

PA Environment Digest

An Update On Environmental Issues In PA

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Analysis: Landmark Court Opinion Turns Environmental Regulation In PA Upside Down

It's dangerous to do an analysis of a 162-page court opinion in 24 hours, but the decision Thursday by the PA Supreme Court declaring the preemption of local regulation under the Act 13 Marcellus Shale drilling law unconstitutional is clearly a landmark by any definition. Many environmental law experts say it has the potential to turn the way environmental impacts are regulated in Pennsylvania upside down.

By giving counties, townships and boroughs the broad authority to set their own environmental standards through zoning and other controls under Article I, Section 27 of Pennsylvania's Constitution--[the Environmental Rights Amendment](#)-- the impact of the opinion will not just be felt by the oil and gas industry.

Environmental standards for power plants, landfills, hazardous waste facilities, biosolids application, farm operations, mining and much more would still be set by DEP, but now could also be set by local governments if they choose and more easily challenged by citizens given the sweeping language in the opinion.

As a result, some say, Pennsylvania could have 2,500 mini-DEP's setting different, more stringent, environmental standards and development and impact fees in the state which pleases some and worries others.

Several other environmental statutes also preempt municipal regulation in one way or another, either explicitly or as a result of earlier court decisions. As a result, their legal status may be in doubt as a result of the opinion.

Those laws include: the Air Pollution Control Act, the Solid Waste Management Act, the Nutrient Management Act and the Agriculture and the Communities and Rural Environment Act (ACRE).

The opinion also seems to give citizens and groups the ability to challenge directly any state environmental standard as being inadequate in at least three other ways: through their local governments, potentially through pre-enforcement review of state environmental regulations or in cases involving environmental justice concerns.

In addition, more traditional local challenges to zoning and land development ordinances and decisions could be expanded to include other environmental requirements and standards since the Court gave municipalities the authority to set their own.

In the near future, the Court opinion will have an impact on portions of [DEP's proposed revisions to Chapter 78](#) drilling regulations required by Act 13 since they implement the setback provisions and the requirement for DEP to evaluate the impact on public resources struck down as unconstitutional by the opinion.

The opinion would also allow counties and municipalities to adopt their own environmental standards to cover drilling on State Forest Land, rather than relying solely on the standards set by the Department of Conservation and Natural Resources. In particular the controversy over drilling in the [Loyalsock State Forest](#) in Lycoming and Sullivan counties comes to mind.

In reality, the broader application of the decision may not be felt for years as individual legal cases challenge specific statutes and litigation over specific local environmental standards work their way through the court system.

And since the Court opinion was based on the Pennsylvania Constitution, passing a new piece of legislation to modify the impact of the opinion could have limited impact. That legislation itself would then be subject to legal challenge on the same constitutional grounds and the same precedent established by the opinion, at least until the composition of the PA Supreme Court changes.

Either way, the opinion is going to generate lots of new work for environmental lawyers.

Environmental Rights Amendment Sponsor

Former Sen. Franklin Kury (D-Northumberland) and prime sponsor of the Environmental Rights Amendment legislation in 1970-71 told the Digest the Court "got it right" and he was gratified to see the Court recognized the language in the Amendment as having real meaning.

"The opinion as it relates to Article I, Section 27 is everything I hoped it would be. It took everything we did then and set a new standard for precedent," said Kury. "Environmental laws and actions will now have to be judged against the Amendment."

The Court's opinion quoted from papers and other information Kury entered into the record while the Amendment was considered in the General Assembly, although he was not involved in the case in any way.

Kury is the author of "Clean Politics, Clean Streams: A Legislative Autobiography and Reflections" about his career in the General Assembly and the issues he was involved in.

Other Comments

"A plurality of our Supreme Court recognizes that Article I, Section 27 is actual constitutional law, and that its text matters. This is a huge step in the right direction," said John Dernbach, a former DEP attorney, now professor at Widener Law School in Harrisburg and another source quoted in the Court's opinion.

"This decision obviously has major consequences for Marcellus Shale development in Pennsylvania as well as Article I, Section 27. Major parts of Act 13 will need to be rewritten by the General Assembly, and there may be another round of litigation after that. But the revitalization of Article I, Section 27 may be of even greater import, even though it did command the votes of a majority. And it is impressive that the plurality framed the amendment's relationship with other provisions of the constitution in terms of sustainable development."

[Click Here](#) for a copy of the decision. [Click Here](#) for a copy of the concurring opinion.

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