The Legal Intelligencer

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Pre-emption and Natural Gas Development: Who Is the Decider?

Commentary
Controversy over development of natural gas from the Marcellus Shale and other "unconventional" resources resulted in two unrelated legal news items during the week of April 9. On April 11, Senior Judge Keith Quigley of the Commonwealth Court preliminarily enjoined the effectiveness of Section 3309 of the 2012 amendments to the Oil and Gas Act, known as Act 13. Then, on April 13, President Obama issued Executive Order 13605, titled "Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources." Each of these events addresses, in part, the important question of which government ought to regulate the pace, manner and form of natural gas development.

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2012-05-01 10:00:00 AM

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Quigley issued his preliminary injunction in a case captioned Robinson Township v. Public Utility Commission. On Feb. 14, Governor Tom Corbett signed Act 13 of 2012, substantially amending the Pennsylvania Oil and Gas Act. Chapter 33 of Act 13 imposes limitations on the ability of municipalities to adopt ordinances regulating oil and gas activities.

Specifically, the new Section 3302 prohibits local ordinances regulating any aspect of oil and gas development or operations that the Department of Environmental Protection regulates, except for (a) zoning or subdivision and land development ordinances adopted under the Municipalities Planning Code or (b) ordinances adopted under the Flood Plain Management Act. Further, permitted ordinances adopted under the Municipalities Planning Code or the Flood Plain Management Act cannot "impose conditions,

requirements or limitations on the same features of oil and gas operations regulated by [the Oil and Gas Act] or that accomplish the same purposes as set forth in" that act. Ordinances that overlap the state statute are pre-empted.

Further, Section 3303 pre-empts local ordinances that regulate oil and gas development in ways already covered by state environmental laws. Section 3304 requires municipal ordinances to treat oil and gas activities in the same way as other, similar activities, and specifically to permit certain "reasonable development" activities.

The Public Utility Commission oversees municipal ordinances under Act 13, and can issue advisory opinions on compliance of ordinances with the requirements of the statute. A municipality whose ordinances do not comply faces litigation to invalidate the ordinances, cost-shifting provisions in that litigation, and loss of state impact fees during the time that the municipality's ordinances remain out of compliance.

Petitioners in Robinson Township sought and obtained an injunction against the effectiveness of Section 3309. Act 13 became effective on April 14. (Corbett was apparently unaware that by signing the bill on Feb. 14, he made the effective date of a signature piece of legislation the singularly inauspicious 100th anniversary of the Titanic's collision with an iceberg and 148th anniversary of John Wilkes Booth's attack on President Lincoln.) Section 3309(b) provides municipalities 120 days from the effective date of Act 13 — that is, until Aug. 13 — to review and, if necessary, to amend ordinances existing as of the date of the statute. It is not clear what an injunction until Aug. 13 means in that context. One suspects that the court intended to start the 120-day review clock on Aug. 13, not April 14, and perhaps to allow noncompliant ordinances adopted between April 14 and Aug. 13 to remain in effect for a further 120 days.

Quigley was persuaded that municipalities required more than four months to review and to revise their ordinances. He did not opine that the petitioners had shown a likelihood of success on the merits of their constitutional challenge to Act 13.

Act 13 and *Robinson Township* address overlapping regulation between the commonwealth and municipalities. The General Assembly has come down clearly on the side of centralizing responsibility in the state. When the commonwealth would permit natural gas development, a municipality may not prohibit it, unless the prohibition arises under the MPC and for reasons different from the issues addressed by state regulations.

Obama's executive order, on the other hand, primarily deals with the possibility of overlapping regulation by a large number of federal agencies. The president observes that "it is vital that we take full advantage of our natural gas resources, while giving American families and communities confidence that natural and cultural resources, air and water quality, and public health and safety will not be compromised." The order explicitly recognizes that "[s]tates are the primary regulators of onshore oil and gas activities." Nevertheless, the president recognizes that many federal agencies — as regulators and land managers — have a role in promoting and assuring safe development of unconventional natural gas.

The executive order therefore establishes an "Interagency Working Group to Support Safe and Responsible Development of Unconventional Domestic Natural Gas Resources." That group — composed of representatives of 13 federal agencies — will coordinate the activities of federal agencies in connection with unconventional natural gas.

The executive order reflects the reality that a boom in a controversial economic activity can give rise to a desire by regulators "to become more involved." Each agency wants to put its imprint on the new industry. That can lead to inconsistent or duplicative requirements or efforts.

Opponents of any activity generally support overlapping regulations. More process and delay tends to discourage any activity. Moreover, additional regulators who can deny an approval increase the likelihood that at least one will stop a project.

Proponents of activity, of course, generally want only one decision-maker. The fewer approvals required, in

principle, the faster and cheaper the approval process can be made.

One also cannot make much of a "good government" case for multiple and overlapping regulations for the same purposes. A proposed natural gas well either is or is not too close to a stream. Only one regulator need assure the proper location. Indeed, as Philip Howard argued in *The Death of Common Sense* , elaboration of procedure and diffusion of responsibility may actually reduce the likelihood of good decision-making.

Pennsylvania and some other states in the region, like Ohio, seem to favor developing good decision-making adaptively through experience as natural gas development proceeds. Other states, some federal agencies and regulators like the Delaware River Basin Commission prefer not to allow much development until the regulators achieve full confidence that the regulatory scheme is fully developed. Municipalities may not have the resources either to proceed adaptively or to develop an optimal set of ordinances on the first pass.

Therefore, the choice of decision-maker can have real consequences for the underlying approach to regulation. Neither Act 13 nor Executive Order 13605 offers the last word on the subject. *Robinson Township* will proceed to a panel of the Commonwealth Court on the merits. But this is an important set of issues.

If you believe that natural gas offers important environmental, economic and national security opportunities, you want gas developed, although, to be sure, done right. If you have that view, there is not much to recommend heavily overlapping regulatory schemes and different regulatory approaches at different levels of government. There will be more coming. •

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