Who’s on First? A Tale of Two States on Hydraulic Fracturing and the Constitution

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The Pennsylvania Supreme Court’s recent decision in Township of Robinson v. Commonwealth, 63 MAP 2012 (Dec. 19, 2013), has spurred an abundance of analysis and debate surrounding Article 1, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment (“ERA”). Reaction to the opinion varies widely, some offering high praise to the Court’s empowerment of the previously little-used Amendment, while others contend that the opinion significantly overreaches by providing unprecedented power to the ERA. Meanwhile, in New York State, a moratorium on hydraulic fracturing is now in its sixth year. New York’s approach to (high-volume water) hydraulic fracturing could not be more different from Pennsylvania’s policies, and yet, this approach also raises significant constitutional concerns that may soon be heard in New York courts. What is interesting in reviewing recent events in both states is that constitutional challenges and environmental impact considerations are being used by those in favor of, and against, oil and gas development to achieve a conflicting end result.

At issue in Township of Robinson was the constitutionality Pennsylvania’s Act 13 of 2012, which amended the Pennsylvania Oil and Gas Act. One of the objectives of Act 13 was to address piecemeal local regulation of oil and gas development by ensuring uniform treatment of operations throughout Pennsylvania. Passage of the Act comported with Pennsylvania’s overarching policies of facilitating oil and gas development within the state. In order to promote state-wide uniformity for local zoning ordinances dealing with oil and gas, Act 13 prohibited local governments from imposing conditions, requirements, or limitations on the construction of oil and gas operations that are more stringent than those imposed on construction activities for other industrial uses. Act 13 also imposed minimum setback requirements from buildings or environmentally sensitive areas, and permitted the Pennsylvania Department of Environmental Protection to waive those provisions only if the operator identified additional measures, facilities, or practices to protect the waters of the Commonwealth.

Almost immediately following its enactment on February 14, 2012, Act 13 faced legal challenges from a variety of individuals, public interest groups, and municipalities. The culmination of those efforts was the recent split decision from the Pennsylvania Supreme Court striking down portions of the Act as unconstitutional. To the amazement of many, a plurality of the Court rested their decision squarely on the ERA, finding that Act 13 violated the ERA, which confers to Pennsylvania citizens the right to clean air, pure water, and
to the preservation of natural, scenic, historic and esthetic values of the environment. The Court invalidated portions of the Act that establish minimum setbacks and that preclude local municipalities from regulating oil and gas development, reasoning that these provisions are incompatible with the Commonwealth’s duty as trustee of Pennsylvania’s public and natural resources under the ERA. As recognized by many observers, and indeed the Court itself, this is the first time that the ERA was used to invalidate and enactment of the General Assembly. Indeed, nationally, only two other states, Montana and Rhode Island, affirm such a right in a Declaration or Bill of Rights. As noted below, the implications of this holding could be far-reaching. The case has been remanded to the Commonwealth Court to determine what remaining portions of Act 13, to the extent they are valid, are severable. However, the Supreme Court will first have to resolve the Commonwealth’s motion for reconsideration which, if granted, would send the case back to the Commonwealth Court for further development of the factual record as it pertains to Act 13’s constitutionality.

Meanwhile, the course of events across the border in New York is playing out very differently, and, in some respects, is the inverse to the developments in Pennsylvania. The story of New York’s moratorium on high-volume hydraulic fracturing began on July 21, 2008, when then-Governor David Paterson ordered the New York Department of Environmental Conservation (“NY DEC”) to update a 1992 Generic Environmental Impact Statement (“GEIS”) for activities associated with oil and gas development. A GEIS is a product of the New York State Environmental Review Act (“SEQRA”) which requires that governmental agencies, including the NY DEC, consider various factors prior to approving certain activities, including drilling for natural gas, that may adversely affect the environment. SEQRA is, in essence, akin to the federal National Environmental Policy Act (“NEPA”). By way of executive orders signed by Governors Paterson and Cuomo, the moratorium has been extended several times and, to date, continues indefinitely while the Department of Health currently reviews the potential impacts to human health associated with hydraulic fracturing. The amended GEIS will be issued presumably upon completion of the state’s health review.

The result is a “tale of two states.” While Pennsylvania is the fastest-growing natural gas producing state in the nation, with recent estimates ranking the state either second or third in production, New York has not seen any natural gas development from high-volume hydraulic fracturing. Pennsylvania has also experienced growth in employment, while New York has not. As stated in a recent Forbes article: “The economic benefits from the increased supply of shale gas in the Northeast are tangible and growing. But while Pennsylvania has embraced its reserves, adding an estimated 250,000 shale related jobs in recent years, New York is entering its sixth year of a fracking moratorium.”

Some in New York may have had enough, and legal challenges to the constitutionality of the moratorium loom. On November 12, 2013, the Joint Landowners Coalition of New York, Inc. (“JLC”) announced that it drafted a complaint against the State for failing to finish the GEIS for high-volume hydraulic fracturing. The complaint reviews the long and complicated history of New York’s protracted moratorium on hydraulic fracturing, and alleges that the issuance of an amended GEIS is being held up for political purposes. The complaint contains several claims, most notably constitutional claims including takings claims under the federal and state constitution, and substantive and procedural due process claims under the Fourteenth Amendment. As to the takings claims, the complaint alleges that the plaintiffs’ right to subsurface oil and gas reserves constitutes private property within the meaning of the New York and federal constitutions. The complaint further alleges that the moratorium has served to deprive plaintiffs of all economically beneficial use of their subsurface property rights without just compensation. The complaint also alleges that the plaintiffs’ substantive and procedural due process claims have been violated when the government “enact[ed] and perpetuat[ed] a Moratorium that lacks a reasonable time frame for defendants’ actions to be completed, that is without justifiable and demonstrated need, where the burden imposed is borne by selected individuals,…rather than the public at large, where there is no enabling legislation or stated procedure for the Moratorium, and where there is no time certain for its expiration….” The complaint has not yet been filed, and JLC is in the process of raising money for the impending litigation.

It is safe to say that the legal landscape on these issues in both Pennsylvania and New York is in flux. The potential challenges to the constitutionality of New York’s moratorium may take place as the New York Court of Appeals is deciding two cases where lower courts have upheld local zoning ordinances effectively banning oil and gas development. See
Anschutz Exploration Corp. v. Town of Dryden, No. 2011-0902 (N.Y. Sup. Ct. Feb. 21, 2012); Cooperstown Holstein Corp. v. Town of Middlefield, No. 2011-0930 (N.Y. Sup. Ct. Feb. 24, 2012). Also relevant is a mandamus action filed by Norse Energy Corporation, who recently filed for bankruptcy allegedly because the state’s failure to finish the GEIS “obliterated” its oil and gas assets; Norse is seeking mandamus relief to compel the state to complete its review. Meanwhile, in Pennsylvania, commentators are in disagreement as to the effect of the Supreme Court’s decision on oil and gas development. Some argue that this is much to do about nothing because localities with a significant financial stake in drilling activities will continue to permit those activities. Others contend that this is a sweeping victory for local municipalities that gives unprecedented power to the ERA, likely resulting in decreased production output and increased production costs. Still others point to some practical consequences, such as the possibility of a constitutionally-mandated environmental impact assessment, similar to that required under NEPA or SEQRA, prior to any project that may have an impact on the citizens’ right to clean air and pure water. Suffice to say, if this decision stands, the ERA could be used as a “club” to stop or delay any substantial industrial activity in Pennsylvania.

What is also unclear is the role constitutional rights may play in resolving these issues. The Pennsylvania Supreme Court has already decided that the ERA plays a role in limiting oil and gas development, but even there the Court admitted that other competing constitutional concerns must be considered and weighed. See Township of Robinson, 63 MAP 2012, slip op. at 78, 79 (“This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights guaranteed in Sections 1, 9, and 10 [of the Pennsylvania constitution].… [W]e recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest.” (emphasis added)) New York courts, meanwhile, may soon be deciding whether that state’s moratorium on oil and gas development violates those very property rights referenced in Township of Robinson.

In the end, both state and federal constitutional provisions can be used to advance arguments both for and against drilling, and courts will be forced to balance those competing concerns. The plurality in Township of Robinson has already undertaken this task. It will be interesting to see how New York resolves these issues, especially considering there is no equivalent ERA in that states’ bill of rights to counteract the explicitly provided. One possible outcome, and one that would have been beyond prediction one year ago is that, whereas constitutional concerns could serve to inhibit oil and gas development in Pennsylvania, competing constitutional concerns could serve to facilitate oil and gas development in New York.

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