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Proposed Chapter 78 Regulations/Public Hearings
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PIOGA Testimony
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The proposed Chapter 78 regulation submission is incomplete and therefore not a "proposed regulation" under the Regulatory Review Act and must be resubmitted as a valid proposed regulation after DEP finalizes the proposal per the public comments

- In May 2013 the Technical Advisory Board (TAB) asked DEP not to submit the regulation package to the EQB as a proposed regulation because it was incomplete, as significant portions of the proposal were unresolved.
- In a May 10, 2013 email response to TAB's request, the DEP Deputy Secretary, Office of Oil and Gas Management, acknowledged that the proposed submission was a "proposal for consideration."
- No changes to the proposal were made as a result of the TAB subcommittee workshop process addressing these unresolved issues:
  - Public resource protection/species of special concern
  - Waste management at well sites (centralized impoundments/on-site processing)
  - Pre-hydraulic fracturing assessment (abandoned and orphan wells)
  - Water supply restoration standards
- The Regulatory Review Act defines a "proposed regulation" as "[a] document intended for promulgation as a regulation which an agency submits to the commission and the committees and for which the agency gives notice of proposed rulemaking and holds a public comment period pursuant to the act of July 31, 1968 (P.L.769, No.240), referred to as the Commonwealth Documents Law."
- A proposal with unresolved issues cannot, as a matter of law, be considered a regulation intended to be promulgated.
- After DEP resolves these issues, the completed proposal must be resubmitted to EQB as a valid "proposed regulation" to comply with the Regulatory Review Act.

The promulgation or proposed promulgation of any regulations related to Act 13 Sections 3215(b), 3215(c), and 3215(e) must be discontinued because of the Pennsylvania Supreme Court December 19, 2013 rulings in *Robinson Township v. Com. of Pennsylvania*.

- The Court ruled that these sections delegating authority to DEP/EQB to develop regulations and apply the statutory requirements therein has been enjoined. Specifically,

at pages 158-159 of the lead opinion (*copies attached*), the Court held these sections to be not severable from Section 3215(b), which was enjoined in its entirety as unconstitutional.

- The Court stated: "Moreover, insofar as Section 3215(c) and (e) are part of the 3215(b) decisional process, these provisions are as well incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215(c) and (e) is therefore, also enjoined." (Emphasis added)
    - The subjects of Section 3215(b)'s setback buffers – blue-lined streams, bodies of water and wetlands – are identified "public resources" themselves in Section 3215(c) (*e.g.*, "scenic rivers" or "habitats" of endangered species) and may be or clearly are part of, found upon, integral to, and indispensable or key features of all of the other public resources identified in Section 3215(c).
    - As such, consideration of impacts to Section 3215(c) public resources is incapable of being accomplished or executed "in accordance with the legislative intent" because the legislative intent is for the now-declared constitutionally defective waiver provision to apply to the location of all wells with respect to the stream, water body, wetlands, and public drinking supply setback buffers to/on all the Section 3215(c).public resources.
    - Consequently, Section 3215(c) is now incomplete because the location of wells on or in relation to the identified public resources is a part of the 3215(b) decisional process.
    - In like manner, as Section 3215 contemplates waiver of various setback buffers, the development of the criteria to use in conditioning a well permit, providing for optimal development of oil and natural gas resources, and protecting private property rights – as directed in Section 3215(e) – cannot be accomplished in accordance with the legislative intent because the now-declared constitutionally defective waiver provision would necessarily be a part of the decisional process of conditioning permits.
    - Consequently, Section 3215(e) cannot stand alone and is also now incomplete.
- DEP acknowledged in the Commonwealth's request for reconsideration of the Supreme Court's ruling on Section 3215(c) and (e) that these sections are currently enjoined.
- In their answer to the Commonwealth's request for reconsideration, the citizens/municipalities agree that these sections are currently enjoined.

Proposed regulation Section 78.15(f)(iv) pertaining to "species of special concern" (i) does not conform to the intention of the legislature and (ii) the DEP/EQB has not been delegated the statutory authority to promulgate a regulation about the habitat of such species.

- With respect to Pennsylvania, the first use of the term "species of special concern" and the original "inventory" of these "special concern species" occurred in 1985 – after the use and appearance of the term "critical communities," which occurred in 1984 in the drafting of the Oil and Gas Act of 1984 (Act 223).

- As reported on the Pennsylvania Biological Survey (PABS) website, the book or publication discussing and identifying 'species of special concern" in Pennsylvania was not published until 1985. The PABS history states:

  > The Pennsylvania Biological Survey traces its origin to an initiative by representatives of the National Audubon Society, Pennsylvania Game Commission, Pennsylvania Fish and Boat Commission, and the former Department of Natural Resources (now two departments - Department of Conservation and Natural Resources and Department of Environmental Protection), who met in 1979 to discuss the need to develop a coordinated inventory and assessment of the flora and fauna of Pennsylvania. The Survey's first task was to document the status of plants and animals of special concern in Pennsylvania. A subsequent five-year effort resulted in the publication in 1985 of *Species of Special Concern in Pennsylvania* (H. H. Genoways and F. J. Brenner, eds., Carnegie Museum of Natural History, Special Public. No. 11, Pittsburgh, Pa.). This volume contained information on the status of 297 species, including representatives of all 5 classes of vertebrates, selected groups of invertebrates, and vascular plants.

- Printers No. 2087 of Act 223, which first appeared on June 12, 1984 included the original appearance of original Oil and Gas Act Section 205(c), which is identical to the current Act 13 Section 3215(c), to include the term "critical communities" (except for the Act 13 addition of subsection 3215(c)(6) pertaining to public drinking water supplies and 3215(b) waivers).
- Section 205(c) was carried forward from Act 223 into Act 13 as Section 3215(c), unchanged except for the addition of Section 3215(c)(6).
- Act 223, to include Section 205(c), was signed by the Governor on December 19, 1984.
- The Pennsylvania legislature did not intend, and could not have intended, for the term "critical communities" to include or mean "species of special concern" or "special concern species." Accordingly, the DEP has no basis in law or fact from which to conclude or decree that the terms "critical communities" "means" or is synonymous with the term "species of special concern" or "special concern species."
- Additionally, there is no consensus in the scientific community, or even among the Pennsylvania agencies responsible for the protection of species, as to the definition or criteria by which any species would be considered to be of "special concern."

The proposals unreasonably impact conventional oil & gas well operations without a compelling environmental justification.

- The limited time for this public testimony is insufficient to address this subject in detail, but PIOGA and other trade associations and their members with conventional oil & gas well operator members have already provided public hearing testimony on this subject and will be providing additional public hearing testimony on this subject, and will also be providing extensive written comments that support this statement.

The regulatory analysis fails to address the requirements of Act 76 of 2012, which amended the Regulatory Review Act to require an economic impact statement and a regulatory flexibility analysis for any proposed regulation that may have an adverse impact on small businesses.

- Many of PIOGA's conventional oil & gas operator members are small businesses within the scope of Act 76 of 2012.
- This Act expressly recognizes that small businesses are critical to Pennsylvania's economy and that uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands, including legal, accounting, and consulting costs, upon small businesses with limited resources. DEP is required to consider the establishment of less stringent compliance requirements for small businesses, performance standards to replace design or operational standards, as well as an exemption of small business from all or any part of the requirements contained in the proposed regulations – but DEP has not done so.
- The limited time for this public testimony is insufficient to address this subject in detail, but PIOGA and other trade associations and their members with small business oil & gas operator members have already provided public hearing testimony on this subject and will be providing additional public hearing testimony on this subject, and will also be providing extensive written comments that support this statement.

ordinance purportedly does not comply. The prerogatives of acting upon policy judgments and enacting local legislation, while limited by the General Assembly's enactment, remain ultimately with local government under the Act 13 scheme. No valid separation of powers concern exists regarding Section 3305(a). See 828 A.2d at 1051. As against this claim, the Commonwealth Court's decision is affirmed, on these different grounds.

V. Severability

The citizens' requested relief is a declaration that Act 13 is unconstitutional in its entirety, based solely on arguments related to the discrete provisions discussed above. We recognize that certain of the provisions we have held to be unconstitutional represent core aspects of Act 13. But, by the same token, several provisions appear relatively independent of other parts of Act 13. See, e.g., 58 Pa.C.S. § 2302 (unconventional gas well fee); § 2505 (appropriations for Marcellus Legacy Fund). Notably, neither the parties nor Act 13 itself address the potential severability of provisions found unconstitutional. Nevertheless, our holding that Sections 3215(b)(4) and (d), 3303, and 3304 violate the Environmental Rights Amendment does not automatically require finding Act 13 unconstitutional in its entirety. Mockaitis, 834 A.2d at 502. Indeed, the presumption is that "[t]he provisions of every statute shall be severable." 1 Pa.C.S. § 1925 (constitutional construction of statutes).[69] Notably, while not citing to the Section 1925 severability

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[69] Section 1925 of the Statutory Construction Act provides that:

> If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision . . . that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the

(continued...)

presumption expressly, the Commonwealth Court obviously recognized that the issue was implicated because, upon finding Section 3304 unconstitutional, the panel was careful to enjoin only those "provisions of Chapter 33 that enforce 58 Pa.C.S. § 3304." Robinson Twp., 52 A.3d at 485.

Setting aside the question of global severability -- *i.e.*, whether the specific provisions held to be unconstitutional require that the entire Act be enjoined -- there are obvious consequences of certain of our holdings. Thus, we have already recognized that Section 3215(b)(4), which addresses waivers of the general rule requiring setbacks for the protection of certain waters of the Commonwealth, is a key part of the Section 3215(b) scheme. It would appear that the General Assembly did not intend for the setback provision to operate without allowing industry operators to secure waivers from the setbacks. Absent the enjoined Section 3215(b)(4), the remaining parts of Section 3215(b) -- which the citizens do not challenge on appeal -- are incomplete and incapable of execution in accordance with the legislative intent. Having held that Section 3215(b)(4) is unconstitutional, we conclude that the remaining parts of Section 3215(b) are not severable. Accordingly, application of Section 3215(b) is enjoined.

Moreover, insofar as Section 3215(c) and (e) are part of the Section 3215(b) decisional process, these provisions as well are incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215(c) and (e) is, therefore, also enjoined. Finally, Sections 3305 through 3309 are those parts of the statutory scheme that establish a mechanism by which to enforce compliance with the Municipalities Planning

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(...continued)

> court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925.