IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Marcellus Shale Coalition, Petitioner	:	
v.	:	No. 573 M.D. 2016 Heard: October 25, 2016
Department of Environmental Protection of the Commonwealth of Pennsylvania and Environmental Quality Board of the Commonwealth of Pennsylvania, Respondents	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: November 8, 2016**

Before the Court is Petitioner The Marcellus Shale Coalition's (MSC) application for expedited special relief in the form of a preliminary injunction (Application). In its Application, MSC asks that this Court either stay or preliminarily enjoin enforcement of certain regulations contained in 25 Pa. Code Chapter 78a (Chapter 78a Regulations), relating to unconventional oil and gas wells, which were published in the *Pennsylvania Bulletin* on October 8, 2016, and became effective immediately.

I. BACKGROUND

A. MSC's Contentions

On October 13, 2016, simultaneously with the filing of the Application, MSC filed in this Court's original jurisdiction a Petition for Review in

the Nature of a Complaint Seeking Declaratory and Injunctive Relief (Petition), challenging various provisions of the Chapter 78a Regulations.[1] MSC's Petition includes the following counts:

- Count I challenging the validity of 25 Pa. Code §§ 78a.1 and 78a.15(f), and (g), pertaining to public resources;
- Count II challenging the validity of 25 Pa. Code §§ 78a.52a and 78a.73(c), and (d), pertaining to area of review;
- Count III challenging the validity of 25 Pa. Code § 78a.58(d), pertaining to onsite processing;
- Count IV challenging the validity of 25 Pa. Code §§ 78a.59a and 78a.59c, pertaining to impoundments;
- Count V challenging the validity of Pa. Code §§ 78a.645, pertaining to site restoration;
- Count VI challenging the validity of 25 Pa. Code § 78a.66(c), pertaining to remediation of spills;
- Count VII challenging the validity of 25 Pa. Code § 78a.121(b), pertaining to waste reporting; and
- Count VIII requesting injunctive relief.

In its Application, MSC contends that the challenged provisions inflict immediate, substantial, and irreparable harm to MSC members in four ways. First, MSC contends that the provisions "may prevent MSC members from completing wells that have been or are in the process of being drilled, thereby threatening the loss of valuable property rights." (Application ¶ 5(i).) Second, MSC contends that the provisions "provide no accommodation or procedures regarding permitting and operations that are in process and ongoing . . . , resulting in the loss of significant

[1] MSC describes itself as "a non-profit membership organization whose members work separately and/or together in various capacities, inter alia, in regard to the exploration, production, transmission and distribution of natural gas from the Marcellus and Utica Shale formations." (Petition ¶ 4.)

and undeterminable amounts of money and resources incurred to re-prepare well permit applications and rebuild or reinstall facilities that were compliant when built and installed." (*Id.* ¶ 5(ii).) Third, MSC contends that the provisions "force MSC members to stop and restart previously lawful and approved waste handling, site restoration and remediation activities to comply with unlawful new requirements, thereby incurring significant additional costs." (*Id.* ¶ 5(iii).) Fourth, MSC contends that the provisions "have no transition period for imposing significant new obligations on an industry, which places MSC members at risk of immediate noncompliance where they did not or could not conform operations or facilities in advance of publication of the rule." (*Id.* ¶ 5(iv).) MSC also contends that some of the challenged regulations violate an express statutory provision and, therefore, result in *per se* irreparable harm for purposes of preliminary injunctive relief.

In addition to the harm described above, MSC contends that greater injury will occur to MSC and its members if special relief is denied, and Respondents the Department of Environmental Protection of the Commonwealth of Pennsylvania (DEP) and the Environmental Quality Board of the Commonwealth of Pennsylvania (EQB) will not be harmed if special relief is granted.[2] Furthermore, MSC contends that an injunction or stay will preserve the status quo, noting other laws that regulate the oil and gas industry and protect the environment will remain effective during the pendency of this litigation. MSC also

[2] In Pennsylvania, environmental regulation and enforcement is split between three bodies—(1) DEP, which implements and enforces the laws; (2) the EQB, which serves as the administrative rulemaking body; and (3) the Environmental Hearing Board, which serves as the adjudicator in disputed matters. *See Tire Jockey Serv., Inc. v. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1185 (Pa. 2007).

contends that there is a strong likelihood that it will succeed on the merits, because the challenged Chapter 78a Regulations are unlawful, illegal, void, and unenforceable for various reasons, including the following: (1) Respondents lack statutory authority to enact the challenged regulations; (2) the challenged regulations contradict or circumvent what is commonly referred to as Act 13[3] and other Pennsylvania statutes and regulations; (3) the challenged regulations are void for vagueness and/or lack standards necessary for implementation; (4) the EQB abdicated its statutory duty to promulgate the Chapter 78a Regulations; (5) Respondents failed to comply with the Regulatory Review Act;[4] (6) Respondents failed to comply with what is commonly referred to as the Commonwealth Documents Law;[5] (7) the challenged regulations violate the Pennsylvania Constitution; and (8) the challenged regulations are unreasonable.

Finally, MSC contends that an injunction or stay of the challenged regulations is reasonably suited to abate and prevent the harm, and the issuance of an injunction will not harm the public or the environment, because MSC members will continue to comply with existing state and federal environmental laws, including Act 13.

B. Respondents' Answer

Respondents filed a joint answer to the Application (Answer), denying that MSC has met the requirements for an injunction or stay. Rather, Respondents

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[3] 58 Pa. C.S. §§ 2301-3504.

[4] Act of June 25, 1982, P.L. 633, *reenacted* by Act of February 21, 1986, P.L. 47, *as amended*, 71 P.S. §§ 745.1-.15.

[5] Act of July 31, 1968, P.L., *as amended*, 45 P.S. §§ 1102-1602; 45 Pa. C.S. §§ 501-907.

maintain that "the Chapter 78a Regulations are lawful and necessary as the first update to the Commonwealth's rules governing surface activities associated with the development of unconventional wells since the significant expansion of natural gas development using enhanced drilling techniques to target the Marcellus Shale formation," which began in Pennsylvania around 2005. (Answer ¶ 2.) Respondents contend that DEP engaged in an extensive, enhanced public participation process to develop the Chapter 78a Regulations, that MSC and its members participated in the process, and that the regulations were promulgated in accordance with all relevant statutory law. Respondents observe that some of the Chapter 78a Regulations have phase-in periods to provide operators with additional time for compliance. As for other Chapter 78a Regulations that do not have phase-in periods, Respondents maintain that, as a result of "the lengthy and thorough public comment and participation process, industry training and regulatory phase-in-opportunities, MSC's members cannot allege that they were surprised, caught off guard, or in any way unprepared for any of these changes." (*Id.*)

Respondents deny that MSC has met the requirements for a preliminary injunction and counter that very real harms to the public could occur if full implementation of the Chapter 78a Regulations is enjoined until MSC has exhausted all of its available appeal rights. For instance, Respondents identify the following harms that the public could experience: "harm to the environment from impoundments of production fluids that breach and/or leak and contaminate soil and ground waters, harm to public health when that contaminated ground water enters private water supplies, and harm to public safety when hydraulic fracturing of new wells communicates with old abandoned wells." (*Id.* ¶ 6.) They contend

that these harms "to the environment and the public health and safety from not implementing the Chapter 78a Regulations will be much greater than the harm the industry will experience if required to fully comply with" the Chapter 78a Regulations. (*Id.*)

Respondents also dispute numerous characterizations by MSC as to the impacts of the Chapter 78a Regulations and further dispute MSC's contention that enjoining the challenged regulations will maintain the status quo. Specifically, Respondents counter by averring that "MSC incorrectly suggests that if these sections are enjoined, their predecessor regulations at 25 Pa. Code Chapter 78 will remain effective and undisturbed during such a stay." (Answer ¶ 7.) Respondents note that 25 Pa. Code § 78a.2 provides that Chapter 78a "supersedes any regulations in Chapter 78 (relating to oil and gas wells) applicable to unconventional wells." Respondents, therefore, contend that if the challenged regulations were enjoined by this Court, "there would be no unconventional well regulations regarding site restoration, waste reporting, spills, impoundments, area of review, and other environmentally-sensitive aspects of site operations." (*Id.*) Thus, there would not be a return to the status quo, because Chapter 78 is now inapplicable and there would be a void in the regulatory framework, which would allow MSC and its members to bypass important environmental protections while this matter is being litigated. As a result, there would be "harm to the health safety and welfare of the public and environment." (*Id.* § 11.)

Finally, although they admit that they do "not have the authority to revise the Chapter 78a Regulations without additional rulemaking," they note that

MSC has not applied for a conference pursuant to Section 3251 of Act 13, 58 Pa. C.S. § 3251.[6]

II. DISCUSSION

A. Standard/Burden of Proof

MSC has the burden of proving its entitlement to interim relief. *Warehime v. Warehime*, 860 A.2d 41, 47 (Pa. 2004). To meet this burden, MSC must establish each of the following "essential prerequisites":

> First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

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[6] Section 3251(a) provides, generally, that DEP "or any person having a direct interest in a matter subject to this chapter may, at any time, request that a conference be held to discuss and attempt to resolve by mutual agreement a matter arising under this chapter." 58 Pa. C.S. § 3251(a). The parties do not elaborate the relevance, if any, of this provision to any of the issues in this proceeding.

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003) (citations omitted). If this Court determines that any one of these essential prerequisites is lacking, MSC has failed to meet its burden. *Warehime*, 860 A.2d at 46.

The "clear right to relief" prong of the inquiry does not require the Court, at this stage, to determine the merits of MSC's claims. Rather, the Court need only review the claims to determine whether MSC raises substantial legal questions that must be resolved in order to determine the relative rights and obligations of the parties. *T.W. Phillips Gas & Oil Co. v. Peoples Natural Gas Co.*, 492 A.2d 776, 780-81 (Pa. Cmwlth. 1985). As for the irreparable harm prong, "[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." *Pa. Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947). Moreover, where harm could be compensated by monetary damages but the government entity responsible for the harm is immune from liability, such that the party seeking a preliminary injunction will be unable to recover damages, "[t]he inability to be adequately compensated by an award of damages constitutes irreparable harm" for the purposes of the above analysis. *Boykins v. City of Reading*, 562 A.2d 1027, 1028-29 (Pa. Cmwlth. 1989). The status quo to be preserved by a preliminary injunction is the last actual, peaceable, lawful, noncontested status which preceded the pending controversy. *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196, 204 n.10 (Pa. Cmwlth.), *appeal denied*, 903 A.2d 1235 (Pa. 2006).

B. Evidence

The Court conducted a two-day hearing on MSC's Application on October 25 and 26, 2016, during which the Court provided the parties an opportunity to offer evidence, including testimony in support of their respective positions. MSC, while bearing this burden of proof in this matter, opted not to present any testimony, and, instead, rested its case after entering the following documents into the record:

- Transcript of the EQB meeting held on February 3, 2016;
- Copy of Chapter 78a Regulations;
- Regulatory Analysis Form (RAF) submitted to Independent Regulatory Review Commission (IRRC) for consideration with Chapter 78a Regulations;
- Letter from the Senate Environmental Resources and Energy Committee to the IRRC and the EQB, dated April 12, 2016, and letter from the House of Representatives Environmental Resources and Energy Committee to the IRRC, dated April 15, 2016 (admitted only for the purpose of establishing that Senate and House committees participated in the regulatory review process and disapproved of the proposed Chapter 78a Regulations).

MSC also offered into evidence the following admission by Respondents, taken from paragraph 12 of their Answer: "The Commonwealth admits that it does not have the authority to revise the Chapter 78a Regulations without additional rulemaking." The Court notes, however, that this appears to be an admission "of law," and not of fact. With that, MSC rested its evidentiary presentation in support of its Application.

Respondents called one witness, Scott Perry, DEP's Deputy Secretary for the Office of Oil and Gas Management (Secretary Perry). Secretary Perry's testimony largely addressed the process by which the Chapter 78a Regulations became final, the substance of the challenged regulations, the need for the challenged regulations, and the various impacts that would follow if the challenged regulations were enjoined.

C. Analysis

1. Count I—Public Resource Protection

In Count I of the Petition, MSC challenges Sections 78a.1 and 78a.15(f) and (g) of the Chapter 78a Regulations, relating to the protection of "public resources."

Section 78a.15(f) purports to establish a pre-application notice requirement, providing:

> An applicant proposing to drill a well at a location that may impact a *public resource as provided in paragraph (1)* shall notify the applicable *public resource agency*, if any, in accordance with paragraph (2). The applicant shall also provide the information in paragraph (3) to [DEP] in the well permit application.

25 Pa. Code § 78a.15(f) (emphasis added). Although the term "public resource" is not defined in Section 78a.1 of the Chapter 78a Regulations (definitions), paragraph (1) of challenged Section 78a.15(f) requires notification if the limit of disturbance of the well site falls within certain distances from listed public resources, including, *inter alia*, "common areas of a school's property or a playground" and "other critical communities," which are defined in relevant part as follows:

> *Common areas of a school's property*—An area on a school's property assessable to the general public for recreational purposes. For the purposes of this definition,

a school is a facility providing elementary, secondary or postsecondary educational services.

. . .

Other critical communities—

(i) *Species of special concern* identified on a *PNDI* receipt, including plant or animal species[.]

25 Pa. Code. § 78a.1 (emphasis added). "PNDI" is defined as follows:

> *PNDI—Pennsylvania Natural Diversity Inventory*—The Pennsylvania Natural Heritage Program's database containing data identifying and describing this Commonwealth's ecological information, including plant and animal species classified as threatened and endangered as well as *other critical communities* provided by the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission and the United States Fish and Wildlife Service. The database informs the online environmental review tool. The database contains only those known occurrences of threatened and endangered species and other critical communities, and is a component of the Pennsylvania Conservation Explorer.

Id. "Public resource agency" is defined as follows:

> *Public resource agency*—An entity responsible for managing a public resource . . . including the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, the United States Fish and Wildlife Service, the United States National Park Service, the United States Army Corps of Engineers, the United States Forest Service, *counties, municipalities and playground owners*.

Id. "Playground" is defined as follows:

> (i) An outdoor area provided to the general public for recreational purposes.
>
> (ii) The term includes community-operated recreational facilities.

Id.

As part of the notification requirement, the applicant must provide each public resource agency with information about its proposal, including, *inter alia*, a plat and proposed measures to mitigate damage(s) to the public resource. *Id.* § 78a.15(f)(2). The applicant must provide this notification at least 30 days *before* submitting its well permit application to DEP. Notified public resources agencies then have 30 days to submit written comments to DEP for DEP's consideration, and the applicant may submit a response to any comments. *Id.* As for DEP's consideration, Section 78a.15(g) provides:

> [DEP] will consider the following prior to conditioning a well permit based on impacts to public resources:
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> (1) Compliance with all applicable statutes and regulations.
>
> (2) The proposed measures to avoid, minimize or otherwise mitigate the impacts to public resources.
>
> (3) Other measures necessary to protect against a probable harmful impact to the functions and uses of the public resource.
>
> (4) The comments and recommendations submitted by public resource agencies, if any, and the applicant's response, if any.
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> (5) The optimal development of the gas resources and the property rights of gas owners.

Id. § 78a.15(g).

MSC articulates eleven separate legal challenges to the above scheme in its Petition. (Petition ¶ 44(a)-(k).) Generally speaking, MSC contends that in light of the Pennsylvania Supreme Court's recent decision in *Robinson Township v. Commonwealth of Pennsylvania Public Utility Commission*, __ A.3d __, (Pa., No. 104 MAP 2014, Sept. 28, 2016) (*Robinson Twp. IV*), which MSC characterizes as enjoining Section 3215(c) of Act B, 58 Pa. C.S. § 3215(c), DEP

lacks the authority to protect "public resources" under the Pennsylvania Oil and Gas Act, also known as Act 13.[7] For this reason, we should enjoin this scheme in its entirety. Alternatively, MSC contends that Act 13 does not provide for, let alone authorize, this type of pre-permitting notification scheme. MSC also contends that the regulations exceed the scope of DEP's authority by extending "public resource" status to species of special concern, common areas of schools, and playgrounds. Moreover, MSC contends that the regulations improperly afford local government agencies and private parties "public resource agency" status. MSC contends that the above scheme fails to comply with Section 3215(e) of Act 13, which requires the EQB, *inter alia*, to "develop by regulation criteria . . . [f]or [DEP] to utilize in conditioning a well permit based on its impact to the public resources identified under subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners." 58 Pa. C.S. § 3215(e)(1). Finally, MSC contends that because the RAF

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[7] Section 3215(c) of Act 13, 58 Pa. C.S. § 3215(c), provides:

> On making a determination on a well permit, the department shall consider the impact of the proposed well on public resources, including, but not limited to:
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> (1) Publicly owned parks, forests, game lands and wildlife areas.
>
> (2) National or State scenic rivers.
>
> (3) National natural landmarks.
>
> (4) Habitats of rare and endangered flora and fauna and other critical communities.
>
> (5) Historical and archaeological sites listed on the Federal or State list of historic places.
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> (6) Sources used for public drinking supplies in accordance with subsection (b).

does not include any estimates for the cost of compliance with mandated mitigation measures, the scheme fails to comply with the Regulatory Review Act.[8] Reviewing each of these legal challenges separately, the Court concludes that MSC has satisfied the "clear right to relief" prong of the preliminary injunction inquiry with respect to some, but not all, of its legal challenges.

Unless and until the Pennsylvania Supreme Court reverses this Court's decision in *Pennsylvania Independent Oil and Gas Association v. Department of Environmental Protection*, ___ A.3d ___, (Pa. Cmwlth., No. 321 M.D. 2015, filed Sept. 1, 2016) (en banc) (*PIOGA*),

> DEP's authority under Section 3215(c) to consider the impact that a proposed well will have on public resources, those listed and unlisted, is extant, limited only by the portion of the Supreme Court's mandate in [*Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013)] that enjoins its application and enforcement with respect to the water source setback and waiver provisions set forth in Section 3215(b) [of Act 13].

PIOGA, ___ A.3d at ____, slip. op. at 8. Accordingly, MSC has not presented a substantial legal question as to DEP's authority to protect public resources under Act 13.

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[8] Section 5(a)(4) of the Regulatory Review Act, 71 P.S. § 745.5(a)(4), requires the agency promulgating the regulations to submit to the Legislative Reference Bureau a regulatory analysis form, or RAF, which sets forth, *inter alia*, "[e]stimates of the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector." In determining whether the proposed regulation is in the public interest, the IRRC must consider, *inter alia*, the "[e]conomic or fiscal impacts of the regulation, which include . . . [d]irect and indirect costs to the Commonwealth, to its political subdivisions and to the private sector." Section 5b(b)(1)(i) of the Regulatory Review Act, 71 P.S. § 745.5b(b)(1)(i).

In addition, because DEP has such authority, the Court is not satisfied at this stage of the proceeding that the pre-application scheme, which essentially requires the applicant to conduct a survey of public resources within the vicinity of the proposed well location and to provide notice and information to agencies that have some responsibility over the management of those public resources, is untethered to DEP's authority under Section 3215(c) of Act 13. The same is true of the portion of the scheme that allows those agencies with management responsibility over the affected public resources to comment on the well permit application. Accordingly, MSC has not raised a substantial legal question that requires enjoining preliminarily Section 78a.15(f) in its entirety.

The Court is also not convinced that MSC's challenge to the cost estimates in the RAF poses such a substantial legal question as to the validity of the Chapter 78a Regulations that a preliminary injunction should issue. With respect to cost estimates for mitigation measures, the RAF provides:

> The final step in the process is mitigation. The cost estimate for mitigation will vary. In some circumstances, an operator may be able to plan the location of the well site using the planning tool discussed above to avoid public resources resulting in zero cost. Any cost associated with mitigation measures is dependent on many variables and may be situation specific in some cases. While [DEP] is unable to provide a *specific estimate* for the implementation of this entire provision, it should be noted that this cost may be substantial depending on the location of the well site.

(RAF at 87 (emphasis added).) Although this language does not provide a "specific" estimate, it provides an explanation as to why DEP is unable to do so. Moreover, the language does provide a general estimate of the cost of compliance with Sections 78a.15(f) and (g) in a range of $0 to "substantial," depending on the situation. MSC did not produce any evidence during the hearing that would

suggest that DEP could have provided a more specific cost estimate in the RAF. Moreover, there is no evidence to suggest that the IRRC was somehow stymied in conducting its review of the Chapter 78a Regulations by the lack of a more specific cost estimate.

With respect to Section 78a.15(g) of the Chapter 78a Regulations, MSC essentially contends that this section falls short of setting "criteria" that DEP must consider in conditioning a well permit based on public resource impact. MSC argues that Section 78a.15(g) is merely an expanded recitation of the statutory language in Section 3215(e), without any explanation of *how* DEP will balance and evaluate each item it must consider and arrive at appropriate permit conditions. Even if the Court accepts MSC's argument, however, it would mean only that Section 78a.15(g) is a restatement of Section 3215(e) of Act 13. The Court sees no reason to enjoin preliminarily a regulation that merely restates a statute. If, as MSC also contends, the EQB has failed to promulgate the regulation that the General Assembly required in Section 3215(e) of Act 13, enjoining or staying Section 78a.15(g) does not remedy that wrong.

The Court, however, is satisfied that MSC has raised a substantial legal question as to how the regulation expands the list of protected public resources beyond those expressly set forth in Section 3215(c) of Act 13. Although the statutory list is not exhaustive,[9] there is a substantial legal question in this case as to whether the General Assembly, in seeking to protect "public resources," intended to protect only publicly-owned natural resources, or also intended to protect all publicly-owned property as well as privately-owned property open to

[9] *See Dechert, LLP v. Commonwealth*, 998 A.2d 575, 580-81 (Pa. 2010).

the public.[10] If the former, then to the extent Section 78a.15(f) extends public resource status to school grounds and playgrounds, it may be in conflict with Section 3215(c) and, therefore, unlawful.[11]

The Court is also satisfied that there is a substantial legal question about the lawfulness of including "special concern species" within the public resource protection provisions of the Chapter 78a Regulations. One of the express public resources protected in Section 3215(c) of Act 13 is "[h]abitats of rare and

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[10] It is possible that when enacting Section 3215(c) of Act 13, the General Assembly intended only to protect those "public natural resources" expressly protected under Article I, Section 27 of the Pennsylvania Constitution, which provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's *public natural resources* are the common property of all the people, including generations yet to come. As trustee of *these resources*, the Commonwealth shall conserve and maintain them for the benefit of all the people.

(Emphasis added.)

[11] This is not to say that protecting our children from the potential harmful impacts of oil and gas activities in close proximity to schools and playgrounds is not a laudable objective. If, however, the list of Section 3215(c) of Act 13 "public resources" can be extended to include schools and playgrounds (publicly- or privately-owned), the same logic would allow the expansion of the list to include any areas that are open to the public—*e.g.*, shopping centers, movie theaters, senior centers, arenas, sports stadiums, amusement parks, etc. Such a broad view of the phrase "public resource," when compared to the list of enumerated public resources in Section 3215(c) of Act 13, would appear to implicate the statutory construction doctrine of *ejusdem generis* ("of the same kind or class"). On this point, the Pennsylvania Supreme Court opined:

> [T]he presence of such a term as "including" in a definition exhibits a legislative intent that the list that follows is not an exhaustive list of items that fall within the definition; yet, any additional matters purportedly falling within the definition, but that are not express, must be similar to those listed by the legislature and of the same general class or nature.

Dep't of Envtl. Prot. v. Cumberland Coal Res., L.P., 102 A.3d 962, 976 (Pa. 2014).

endangered flora and fauna and other critical communities." Section 78a.1 of the Chapter 78a Regulations defines "other critical communities" to include "species of special concern." Based on the evidence and legal argument of the parties, it appears that "species of special concern" is a resource classification that falls below endangered or threatened species and that, unlike endangered and threatened species,[12] is not the result of any public rulemaking and does not have any special protection afforded under the laws of this Commonwealth that DEP is entrusted to enforce.

Accordingly, based on the foregoing, MSC has satisfied the clear right to relief prong of the preliminary injunction inquiry with respect to Sections 78a.1 and 78a.15(f) and (g) of the Chapter 78a Regulations insofar as they include "common areas on a school's property or a playground" and "species of special concern" as "public resources" and include "playground owners" in the definition of "public resource agency." The Court finds further that inclusion of these items in these sections constitutes irreparable harm *per se*, in that their inclusion appears to be untethered to Respondents' statutory authority. Alternatively, according to cost estimates in the RAF, there is a cost to compliance with these provisions—costs that well applicants will be unable to recover from Respondents if this Court should rule in favor of MSC on the merits. This, too, constitutes irreparable harm.

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[12] *See, e.g.*, 17 Pa. Code §§ 45.12 (endangered plants), .13 (threatened plants); 58 Pa. Code §§ 75.1 (endangered fish, amphibians and reptiles, and invertebrates), 75.2 (threatened fish, amphibians and reptiles, and invertebrates); 58 Pa. Code §§ 133.21 (endangered and threatened birds), .41 (endangered and threatened mammals).

The harm to MSC from refusing the preliminary injunction outweighs any purported harm from granting it.[13] Enjoining these discrete provisions will restore the parties to the status quo as it existed prior to the alleged wrongful conduct, that being the absence of any statute or regulation linking the enjoined provisions to the public resource protection provisions in Section 3215(c) of Act 13. The preliminary injunction issued by the Court with respect to Count I will be narrowly tailored to the discrete provisions set forth above, leaving intact the overall notice/comment/mitigation scheme in Section 78a.15(f) of the Chapter 78a Regulations. In light of the foregoing, a preliminary injunction that precludes DEP from enforcing these provisions of the Chapter 78a Regulations will not adversely affect the public interest.

2. Count II—Area of Review

In Count II of the Petition, MSC challenges Sections 78a.52a and 78a.73(c) and (d) of the Chapter 78a Regulations, relating to the "area of review."

Section 78a.52a requires a well operator to identify all active, inactive, orphan, abandoned, and plugged and abandoned wells[14] that have a well

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[13] As with many of the provisions in the Chapter 78a Regulations, these provisions provide new and greater environmental protections and impose new requirements on well applicants. Respondents, however, did not produce any evidence during the hearing in this matter to prove that enjoining preliminarily the enforcement of these discrete provisions will harm any person, entity, or the public in general.

[14] Act 13 defines the following:

> **"Abandoned well."** Any of the following:
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> (1) A well:
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> (i) that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months';

(Footnote continued on next page...)

bore path within 1,000 feet of the operator's well bore, measured horizontally from the operator's vertical well bore and from the surface above the entire length of any horizontal well bore. 25 Pa. Code § 78.52a. Section 78.73(c) and (d) impose advance notice, monitoring, and remediation obligations in the event that stimulation of a well by hydraulic fracturing, or fracking, causes an intrusion into or alteration of one of the wells identified in the area of review survey. The reference to an intrusion or alteration refers to the concern that gas, oil, brine, or fluids used in fracking a particular well may migrate to other wells nearby, rise to

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(continued...)

> (ii) for which equipment necessary for production, extraction or injection has been removed; or
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> (iii) considered dry and not equipped for production within 60 days after drilling, redrilling or deepening.
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> (2) The term does not include wells granted inactive status.
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> . . . .
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> **"Inactive."** To shut off the vertical movement of gas in a gas storage well by means of a temporary plug or other suitable device or by injecting bentonitic mud or other equally nonporous material into the well.
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> . . . .
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> **"Orphan well."** A well abandoned prior to April 18, 1985, that has not been affected or operated by the present owner or operator and from which the present owner, operator, or lessee has received no economic benefit other than as a landowner or recipient of a royalty interest from the well.

58 Pa. C.S. § 3203.

the surface, and contaminate groundwater.[15] Specifically, Section 78.73(c) and (d) provide:

> (c) The operators of active, inactive, abandoned, and plugged and abandoned wells identified as part of an area of review survey conducted under § 78a.52a (relating to area of review) that likely penetrate within 1,500 feet measured vertically from the stimulation perforations, if known, shall be notified. Notice shall be provided at least 30 days prior to the start of drilling the well or at the time the permit application is submitted to [DEP] if the start of drilling is planned less than 30 days from the date of permit issuance. *Orphan wells, abandoned wells, and plugged and abandoned wells identified as part of an area of review survey conducted under § 78a.52a that either penetrate within 1,500 feet measured vertically from the stimulation perforations or have an unknown true vertical depth shall be visually monitored during stimulation activities.* The operator shall immediately notify [DEP] of any changes to a well being monitored, of any treatment pressure or volume changes indicative of abnormal fracture propagation at the well being stimulated or if otherwise made aware of a confirmed well communication incident associated with their stimulation activities. Notice shall be provided to [DEP] electronically through [DEP's] web site. *In an event such as this, the operator shall cease stimulating the well that is the subject of the area of review survey and take action to prevent pollution of waters of the Commonwealth or discharges to the surface. The operator may not resume stimulation of the well that is the subject of the area of review survey without [DEP] approval.*
>
> (d) *An operator that alters an orphan well, or an abandoned well or plugged and abandoned well by*

[15] *See* 25 Pa. Code. § 78a.73(b) ("The operator shall prevent gas, oil, brine, completion and servicing fluids, and any other fluids or materials from below the casing seat from entering fresh groundwater, and shall otherwise prevent pollution or diminution of fresh groundwater.").

> *hydraulic fracturing shall plug the altered well in accordance with this chapter, or the operator may adopt the altered well and place it into production.*

Id. § 78a.73(c), (d) (emphasis added).

MSC articulates several challenges to these provisions. (Petition ¶ 49(a)-(f).) First, MSC contends that the provisions impose an "unreasonable and unwarranted" monitoring requirement. MSC maintains that there is no legal authority for the new "area of review" requirements. Indeed, MSC maintains that requiring someone other than the well owner to plug an orphan or abandoned well conflicts with Section 3220 of Act 13, 58 Pa. C.S. § 3220, which imposes plugging requirements only on the well owner or operator. MSC also contends that the regulations are void for vagueness, citing to DEP's intent to issue a follow-up technical guidance document. Finally, MSC contends that the monitoring and remediation provisions would require a well operator to enter illegally onto property owned and controlled by others—*i.e.*, to trespass.

Reviewing each of these legal challenges separately, MSC has satisfied the "clear right to relief" prong of the preliminary injunction inquiry with respect to some, but not all, of the its legal challenges. The Court notes that MSC did not produce any evidence during the hearing that would cause the Court to conclude that DEP's concern about the unintentional migration of fluids and other materials associated with fracking from the target well to nearby orphan, abandoned, or plugged and abandoned wells is irrational or unsubstantiated. Similarly, MSC did not produce any evidence during the hearing that such a

migration poses no risk to the "waters of the Commonwealth," as broadly defined by The Clean Streams Law.[16]

Indeed, the General Assembly was aware of the potential harm that well operations may have on the waters of the Commonwealth when it passed Act 13, as evidenced by Section 3217 of Act 13, 58 Pa. C.S. § 3217, which provides, in relevant part:

> **(a) General Rule.**—To aid in protection of fresh groundwater, well operators shall control and dispose of brines produced from the drilling, alteration or operation of an oil or gas well in a manner consistent with . . . The Clean Streams Law, or any regulation promulgated under The Clean Streams Law.
>
> **(b) Casing.**—To prevent migration of gas or fluids into sources of fresh groundwater and pollution or diminution of fresh groundwater, a string or strings of casing shall be run and permanently cemented in each well drilled through the fresh water-bearing strata to a depth and in a manner prescribed by regulation by [DEP].

Further, by this section, as well as Section 3273 of Act 13, 58 Pa. C.S. § 3273,[17] the General Assembly clearly envisioned when it passed Act 13 that DEP's

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[16] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-.1001. Section 1 of The Clean Streams Law, *as amended*, 35 P.S. § 691.1, defines "Waters of the Commonwealth" to include:

> any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of the Commonwealth.

[17] Section 3273 of Act 13 provides:

> This chapter does not affect, limit or impair any right or authority of [DEP] under the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law; the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the

(Footnote continued on next page...)

authority to regulate well operations to protect the health, safety, and welfare of the Commonwealth extended beyond Act 13 and encompassed authority granted under a plethora of existing environmental laws, working in concert with Act 13.[18] Section 3259(2)(ii) of Act 13, 58 Pa. C.S. § 3259(2)(ii), expressly provides that it is unlawful to "conduct an activity related to drilling for or production of oil and gas . . . in any manner as to . . . adversely affect public health, safety, welfare or the environment." The Court also notes the authority granted to the EQB in Section 3274 of Act 13, 58 Pa. C.S. § 3274, to "promulgate regulations to implement this chapter."

In light of the foregoing, further analysis of DEP's authority to enact regulations to address concerns about the migration of fluids and other materials used in hydraulic fracturing from the stimulated well to nearby wells and, thereafter, to groundwater and other waters of the Commonwealth is unnecessary for purposes of the preliminary injunction inquiry. The Court is satisfied that MSC has not presented a substantial legal question as to DEP's authority in this regard.

(continued...)

> Air Pollution Control Act; the act of November 26, 1978 (P.L. 1375, No. 325), known as the Dam Safety and Encroachments Act; or the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act.

[18] In light of the express acknowledgement and preservation in Act 13 by the General Assembly of DEP's authority to regulate the oil and gas industry through other environmental laws, the Court is not persuaded at this juncture by MSC's argument that this is a case where DEP has suddenly discovered in a long-existing law the power to regulate the environmental impacts of the oil and gas industry. *See Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (involving expanded exercise of regulatory authority under statute on books for decades, Clean Air Act). Act 13 is a relatively recent law (2012).

In addition, because the Court presumes that DEP has such authority, the Court is not satisfied at this stage of the proceeding that the area of review survey portions of 25 Pa. Code § 78a.52a, which essentially requires a well operator to prepare and submit to DEP a survey of all active, inactive, orphan, abandoned, and plugged and abandoned wells within the vicinity of the drilling site of a new well, is untethered to DEP's authority under Act 13, The Clean Streams Law, or other environmental laws that work in tandem with Act 13. The Court is also not convinced that MSC's void for vagueness challenge to the requirement that, as part of the area of review survey, a well operator "identify the surface and bottom hole locations" of nearby wells poses such a substantial legal question as to the validity of Section 78a.52a of the Chapter 78a regulations that a preliminary injunction should issue. The Court is also not convinced that MSC's concerns about the lawfulness and reasonableness of Section 78a.52a(e) of the Chapter 78a Regulations, which provides that, upon receipt of the area of review survey DEP may require the well operator use "additional measures" to prevent fracking activity migration to nearby wells, pose such a substantial legal question that we should preliminarily enjoin it. Accordingly, MSC has not raised a substantial legal question that requires enjoining preliminarily Section 78a.52a in its entirety.

The Court, however, is satisfied that MSC has raised a substantial legal question as to the reasonableness of the monitoring and remediation provisions set forth in Section 78a.52a(c)(3) and 78a.73(c) and (d). Although MSC did not provide any testimony or other evidence relating to the difficulty that the industry would have in complying with these provisions, significant implementation issues are readily apparent from a reading of the provisions. These regulations *require* well operators to monitor all wells identified in the area of

review survey, regardless of whether those wells are accessible to the well operator. Similarly, they *require* well operators to plug any well within the survey area that becomes impacted by the well operator's stimulation activities, again regardless of whether the affected well is accessible to the well operator. Moreover, there is a substantial legal question as to whether Section 78a.73(d) is inconsistent with the well plugging requirements set forth in Section 3220 of Act 13, 58 Pa. C.S. § 3220, which places the onus on the owner or operator to plug its own wells, not the wells of others, and how this provision relates to DEP's authority to plug wells under Section 3271 of Act 13, 58 Pa. C.S. § 3220 (relating to well plugging funds).

Accordingly, based on the foregoing, MSC has satisfied the clear right to relief prong of the preliminary injunction inquiry with respect to Section 78a.52(c)(3) and Section 78a.73(c) and (d) of the Chapter 78a Regulations, imposing monitoring and remediation obligations on well operators with respect to wells identified in the area of review survey. The RAF submitted to the IRRC estimates the cost of compliance with these provisions to be in excess of $11 million. Unless enjoined, these provisions may very well cause well operators to incur costs of compliance that they will be unable to recover from Respondents if this Court should rule in favor of MSC on the merits. This constitutes irreparable harm.

The harm to MSC from refusing the preliminary injunction outweighs any purported harm from granting it.[19] Enjoining these discrete provisions will restore the parties to their status quo as it existed prior to the alleged wrongful

[19] *See supra* n.12.

conduct, that being the absence of any monitoring or remediation requirements with respect to wells owned or operated by someone other than the owner and operator of the stimulated well. The preliminary injunction issued by the Court with respect to Count II will be narrowly tailored to the discrete provisions set forth above, leaving intact the overall area of review survey requirement and the requirement that the owner and operator of the well being stimulated monitor and, if necessary, remediate any of its/their wells identified in the area of review survey, but not the wells of others. In light of the foregoing, a preliminary injunction that precludes DEP from enforcing these provisions of the Chapter 78a Regulations will not adversely affect the public interest.

3. Count III—Onsite Processing

In Count III of the Petition, MSC challenges Section 78a.58(f) of the Chapter 78a Regulations, relating to "Onsite processing." This section provides:

> Processing residual waste generated by the development, drilling, stimulation, alteration, operation or plugging of oil and gas wells other than as provided in subsections (a) and (b) shall comply with the Solid Waste Management Act . . . .[20]

25 Pa. Code § 78a.58(f). Subsection (a) of Section 78a.58 provides that a well operator may seek approval from DEP to process "fluids" on either the well site where the fluids are generated *or* the well site where the processed fluids will be beneficially used. *Id.* § 78a.58(a). A separate subsection addresses drill cuttings:

> The operator may request to process drill cuttings *only at the well site where those drill cuttings were generated* by submitting a request to [DEP] for approval. The request shall be submitted on forms provided by

[20] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003.

> [DEP] and demonstrate that the processing operation will not result in pollution

Id. § 78a.58(e) (emphasis added). The Solid Waste Management Act defines "drill cuttings" as "[r]ock cuttings and related mineral residues created during the drilling of wells" under Act 13 and its predecessor, the Oil and Gas Act of 1984. Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103. "Drill cuttings," however, are expressly excluded from the definition of "solid waste" and, by implication, any of the subclasses of "solid waste," such as "municipal waste," "residual waste," and "hazardous waste." *See id.* (definition of "solid waste").

Section 78a.58 of the Chapter 78a Regulations is tied to Section 3273.1 of Act 13, 58 Pa. C.S. § 3273.1. Section 3273.1(a) of Act 13, *inter alia*, essentially waives the permitting and bonding requirements of the Solid Waste Management Act with respect to the processing of "residual wastes generated by the drilling of an oil or gas well . . . which is located on *the well site*," if the owner or operator meets certain conditions. (Emphasis added.)[21] The term "well site," for purposes of this section, is defined to mean "areas occupied by all equipment or facilities necessary for or incidental to drilling, production or plugging a well." 58 Pa. C.S. § 3273.1(d).

MSC alleges that Section 78a.58(f) of the Chapter 78a Regulations is in conflict with Section 3273.1 of Act 13 in a couple of respects. (Petition ¶ 55.) Primarily, MSC contends that the regulation improperly limits the exemption to

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[21] This is not an exemption from the Solid Waste Management Act in its entirety: "This section does not diminish or otherwise affect duties or obligations of an owner or operator under the Solid Waste Management Act." 58 Pa. C.S. § 3273.1(c).

processing activities that occur only at the well site from which the residual waste was generated or the well site where the residual waste, once processed, is intended to be beneficially used. Instead, MSC claims that if the processing occurs at any location that meets the definition of "well site" in Section 3273.1(d) of Act 13, the statutory exemption applies. MSC's interpretation would facilitate processing of residual waste from more than one well site at a centralized location (that happens to meet the definition of a "well site") and distribution of the recycled material to multiple well sites for beneficial use. The EQB's interpretation precludes centralized processing and distribution and, instead, if recycling is the goal, would require processing equipment at every well site that generates residual waste, every well site that uses processed residual waste, or both.

To prevail on its primary argument, MSC would have to prevail on its challenge to the EQB's construction of Section 3273.1 of Act 13 embodied in Section 78a.58. The merits of MSC's challenge will turn on statutory construction. Relevant to that inquiry, the Court will be compelled to consider the following guidance from the Supreme Court: "With respect to issues involving the interpretation of a statute, an administrative agency's interpretation is to be given 'controlling weight unless clearly erroneous.' However, when an administrative agency's interpretation is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight." *Lancaster Cnty. v. Pa. Labor Relations Bd.*, 94 A.3d 979, 986 (Pa. 2014) (quoting *Borough of Ellwood City v. Pa. Labor Relations Bd.*, 998 A.2d 589 (Pa. 2010)).

Secondarily, MSC argues that Section 78a.58(f), and by reference subsection (a), limit the Section 3273.1 of Act 13 exemption to the processing of

fluids, when the statutory language extends to all residual wastes generated at a well site.

Reviewing each of these legal challenges separately, the Court is satisfied that MSC has presented a substantial legal question as to the proper construction of the exemption set forth in Section 3273.1 of Act 13. The Court, however, is not satisfied at this stage of the proceeding that MSC has presented a substantial legal question on the issue of whether Section 78a.58(f) precludes application of the Section 3273.1 exemption to residual wastes generated by the drilling of an oil and gas well other than fluids. Specifically, MSC did not present any evidence as to types of residual waste, other than fluids, that are implicated by oil and gas drilling. During oral argument, MSC contended that drill cuttings are residual waste. As noted above, however, drill cuttings are expressly exempt from the definition of "solid waste" in the Solid Waste Management Act and, therefore, cannot be considered "residual waste," a component of "solid waste." In the absence of such evidence, the Court cannot say that Section 78a.58 improperly limits the exemption in Section 3273.1 of Act 13 to the processing of fluids, which may be the only residual waste generated at well sites.

Although there is a substantial legal question as to the proper construction of Section 3273.1 of Act 13, the Court cannot say at this point that the agency's interpretation is so divorced from the statutory language that, unless enjoined, it will cause irreparable harm *per se*. Moreover, there is no cost of compliance estimate in the RAF with respect to this provision. As noted above, MSC did not present any testimony or other evidence as to the harm that the industry will suffer if this provision is not enjoined preliminarily. Specifically, there is no evidence in the record that any entity currently conducts centralized

processing of fluids and how implementation of the regulation, pending the Court's disposition of the merits, would impact its operations. Such economic harm would seem obvious. The Court, however, is not permitted to assume harm. Harm must be based on evidence. Accordingly, although MSC satisfied the "clear right to relief" prong of the preliminary injunction inquiry, the Court finds an absence of evidence to support the other prongs. For this reason, MSC's request for preliminary injunctive relief with respect to Count III will be denied.

4. Count IV—Impoundments

In Count IV of the Petition, MSC challenges Sections 78a.59b and 78a.59c of the Chapter 78a Regulations. Section 78.59b imposes new construction standards for well development impoundments (storage of fresh water to be used in drilling operations), including requirements that these impoundments be constructed with a synthetic impervious liner and that the impoundments be either continuously monitored by an individual or enclosed by a fence, so as to prevent unauthorized access or damage by third parties or wildlife. 25 Pa. Code. § 78a.59b(d), (e). Existing well development impoundments must either be upgraded to meet these new requirements or closed by October 10, 2017. *Id.* § 78a.59b(b). Section 78.59c requires that operators of centralized impoundments (storage of waste water from drilling operations) either close these impoundments, in accordance with the terms of the regulation, or obtain a permit for the impoundment under the Solid Waste Management Act. 25 Pa. Code § 78.59c.

MSC articulates four separate legal challenges to the above scheme in its Petition. (Petition ¶ 64(a)-(d).) First, acknowledging that DEP may regulate off-well site fresh water impoundments under The Clean Streams Law and the

Dam Safety and Encroachments Act,[22] MSC contends that it lacks the authority to regulate them under Act 13. MSC also contends that requiring the permitting of centralized storage impoundments under the Solid Waste Management Act conflicts with the law, which does not require a permit for such impoundments. MSC also contends that the provisions violate Article III, section 32 of the Pennsylvania Constitution (prohibiting special laws). Finally, MSC contends that the regulations are unlawful and unreasonable because they require upgrading or closure of existing impoundments, constructed and approved according to DEP standards and permits then in effect.

The Court is satisfied at this stage of the proceedings that MSC has raised substantial legal questions over the legal validity of the challenged regulations in terms of how they treat existing impoundments, built years ago pursuant to permits and DEP's view of the law at the time. Secretary Perry credibly testified that these regulations stem not from a change in law, but from a change in DEP's interpretation of long-standing law. Secretary Perry also confirmed that impoundments that exist today and that, at the time, were permitted and built to DEP standards, would have to be retrofitted or closed under DEP's new interpretation, as set forth in the regulations. *See Young J. Lee, Inc. v. Dep't of Rev.*, 474 A.2d 266, 270 (Pa. 1983) ("The government cannot, on the one hand, create a business which is dependent on a permit and then, with the other, destroy it by revoking the authorizing permits without first affording "sufficient" due process."). Cost estimates to retrofit or close these impoundments range from several hundreds of thousands to millions of dollars. (RAF at 96-98). Unless these

[22] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S §§ 693.1-.27.

provisions are enjoined, MSC will be unable to recover these costs from the Commonwealth should it ultimately prevail on the merits. This constitutes irreparable harm.

The harm to MSC from refusing the preliminary injunction outweighs any purported harm from granting it. DEP contends that these new requirements are necessary to protect against contamination. Although the new requirements will undoubtedly provide additional health and safety protection, DEP provided no evidence to support a finding that any existing impoundment poses an immediate threat to the health and safety of the Commonwealth, including its citizens and the environment, such that all must be brought up to current standards or closed before the Court has an opportunity to rule on the merits of MSC's challenge. The preliminary injunction issued by the Court with respect to Count IV will be narrowly tailored to the effect that these regulations have on existing impoundments; new impoundments must comply with the new standards. In light of the foregoing, a preliminary injunction that precludes DEP from enforcing these provisions of the Chapter 78a Regulations as to well development impoundments and centralized impoundments that existed prior to the effective date of the regulations will not adversely affect the public interest.

5. Count V—Site Restoration

In Count V of the Petition, MSC challenges Section 78a.65 of the Chapter 78a Regulations, relating to site restoration.

Site restoration is addressed in Section 3216 of Act 13, 58 Pa. C.S. § 3216. Generally, a well owner or operator must "restore the land surface within the area disturbed in siting, drilling, completing and producing the well." 58 Pa. C.S. § 3216(a). The section specifically requires implementation of an

erosion and sediment control plan in accordance with The Clean Streams Law with respect to earthmoving and soil disturbing activities incidental to the development of the well. *Id.* § 3216(b). Section 3216 sets forth timelines within which certain site restoration must be completed, unless extended by DEP. *Id.* § 3216(c), (d), (g). With respect to overall restoration, the section provides: "Restoration activities required by this chapter or in regulations promulgated under this chapter *shall also comply with all applicable provisions of [T]he Clean Streams Law.*" *Id.* § 3216(e) (emphasis added). Section 78a.65 of the Chapter 78a Regulations appears to implement the site restoration requirements in Section 3216 of Act 13.

MSC articulates five separate legal challenges to Section 78a.65 in its Petition. (Petition ¶ 71(a)-(e).) Several of these challenges, however, relate to a single contention that the regulation imposes site restoration requirements in excess of those required under The Clean Streams Law. First, MSC complains that Section 78a.65(b) requires a "duplicative site restoration plan" for well sites over 5 acres. MSC contends that under Section 3216 of Act 13, all that is required is the site restoration plan required by The Clean Streams Law. Second, and more specifically, MSC contends that the EQB lacks authority under either Act 13 or The Clean Streams Law to require that a site restoration plan address "[t]he restoration of *areas not needed to safely operate the well* to approximate original condition," 25 Pa. Code. § 78a.65(b)(1) (emphasis added). In its third, but related, contention, MSC challenges the EQB's delineation in the regulation of the "areas necessary to safely operate the well." *Id.* § 78a.65(a)(1)(iv). Implicit in MSC's challenge is the contention that the EQB is not competent to make such a determination by regulation.

MSC also challenges Section 78a.65(d) of the Chapter 78a Regulations, contending that it purports to impose costly requirements under The Clean Streams Law regulations relating to post-construction stormwater management (PCSM) plans and best management practices (BMPs) contrary to existing law. Section 78a.65(d) provides:

> Disturbed areas associated with well sites that are not included in a restoration plan, and other remaining impervious surfaces, must comply with all requirements in Chapter 102 [of The Clean Streams Law regulations] (relating to erosion and sediment control). *The PCSM plan provisions in § 102.8(n) apply only to the portions of the restoration plan that provide for restoration of disturbed areas to meadow in good condition or better or otherwise incorporate ABACT*[23] *or nondischarge PCSM BMPs.*

25 Pa. Code § 78a.65(d) (emphasis added). Under Section 102.8 of The Clean Streams Law regulations, all PCSM plans must meet certain minimum requirements. *Id.* § 102.8(f). Section 102.8(g) requires some PCSM plans to include additional information, relating to pre-development and post-development stormwater analysis of the site. *Id.* § 102.8(g). "[R]egulated activities that require site restoration or reclamation, and small earth disturbance activities identified in

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[23] ABACT refers to "[a]ntidegradation best available combination of technologies," as further defined in The Clean Streams Law regulations as follows:

> Environmentally sound and cost effective treatment, land disposal, pollution prevention and stormwater reuse BMPs that individually or collectively manage the difference in the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities to maintain and protect the existing quality of the receiving surface waters of this Commonwealth.

25 Pa. Code § 102.1.

subsection (n)," however, are expressly exempt from this additional requirement. *Id.* Section 102.8(n) of The Clean Streams Law regulations provides, in relevant part:

> The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from oil and gas activities . . . that require compliance with this chapter, may be used to satisfy the requirements of this section if the PCSM, reclamation or restoration plan meets the requirements of subsections (b), (c), (e), (f), (h), (i) and (l) and, when applicable, subsection (m).

Id. § 102.8(n). MSC contends that Section § 78a.65(d) of the Chapter 78a Regulations essentially guts this exemption and requires additional stormwater analysis under the Act 13 regulations that well owners and operators are not required to conduct under The Clean Streams Law regulations.

Finally, MSC alleges that the section is void for vagueness, citing to DEP's intent to issue a follow-up technical guidance document. MSC also alleges that the RAF fails to include an estimate for the cost of compliance.

Reviewing each of these legal challenges separately, the Court concludes that MSC has satisfied the "clear right to relief" prong of the preliminary injunction inquiry with respect to some, but not all, of its legal challenges. The Court first dispenses with MSC's vagueness challenge and its challenge to the adequacy of the cost estimate in the RAF. The Court is not convinced that MSC's vagueness challenge poses such a substantial legal question as to the validity of Section 78a.65 of the Chapter 78a regulations that a preliminary injunction should issue. The Court is also not convinced that MSC's challenge to the cost estimates in the RAF poses such a substantial legal question as to the validity of the Chapter 78a Regulations that a preliminary injunction should issue. With respect to cost estimates for site restoration, the RAF provides estimates for the cost of

compliance that DEP received from unconventional well operators, which ranged from $200,000 to $300,000 per well pad. DEP, however, rejected those estimates. Instead, with respect to DEP's estimates, the RAF provides:

> This section is intended to provide clarity for implementing existing requirements from both Act 13 and Chapter 102. To the extent that an operator would incur the costs listed above, they would incur those costs regardless of the status of Section 78a.65 because they are costs associated with complying with Act 13 and Chapter 102.

(RAF at 101.) Accordingly, DEP's cost estimate is $0. MSC may disagree with this statement, but the statement provides a cost estimate and a basis for the estimate. MSC did not produce any evidence during the hearing that would suggest that DEP improperly rejected the cost estimates from unconventional well operators. Moreover, there is no evidence to suggest that the IRRC was somehow stymied in conducting its review of the Chapter 78a Regulations by DEP's cost estimate of $0.

The Court is also not satisfied at this stage of the proceeding that MSC has raised a substantial legal question over the validity of Section 78a.65(b)(1) (relating to restoration of "areas not needed to safely operate the well to approximate original conditions") and (a)(1)(iv) (defining "areas necessary to safely operate the well").[24] In the Court's preliminary assessment, it appears that Act 13 requires well site restoration, which includes, but is not limited to, compliance with The Clean Streams Law regulations dealing with erosion and

[24] The Court takes special note that MSC presented no evidence that would allow this Court to conclude that the list of areas identified in Section 78a.65(b)(1) is deficient, inadequate, or inaccurate.

sediment control plans (E&S Plans)—*i.e.*, the Section 102 regulations discussed above. Section 78a.65 of the Chapter 78a Regulations appears to address both. It does not appear to the Court that either of the above provisions directly relates to an E&S Plan; instead, they appear to relate to a broader duty under Section 3216(a) of Act 13. Accordingly, the Court sees no conflict at this point with these provisions and The Clean Streams Law regulations.

The Court, however, is satisfied that MSC has raised a substantial legal question as to whether Section 78a.65(d) imposes erosion and sediment control measure requirements on well owners and operators in excess of what is required under The Clean Streams Law and the Section 102 regulations. Section 3216(b) and (c) of Act 13 clearly provide that erosion and sediment control measures must be implemented in accordance with The Clean Streams Law. The Court notes again that in the RAF, DEP describes these provisions as mere clarifications of existing law. MSC disagrees. To the extent Section 78a.65(d) abrogates any requirements or exemptions in The Clean Streams Law, MSC has raised a substantial legal question over its validity.

Accordingly, based on the foregoing, MSC has satisfied the clear right to relief prong of the preliminary injunction inquiry with respect to Section 78a.65(d) of the Chapter 78a Regulations. The Court finds further that any conflict between this provision and The Clean Streams Act and Section 102 regulations constitutes irreparable harm *per se*, as it would appear to conflict with the General Assembly's intent as expressly stated in Section 3216(b) and (e) of Act 13. The harm to MSC from refusing the preliminary injunction outweighs any purported harm from granting it. Indeed, according to the RAF, an order preliminarily enjoining DEP from implementing this regulation should have no

effect on DEP, as it merely restates what DEP believes are current restoration requirements. (RAF at 100.) Enjoining this provision will restore the parties to their status quo as it existed prior to the alleged wrongful conduct, that being the absence of this particular provision. The preliminary injunction issued by the Court with respect to Count V will be narrowly tailored to Section 78a.65(d), leaving intact the bulk of Section 78a.65 pending the outcome of this litigation. In light of the foregoing, a preliminary injunction that precludes DEP from enforcing Section 78a.65 of the Chapter 78a Regulations will not adversely affect the public interest.

6. Count VI—Remediation of Spills

In Count VI of the Petition, MSC challenges Section 78a.66(c) of the Chapter 78a Regulations, relating to remediation of spills.

Section 78.66(c) provides for the "reporting and remediation of spills or releases of *regulated substances* on or adjacent to well sites and access roads." 25 Pa. Code. § 78a.66(a) (emphasis added). The Act 13 definition of "regulated substance" incorporates by reference the definition of the same term in the Land Recycling and Environmental Remediation Standards Act,[25] commonly referred to as "Act 2." 58 Pa. C.S. § 3203 (definition of "regulated substance"). The term "regulated substance" is defined broadly to include any hazardous substances and contaminants regulated under various statutes, including, *inter alia*, The Clean Streams Law and the Solid Waste Management Act. Section 102 of Act 2, 35 P.S. § 6026.102.

[25] Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101-.908.

Section 78.66 of the Chapter 78a Regulations has two primary components. The first imposes reporting requirements in the event of a spill or release of a regulated substance. 25 Pa. Code. § 78.66(b). MSC does not challenge these reporting requirements. The second component relates to the remediation of releases. MSC focuses its challenge on the portion of the regulation relating to spills or releases of regulated substances in an amount greater than or equal to 42 gallons. The relevant portions of the regulation provide:

> Remediation of an area polluted by a spill or release is required. The operator or other responsible party *shall remediate a release in accordance with the following*:
>
> . . . .
>
> (2) For spills or releases to the ground of greater than or equal to 42 gallons or that pollute or threaten to pollute waters of the Commonwealth, the operator or other responsible person must demonstrate attainment of one or more of the standards established in Act 2 and Chapter 250 [the Act 2 regulations, 25 Pa. Code §§ 250.1-.708] (relating to administration of Land Recycling Program) in the following manner:
>
> (i) Within 15 business days of the spill or release, the operator or other responsible party shall provide an initial written report . . .
>
> . . . .
>
> (ii) After the initial report, any new pollution or other impacts identified or discovered . . . shall also be reported in writing to [DEP] within 15 business days of discovery.
>
> (iii) Within 180 calendar days of the spill or release, the operator or other responsible person shall perform a site characterization to determine the extent and magnitude of the pollution and submit a site characterization report to the appropriate [DEP] regional office describing the findings. The time to submit the site

> characterization report may be extended by [DEP] . . . .
>
> . . . .
>
> (v) If the site characterization indicates that the interim remedial actions taken did not adequately remediate the spill or release, the operator or other responsible party shall develop and submit a remedial action plan . . . within 45 calendar days of submission of the site characterization report . . . . Remedial action plans must contain the elements outlined in § 245.311(a) [of the Storage Tank and Spill Prevention Program regulations, 25 Pa. Code ch. 245] (relating to remedial action plan), as well as a schedule for the submission of remedial action progress reports.
>
> (vi) Within 45 days after the selected remediation standard has been attained, the operator or other responsible party shall submit a remedial action completion report . . . .

25 Pa. Code § 78a.66(c).

MSC articulates four separate legal challenges to the above spill remediation scheme in its Petition. (Petition ¶ 76(a)-(d).) First, MSC contends that the EQB lacks the authority to compel compliance with "the Act 2 process," which MSC contends is voluntary as a matter of law. Second, MSC contends that the site remediation requirements amount to "special legislation" targeted to the oil and gas industry, in violation of Article III, section 32 of the Pennsylvania Constitution. Third, but related to its second challenge, MSC claims that the regulation is unreasonable, because it subjects the oil and gas industry to remediation standards above and beyond those applicable to other industries.

Finally, MSC also alleges that the RAF fails to include an estimate for the cost of compliance.[26]

Reviewing each of these legal challenges separately, MSC has not raised at this stage of the proceeding a substantial legal question over the validity and enforceability of Section 78a.66(c) of the Chapter 78a Regulations. Specifically, the Court is not convinced that Act 2 is, as MSC characterizes, a purely voluntary program. Clearly, one of the purposes of Act 2 is to encourage the remediation and redevelopment of contaminated property in the Commonwealth and to incentivize such cleanup activities. Section 102 of Act 2, 35 P.S. § 6026.102. Nothing in Act 2, however, makes remediation of contaminated sites "voluntary" for those responsible for the contamination. Act 2 expressly provides that the remediation standards in the law apply whether the remediation is voluntarily conducted or *required* under the law. Section 106(a) of Act 2, 35 P.S. § 6026.102(a). For purposes of a preliminary injunction proceeding, MSC's efforts to distinguish between the Act 2 "standards" and the Act 2 "process" yields only an unpersuasive nuance, at least at this stage of the proceeding.

With respect to the remaining challenges, the Court concludes that the lack of any supporting record evidence precludes a finding that MSC has raised a substantial legal question warranting further consideration of its request for preliminary injunctive relief. Specifically, MSC presented no evidence that the

[26] Consistent with this Court's analysis of the same challenge to other portions of the Chapter 78a Regulations discussed above, the Court is not satisfied that MSC has raised a substantial legal question as to its cost estimate challenge to Section 78a.66(c).

process and timelines set forth in Section 78a.66(c) of the Chapter 78a Regulations are unreasonable on their face or in their treatment of the oil and gas industry when compared to other similar industries in the Commonwealth.

For the reasons set forth above, MSC has failed to satisfy the "clear right to relief" prong of the preliminary injunction inquiry with respect to its challenge to Section 78a.66 of the Chapter 78a Regulations. Accordingly, MSC's request for preliminary injunctive relief with respect to Count VI of the Complaint will be denied.

7. Count VII—Waste Reporting

In Count VII of the Petition, MSC challenges Section 78a.121(b) of the Chapter 78a Regulations, relating to waste reporting. This section requires each operator of an unconventional well to include within its *monthly* production and status report for each well

> information on the amount and type of waste produced and the method of waste disposal or reuse, including the specific facility or well site where the waste was managed. Waste information submitted to [DEP] in accordance with this subsection is deemed to satisfy the residual waste biennial reporting requirements of § 287.52 [of the residual waste management regulations under the Solid Waste Management Act] (relating to biennial report).

25 Pa. Code. § 78a.121(b).

MSC articulates three separate legal challenges to this section. (Petition ¶ 80(a)-(c).) First, MSC argues that imposing a monthly reporting requirement for waste conflicts with the Unconventional Well Report Act,[27] which

[27] Act of October 22, 2014, P.L. 2853, 58 P.S. §§ 1001-1003.

requires operators of unconventional wells to file with DEP monthly reports "specifying the amount of production on the most well-specific basis available," but does not mention waste reporting. Section 3(a) of the Unconventional Well Report Act, 58 P.S. § 1003(a). Next, MSC contends that the provision conflicts with the residual waste reporting requirement under 25 Pa. Code § 287.52, which requires a biennial report. Third, MSC challenges the reasonableness of the requirement, contending that it "imposes excessive costs with no discernable benefit" and imposes reporting requirements on the oil and gas industry "that are stricter than those for any other industry in the Commonwealth." (Petition ¶ 80(b).)

Reviewing each of these legal challenges separately, MSC has not raised at this stage of the proceeding a substantial legal question over the validity and enforceability of Section 78a.121(b) of the Chapter 78a Regulations. Although the General Assembly's decision to *require* monthly production reports in the Unconventional Well Report Act would preclude DEP from promulgating a regulation that requires, say, *weekly* production reports, a mandate for monthly production reports does not necessarily express a legislative intent to prohibit DEP from exercising its discretion by also requiring monthly waste reporting. Accordingly, a conflict between the monthly waste reporting requirement in the regulation and the monthly production reporting requirement in the Unconventional Well Report Act is not so apparent that it raises a substantial legal question supporting preliminary injunctive relief.

MSC alleges a conflict between the monthly reporting requirement in Section 78a.121(b) and the biennial reporting requirement for residual waste in 25 Pa. Code § 287.52. The Court notes, however, that Section 78a.121(b)

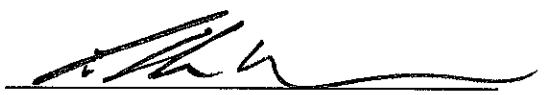
expressly references the biennial reporting requirement under Section 287.52 of the residual waste management regulations under the Solid Waste Management Act and provides that compliance with the monthly reporting requirement will be deemed to satisfy the biennial reporting requirement. In other words, the regulation appears to resolve the purported conflict upon which MSC would have this Court base preliminary injunctive relief.

MSC's final and most compelling legal argument with respect to this provision relates to its allegation of disparate treatment of the oil and gas industry with respect to the reporting of residual waste. Even if the Court assumes different treatment, however, MSC failed to present any evidence that such disparate treatment is unreasonable or unjustified. Moreover, MSC did not present any evidence to support its "excessive cost with no discernable benefit" claim.

For the reasons set forth above, MSC has failed to satisfy the "clear right to relief" prong of the preliminary injunction inquiry with respect to its challenge to Section 78a.121(b) of the Chapter 78a Regulations. Accordingly, MSC's request for preliminary injunctive relief with respect to Count VII of the Petition will be denied.

III. CONCLUSION

For the reasons set forth above, the Court will enter an order granting in part and denying in part MSC's Application. As explained above, the order will grant preliminary injunctive relief in part with respect to Counts I, II, IV, and V of the Petition. In all other respects, MSC's Application will be denied.



P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Marcellus Shale Coalition, Petitioner	:	
v.	:	No. 573 M.D. 2016
Department of Environmental Protection of the Commonwealth of Pennsylvania and Environmental Quality Board of the Commonwealth of Pennsylvania, Respondents	:	

ORDER

AND NOW, this 8th day of November, 2016, upon consideration of Petitioner The Marcellus Shale Coalition's (MSC) application for expedited special relief in the form of a preliminary injunction (Application), seeking to enjoin Respondent Department of Environmental Protection of the Commonwealth of Pennsylvania (DEP) from enforcing certain provisions of DEP's regulations contained in 25 Pa. Code Chapter 78a (Chapter 78a Regulations), relating to unconventional oil and gas wells, Respondents' joint answer thereto, and following a hearing on this matter, it is hereby ORDERED that the Application is GRANTED, in part, and DENIED, in part, as follows:

1. DEP is hereby ENJOINED preliminarily from implementing and enforcing the following provisions of the Chapter 78a Regulations:

(a) COUNT I: Sections 78a.1 and 78a.15(f) and (g) of the Chapter 78a Regulations, only to the extent that they include "common areas on a school's property or a playground" and "species

of special concern" as "public resources" and include "playground owners" in the definition of "public resource agency";

(b) COUNT II: Section 78a.52(c)(3) and Section 78a.73(c) and (d) of the Chapter 78a Regulations, only to the extent that they impose monitoring and remediation obligations on owners and operators with respect to wells identified in the area of review survey owned and/or operated by others;

(c) COUNT IV: Sections 78a.59b(b) and 78.59c in their entirety; and

(d) COUNT V: Section 78a.65(d) in its entirety.

2. In all other respects, the Application is DENIED.

3. Pursuant to Pa. R.C.P. 1533(d), this Order shall become effective upon MSC's filing of a bond or legal tender of the United States with the Court in the amount of one hundred dollars ($100).

P. KEVIN BROBSON, Judge