor: Senator YAW

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 2, 2017 [House]

Memo: Oil and Gas Lease Protection Package

Printer’s No.: 93

Senate Bill 141

Short Title: An Act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in development, providing for lease extended by production.

Prime Sponsor: Senator YAW

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 20, 2017 [Senate]

Memo: Pugh Clause

Printer’s No.: 118

Senate Bill 142

Short Title: An Act amending title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in utilization, providing for unconventional oil and gas conservation by consolidating the Oil and Gas Conservation Law with modifications relating to definitions, standard unit order, process, administration, standard of review, hearings and appeals, establishment of units, integration of various interests, lease extension and scope, providing for gas and hazardous liquids pipelines; and making a related repeal.

Prime Sponsor: Senator YAW

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 20, 2017 [Senate]

Memo: Company to Company Integration

Printer’s No.: 119

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Pennsylvania Bar Foundation 2018 NightOUT
A Tribute to Sen. Stewart J. Greenleaf

Nov. 15, 2018, 6 to 9 p.m.
Sheraton Harrisburg-Hershey Hotel

The Pennsylvania Bar Foundation’s annual NightOUT event will honor State Sen. Stewart J. Greenleaf, who is retiring following 40 years of service in the Pennsylvania Senate. Sen. Greenleaf’s extraordinary career includes his service as chair of the Senate Judiciary Committee for 30 years. Senator Greenleaf has passed more legislation than any other member of Pennsylvania’s 253-member General Assembly.

The net proceeds benefit the Pennsylvania Bar Foundation – PA IOLTA Loan Repayment Assistance Program, an initiative that works with the Supreme Court of Pennsylvania to strengthen the ranks of attorneys providing free civil legal services to Pennsylvania’s most vulnerable through the statewide network of IOLTA-funded civil legal services organizations. Tickets are $100 each, $30 of which qualifies as a charitable contribution.


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Senate Bill 1088

Short Title: An Act relating to conventional wells and the development of oil, gas and coal; imposing powers and duties on the Department of Environmental Protection; and providing for preliminary provisions, for general requirements, for underground gas storage, for enforcement and remedies, for related funds, parties and activities and for miscellaneous provisions.

Prime Sponsor: Senator HUTCHINSON

Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 19, 2018 [Senate]

Memo: Oil and Gas Act Redraft

Printer’s No.: 1546

Register Now: 2019 Midyear Meeting,
Jan. 30-Feb. 3, Grand Cayman

Mark your calendars now to attend the PBA Midyear Meeting, Jan. 30–Feb. 3, 2019, at the Grand Cayman Marriott Beach Resort, Grand Cayman, Cayman Islands. Located on the award-winning Seven Mile Beach, the resort offers an outdoor pool, four restaurants, and a spa, with crystal clear waters just steps away.

Offering up to 10 CLE hours, the professional development programming will include a diverse menu of courses. In addition, there will be numerous opportunities to connect with state bar leaders as well, including social events such as a welcome dinner and a “Party with the President” farewell dinner with entertainment.

The full conference package cost for Island and Courtyard View are $2,370 per room single occupancy and $2,685 per room double occupancy; Partial Ocean View are $2,715 per room single occupancy and $3,030 per room double occupancy; and Oceanfront View are $2,990 per room single occupancy and $3,305 per room double occupancy. Attendees are encouraged to book flights early. Get the conference brochure and register by Dec. 14.
Oil and Gas Regulatory Update, Fall 2018

By Jon C. Beckman, Esq., Steptoe & Johnson PLLC

Introduction

This Fall 2018 Update includes three cases, Gorsline v. Board of Supervisors of Fairfield Township, 186 A.3d 375 (Pa. 2018), Marcellus Shale Coalition v. Department of Environmental Protection, No. 573 M.D. 2016, 2018 WL 4009286, --- A.3d --- (Pa. Commw. Ct. Aug. 23, 2018), and Wayne Land and Mineral Group LLC v. Delaware River Basin Commission, 894 F.3d 509 (3d Cir. 2018). Gorsline is a much anticipated decision by the Supreme Court of Pennsylvania that reviewed the grant of a conditional use permit for oil and gas development in a residential-agricultural district. The decision did not settle all the issues the stakeholders raised, but it continues shedding light on the interplay between oil and gas development and land use regulation. Marcellus Shale Coalition is an opinion by the Commonwealth Court concerning portions of the Chapter 78a regulations promulgated under Pennsylvania’s Oil and Gas Act. The unanimous decision features thorough statutory analysis of each challenged provision. Finally, Wayne Land and Mineral is a Third Circuit decision allowing a landowner’s challenge to proceed against the Delaware River Basin Commission’s moratorium on the use of hydraulic fracturing within the basin.

A. Gorsline v. Board of Supervisors of Fairfield Township

Gorsline v. Board of Supervisors of Fairfield Township, 186 A.3d 375 (Pa. 2018) is an appeal of a local zoning determination. Before the court was the question of whether or not a gas well could be a conditional use as “similar and compatible” to a permitted use defined as “public utility services.” This was a closely watched and long awaited decision because it represented the latest appeal settling issues involving the interplay between local zoning and oil and gas exploration. Objectors claimed that the conditional use permit violated substantive due process and the Environmental Rights Amendment. The majority decision did not reach these constitutional issues. The court’s opinion rested on review of the record upon which the township granted the conditional use permit.

Inflection Energy, LLC applied for a conditional use permit to construct a well pad and drill an unconventional oil and gas well in a district zoned Residential-Agricultural (“R-A”) in Fairfield Township, Lycoming County. Id. at 378. The Township Zoning Ordinance did not list oil and gas production activities as a permitted use in R-A. Id. The Township Board of Supervisors (the “Board”) approved the permit application as a conditional use in a Residential-Agricultural District. Id. at 380. The Gorslines, local residents who objected to the application, appealed the Board’s approval to the Court of Common Pleas of Lycoming County. Common pleas reversed the Board’s decision. Id. at 381. Inflection Energy and the landowner appealed the common pleas decision to the Commonwealth Court. Id. The Commonwealth Court found that common pleas erred in reversing the Board. Id. The Commonwealth Court based its decision on recent precedent in MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board, 102 A.3d 549 (Pa. Commw. Ct. 2014), finding that the proposed conditional use was similar to and compatible with two permitted uses: “public service facility” use and/or “essential service” use. Id. The Gorslines appealed.

In a 4–3 decision, the Supreme Court reversed the Commonwealth Court, holding that Board’s approval was not supported by “substantial evidence” and that the Commonwealth Court’s reliance on MarkWest was error. Id. at 385 – 86. The court held that Inflection’s proposed use was not, “in any material respect,” of the same general character as any allowed use in the R-A zoning district, including public service facility use or essential services use. Id. at 386. Notably, the court found that the Board did not properly weigh the evidence presented about the proposed uses claimed for the wells as compared with the uses permitted in the district.

The court noted a limitation on the scope of its holding, stating “this decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses.” Id. at 389. Fairfield Township could amend its ordinance to permit oil and gas development if it so chooses.

The court did not reach the constitutional issues raised by the objectors to the permit. Stakeholders closely watched Gorsline because the court had permitted the appeal which cited violations of substantive due process and the Environmental Rights Amendment of the Pennsylvania Constitution. These issues stem from the opinion of a plurality of the court in Robinson...
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Township v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (2013). In his dissent, Justice Dougherty noted that the majority failed to address these constitutional issues in favor of conducting “error review” analysis. Id. at 390 n.1 (Dougherty, J., dissenting). He continued, noting that the Board is the factfinder in the position of judging credibility of the evidence presented. The dissent argued that the court improperly substituted its judgment for that of the Board.

B. Marcellus Shale Coalition v. Department of Environmental Protection

The Commonwealth Court invalidated certain regulations promulgated under Pennsylvania’s Oil and Gas Act of 2012 (“Act 13”) while upholding others in Marcellus Shale Coalition v. Department of Environmental Protection, No. 573 M.D. 2016, 2018 WL 4009286, --- A.3d --- (Pa. Commw. Ct. Aug. 23, 2018). The Marcellus Shale Coalition (“MSC”) filed a petition for review in the Commonwealth Court seeking declaratory and injunctive relief. MSC challenged the validity of certain regulations relating to unconventional oil and gas activities governed by Act 13. The regulations are located in Title 25, Chapter 78a of the Pennsylvania Administrative Code. The Commonwealth Court, acting in its original jurisdiction, issued an order enjoining enforcement of the challenged regulatory provisions pending a final resolution of the challenges to the regulations on the merits. The Commonwealth Court’s grant of injunctive relief went up to the Supreme Court, where it was affirmed in part and reversed in part. Marcellus Shale Coalition v. Depy. Envt'l Prot., 185 A.3d 985 (Pa. 2018). Turning to the merits, Commonwealth Court granted partial summary relief on the first count of MSC’s complaint by unanimous decision, invalidating certain public resources provisions found in 25 Pa. Code §§ 78a.1 and 78a.15(f) and (g), but upholding other portions of sections 78a.15(f) and (g). At its base, this decision analyzed whether or not the Environmental Quality Board (“EQB”) acted beyond the scope of its statutory authority by establishing new public resources and public resource agencies.

First, the Commonwealth Court upheld the permitting process devised under Section 78a.15(f) and (g). MSC argued that the “pre-permit process” established under Section 78a.15(f) and (g) was unlawful because it was promulgated without a full understating of the burdens it imposes and fails to develop sufficient criteria required by Act 13. Id. at *6. EQB and the Department of Environmental Protection (“DEP”) countered that the regulations “fall squarely within [DEP’s] statutory authorities and constitutional duties. Id. The court held that the pre-permitting process devised under Section 78a.15(f) and (g) is not invalid or unenforceable. DEP may seek information from permit applicants and comments from public resource agencies as part of the pre-permit process because it is required to consider the impact of the permit under Act 13. Id. at *11. The court did not find the lack of cost estimates to be a failure to consider the burden of the regulation. Id. at *13.

Next, the court considered whether the definition of “other critical communities” in Section 78a.1 unlawfully expanded the list of public resources identified in Act 13 by including “species of special concern.” Id. at *13. The court held the definition unlawful for two reasons. First, including “species of special concern” in the definition was beyond the scope of the statutory list of “other critical communities.” Looking to the context of Section 3215(c) of Act 13, the court noted that the species of “special concern” is not of the same general nature or class of the statutory listed items, which were subject to greater risk of harm, such as species that are endangered or threatened. Id. at *17–18. To be within the scope of the statute, the species had to be “rare.” Id. at *19. “Species of special concern” is a resource classification that falls below endangered or threatened and is outside the scope of Section 3215(c). Id. Furthermore, the court held that the definition improperly avoided the rulemaking process. The inclusion of “species of special concern” in the definition was invalidated.

The court then considered whether the inclusion of “common areas of a school’s property or a playground” in the pre-permit notification process was lawful and enforceable. The public resources provisions obligated drilling permit applicants to provide pre-application notices relative to “public resources.” 25 Pa. Code § 78a.15(f)(1)(vi). The regulation includes “common areas on school’s property or a playground and “other critical communities.” Marcellus Shale Coalition, 2018 WL 4009286 at *20–21. Under the regulation, the permit applicant must notify each “public resource agency” which manages a public resource of the proposal. This would include playground owners. Id. at *21. MSC argued that “common areas of a school’s property and playgrounds” are not within the same general class or nature as other public resources listed in Act 13. Id. at *24; see 52 Pa. C.S.A. 3215(c) (listing public resources). The court agreed, stating that “[a]s for playgrounds . . . the definition is so broad as to defy quantification and compliance” and embraces both publicly and privately owned

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playgrounds. Id. at *24.

Finally, the court also declared Section 78a.15(g)’s requirement that DEP will consider comments and recommendations submitted by municipalities as unconstitutional and unenforceable based on the Supreme Court’s decision in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013). In that decision, the Court declared Section 3215(d) of Act 13 unconstitutional and enjoined its application. Section 3215(d) provided the statutory authority for the Section 78a.15(g) comment and recommendation requirement. Therefore, the court held it is unenforceable.

This decision continues the line of analysis of the Supreme Court’s decision in *Robinson Township (II)*. Act 13 and the regulations promulgated under its authority continue to be settled.

### C. Wayne Land and Mineral Group LLC v. Delaware River Basin Commission

*Wayne Land* is a challenge to the Delaware River Basin Commission’s ("DRBC") jurisdiction over oil and gas operations. Wayne Land and Mineral Group, LLC ("Wayne") filed an action for declaratory relief in the United States District Court for the Middle District of Pennsylvania seeking a declaration that the DRBC did not have the authority to require Wayne to apply for and obtain project approval for natural gas well pad, gas well, and related facilities and associated hydraulic fracturing activities for natural gas development on owner’s property. DRBC derives its authority from the Delaware River Basin Compact. *Wayne Land and Mineral Group LLC v. Delaware River Basin Commission*, 894 F.3d 509 (3d Cir. 2018). Under the compact, DRBC must create a plan for the immediate and long range development and uses of the water resources of the Delaware River Basin. That plan must include all public and private “projects” and facilities which are required, in the judgment of the DRBC, “for the optimum planning, development, conservation, utilization, management and control of the water resources of the [B]asin to meet present and future needs[.]” DRBC instituted a moratorium on hydraulic fracturing for the production of natural gas in the basin in 2009, but has not yet promulgated any final regulations related to the review of natural gas exploration and production projects. The district court dismissed Wayne’s action under Federal Rule of Civil Procedure 12(b)(6), finding that Wayne’s activities were properly subject to the DRBC’s oversight under the compact.

The Third Circuit vacated and remanded for further proceedings, finding that the Delaware River Basin Compact that gives DRBC its authority was ambiguous as to whether Wayne’s activities constituted a “project” subject to DRBC’s review. Because it is unclear whether or not the activities fell within the scope of “project,” the district court must undertake fact-finding to determine the intent of the compact’s drafters.

While the Third Circuit decision is preliminary — it simply remands to the district court to allow the parties to submit evidence — the import may be significant. The Third Circuit concluded that the compact should be analyzed under the principles of contract. Notably, the court considered only whether the DRBC had jurisdiction over the hydraulic fracturing under the section of the compact allowing it to review and approve “projects.” The court expressly took no position on whether a different provision of the compact might confer jurisdiction upon the DRBC to approve or deny the same activity. The next challenge may bring a broader argument under the compact.

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### Seeking Nominations for Scholarships

The *James W. Stoudt Memorial Scholarship*, offered by the Pennsylvania Bar Foundation, provides three $3,000 scholarships, two of which are dedicated to the support of historically underrepresented minority law students of African American, Hispanic American or Native American ancestry. This scholarship is open to Pennsylvania residents in their second year of a full-time law school program or third year of a part-time program. Application deadline: Dec. 3.

The *Joseph T. McDonald Memorial Scholarship*, offered by the Pennsylvania Bar Foundation, provides a $3,000 scholarship to a full-time, third year Pennsylvania resident involved in the Penn State Dickinson School of Law trial advocacy program. Application deadline: Dec. 1.