Received 1/7/2022 4:18:38 PM Supreme Court Middle District

Filed 1/7/2022 4:18:00 PM Supreme Court Middle District
69 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THE MARCELLUS SHALE COALITION,

Appellee

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA and ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

No. 69 MAP 2021

REPLY BRIEF FOR APPELLANTS

Appeal from the Decision of the Commonwealth Court of Pennsylvania
Dated August 12, 2021, 573 MD 2016, Issued in its Original Jurisdiction

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January 7, 2021

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I. THE PUBLIC RESOURCE SCREENING PROCESS CODIFIED THE DEPARTMENT'S APPLICATION PROCESS FOR CONSIDERING IMPACTS TO PUBLIC RESOURCES, INCLUDING SPECIES OF SPECIAL CONCERN AND COORDINATING WITH PUBLIC RESOURCE AGENCIES.

No credible argument exists to dispute that the process in 25 Pa. Code Section 78a.15(f) ("Public Resource Screening Process") and the challenged definitions in 25 Pa. Code Section 78a.1 ("Public Resource Definitions") codified the Department's well permit application process that required drillers to (1) identify public resources, including species of special of concern, that may be impacted by drilling, (2) provide information about identified public resources, and (3) coordinate with applicable public resource agencies, to meet its obligations to consider the impacts of a proposed unconventional well on public resources. R. 743a, 1099a, 1207a, 1212a–1234a, 1319a, 1357a, 1434a–1455a. However, the Coalition disputes this fact for the first time in its brief. *See* Appellee's Br. 1–4. While the Public Resource Screening Process contains amendments that resulted from the public comment process ((i.e., the addition of "common areas of a school's property" and "playgrounds"), the Coalition's new assertion is contrary to evidence, past statements and the findings in *Pennsylvania Independent Oil & Gas Association v. Commonwealth, Department of Environmental Protection*, 146 A.3d 820 (Pa. Cmwlth. 2016), aff'd 161 A.3d 949 (Pa. 2017) ("*PIOGA*") that there was an

established process, including the Department's interpretation that "other critical communities" means "species of special concern", that formed the basis for these regulatory requirements.[1] This assertion raises a new material fact in dispute.

Before the Commonwealth promulgated the Public Resource Screening Process, including the Public Resource Definitions, the Pennsylvania Independent Oil and Gas Association ("PIOGA") challenged the Department's authority to consider the impacts of proposed well locations on public resources during the application process. In *PIOGA*, Commonwealth Court held that the Department had authority under "Section 3215(c) to consider the impact that a proposed well will have on public resources, those listed and unlisted," and that the Department's "specific power and duty to promulgate regulations with respect to public resource consideration for well permits is in addition to the power vested in the [Board] to promulgate regulations with respect to implementation of Act 13 in general, *see* 58 Pa.C.S. § 3274." *Id*. at 829–830.

[1] The Coalition also seeks to revive its argument that the 2012 Oil and Gas Act does not authorize requiring notice to public resource agencies – one of the challenges from its Petition for Review that was decided in *Marcellus Shale Coalition v. Department of Environmental Protection*, 193 A.3d 447 (Pa. Cmwlth. 2018) ("*MSC III*"). *See* R. 015a–017a, 1103a–1108a. In *MSC III,* Commonwealth Court held that the Commonwealth has statutory authority under Section 3215(c) of the 2012 Oil and Gas Act to require, in 25 Pa. Code § 78a.15(f), well permit applicants to provide notice to applicable public resource agencies as part of its impact consideration. *MSC III*, 193 A.3d at 465–466. The Coalition did not appeal this holding and improperly makes this assertion here.

In addressing PIOGA's challenge, Commonwealth Court found that:

> [The Department] requires well permit applicants to complete the form entitled "Coordination of a Well Location with Public Resource" (DEP Form No. 5500-PM-OG0076) ("Public Resources Form") and to comply with DEP's Policy for Pennsylvania Natural Diversity Inventory ("PNDI") Coordination During Permit Review and Evaluation (DEP Document No. 021-0200-001) ("PNDI Policy"). . . . DEP requires well permit applicants to identify the impacts to threatened and endangered species and ***species of special concern***, and to coordinate with applicable jurisdictional agencies if these species may be present at or near the proposed well site consistent with the PNDI Policy.

Id. at 824 (emphasis added).

Commonwealth Court further found that

> [t]hrough the Public Resources Form, [the Department] asks, *inter alia*, that the well permit applicant identify public resources in the vicinity of the proposed well site, coordinate with responsible agencies, and describe measures that the applicant will take to protect those public resources. Through the PNDI Policy, [the Department] seeks, *inter alia*, to identify and mitigate any impact a proposed well site may have on certain threatened, endangered, or ***special concern species*** (both flora and fauna).

Id. (emphasis added).

The Coalition's claims, *see* Appellee's Br. 1–4, run contrary to its "Statement of the Case" in its "Brief in Support of Application for Summary Relief on Count I on the Petition" filed before Commonwealth Court, where the Coalition acknowledged that

> [b]efore the Public Resource Regulations were adopted, permit applicants coordinated with the jurisdictional agencies and utilized a form developed by the Department to inform the Department whether

> any public resources listed in Section 3215(c) were within certain threshold distances of the proposed well.

R. 1099a.

The Coalition attached the PNDI Policy and the Public Resource Form as exhibits to its Application for Summary Relief. R. 1207a, R. 1319a. The PNDI Policy states that "[t]he department has historically and continues to interpret 'other critical communities' to include 'species of special concern'" and specifies that applicants ***must*** notify the applicable agency if the PNDI receipt identifies a potential impact to species of special concern at the proposed well site, should consult with the applicable agency and implement measures recommended to avoid and mitigate impacts. R. 1207a. The Public Resource Form requires well permit applicants to notify the Department if the PNDI receipt identifies impacts to species of special concern and to describe the coordination with applicable resource agencies. R. 1319a. Even the Coalition's former president, Davis J. Spigelmyer, affirmed that, before the Public Resource Screening Process was adopted in Chapter 78a, "MSC members coordinated with state and federal public resource agencies regarding well permit applications and utilized the [Public Resource Form]." R. 1357a.

The Public Resource Screening Process codified the well permit application process established prior to this challenged rulemaking, including the Department's interpretation of "other critical communities" as "species of special concern" as provided in the Public Resource Form and PNDI Policy. It is a material fact in

dispute. This fact establishes that the Commonwealth's interpretation in the challenged legislative rulemaking is "reasonable" and "not clearly erroneous" consistent the holding in *Eagle Environmental II, L.P. v. Commonwealth, Department of Environmental Protection*, 884 A.2d 867 (Pa. 2005) ("*Eagle*") as discussed in the Commonwealth's Brief at pages 24-25. The Commonwealth's authority to define the undefined term "other critical communities" should have been afforded great weight. *See also Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.,* 983 A.2d 1231, 1239 (Pa. 2009) (broad rulemaking authority "encompasses the delegated legislative power to define by regulation terms otherwise undefined by statute").

This pre-existing process and the Department's prior interpretations are material facts that the Commonwealth would establish at a hearing in this matter. The Coalition's argument is unpersuasive. The Coalition raises it here for the first time. It is contrary to evidence of record, past statements of its then President, and *PIOGA*.

II. THE COALITION SEEKS TO LIMIT THE BOARD'S RULEMAKING AUTHORITY CONTRARY TO THE GENERAL ASSEMBLY'S BROAD GRANT OF AUTHORITY TO ADOPT REGULATIONS.

The Coalition highlights that it recited the proper three-prong test for determining the validity of a legislative rulemaking in briefing its arguments to Commonwealth Court. However, that has no relevance. Commonwealth Court

failed to apply the proper test when it determined the validity of the Public Resources Definitions. The Coalition argues that the Commonwealth's reliance on the broad grant of rulemaking authority and statutory purposes violates the rules of statutory construction because the intent of the General Assembly may only be considered if the words of the statute are not explicit. Appellee's Br. 14. This argument is at odds with *Eagle* and *Tire Jockey Service, Inc. v. Commonwealth, Department of Environmental Protection*, 915 A.2d 1165 (Pa. 2007) ("*Tire Jockey*") as discussed in the Commonwealth's Brief at pages 23–25. The Coalition urges this Court to develop a new test to limit the Commonwealth's rulemaking authority to promulgating regulations that merely mirror the express words of the 2012 Oil and Gas Act.

The Coalition ignored Section 3274 of the 2012 Oil and Gas Act, *Tire Jockey* and *Eagle* when it briefed this issue to Commonwealth Court. R. 1080a–1161a. Now the Coalition attempts to distinguish *Tire Jockey* and *Eagle*. The Coalition cannot establish that the Commonwealth lacks authority under 2012 Oil and Gas Act, The Clean Stream Law, the Solid Waste Management Act and the Dam Safety and Encroachments Act. Instead, it asks this Court to adopt a new framework to analyze the issues in this matter. The Coalition's new test would limit the Commonwealth's legislative rulemaking authority solely to mirroring the language in the statute, rendering such rulemaking authority meaningless surplusage. *See* 1

Pa.C.S. 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions"). Adoption of this test would eviscerate the legislative rulemaking process, erasing the difference between interpretative and legislative rulemakings. It would convert the first prong of the *Tire Jockey* test into the test for interpretative rulemaking. An administrative agency would only be authorized to adopt rules that track a statute or merely construe, and do not expand, the terms of the statute. *See Slippery Rock*, 983 A.2d at 1236–1237, 1239-1242.

The Coalition's take on what is "clear and unmistakable" authority is misplaced and contrary to precedent. *See Eagle*, 884 A.2d at 878 (when considering whether a legislative rulemaking is authorized by a statutory delegation of rulemaking authority, the legislature's delegation of rulemaking authority must be clear and unmistakable). The Coalition argues that the Commonwealth does not have "clear and unmistakable" authority to define "public resources" as including areas where children and the general public recreate – "playgrounds" and "common areas of a school's property" – and "other critical communities" as "species of special concern" because the 2012 Oil and Gas Act does not expressly contain the words "species of special concern", "playground" or "common areas of a school's property." The Coalition is wrong.

What must be "clear and unmistakable" is the General Assembly's grant of authority to promulgate regulations. Section 3274 of the 2012 Oil and Gas Act

authorizes the Board to promulgate regulations to implement the provisions of the 2012 Oil and Gas Act. The legislature's grant of authority for the Board to promulgate regulations is clear and unmistakable. *But cf., Bailey v. Zoning Board of Adjustment of City of Philadelphia*, 801 A.2d 492, 501–502 (Pa. 2002) (determining the rule in question was an interpretative rule because there was no provision directing the adoption of rules to administer the ordinance); *Hommrick v. Commonwealth of Pennsylvania, Pennsylvania Public Utilities Commission*, 231 A.3d 1027, 1034-1037 (Pa. Cmwlth. 2020) (the authorizing statute did not contain a broad grant of authority to do whatever is necessary to effectuate the enabling statute). The plain language of Section 3274 does not limit this authority. *See* 58 Pa.C.S. § 3274. Rather, it contains the General Assembly's direction to the Board to promulgate regulations to implement the 2012 Oil and Gas.

A. The Commonwealth properly relies on *Eagle* as well-established precedent that applies to legislative rulemakings.

The Coalition's three attempts to distinguish *Eagle* fail.

First, the Coalition argues that *Eagle* is factually distinguishable and that there is a different statutory context. The Coalition asserts that *Eagle* addressed the "waste facilities like landfills [that] are of particular concern to communities and are within a highly regulated industry" and, here, "[p]roducing oil and gas well sites are not waste facilities but are regulated to ensure restoration after construction and strict water handling during operation." Appellee's Br. 16. This attempt to minimize the

community concern and impacts associated with unconventional well development lacks merit. *See Robinson Township v. Commonwealth*, 83 A.3d 901, 976 (Pa. 2013) ("*Robinson II*") (comparing the impacts from and community interest in unconventional well development to that of coal extraction).

There is no dispute that the activities associated with the development of unconventional wells, including drilling, operation and plugging, include activities regulated under the Solid Waste Management Act.[2] ***Residual waste*** generated by the drilling or production of unconventional wells, which is not ***water***, must be managed in accordance 25 Pa. Code Chapter 78a (relating to unconventional wells). R. 728a; *see* 25 Pa. Code § 78a.56–63a. The Coalition's attempt to argue that there is meaningful difference between waste activities regulated at landfills and waste activities regulated at unconventional well sites is disingenuous at best.

Second, the Coalition argues that the Solid Waste Management Act contains a provision that the act is to be construed liberally and an express provision regarding economic impacts, while the 2012 Oil and Gas Act does not contain similar language. Appellee's Br. 16. The Coalition's argument ignores the conclusion in

[2] Section 3274.1(a) of the 2012 Oil and Gas contains a limited exemption from only the permitting and bonding requirements in the Solid Waste Management for residual waste facilities located on a well site if the residual waste generated by drilling or production is disposed, processed or stored at the well site where the residual waste was generated. 58 Pa.C.S. § 3274.1(a). This exemption only applies if the well site is permitted and bonded under the 2012 Oil and Gas Act and the owner/operator complies with all applicable regulations. Residual waste management facilities at well sites that do not fit within this exemption are required to obtain a permit and bond under the Solid Waste Management Act.

Eagle that the challenged regulation was "authorized by the general grant of authority provided to the [Board] to establish rules and regulations to accomplish the purposes of the Solid Waste Management Act and [the Municipal Waste Management Planning, Recycling and Waste Reduction Act]." *Eagle*, 884 A.2d at 878.

The Public Resource Definitions are authorized, in part, by the Solid Waste Management Act, so there is no basis to make this distinction. While the 2012 Oil and Gas Act does not contain the exact words "species of special concern", "playgrounds", or "common areas of a school's property", it does contain the undefined terms "public resources" and "other critical communities." A broad grant of rulemaking authority, such as that granted in Section 3274 and the other authorizing statutes, encompasses the delegated legislative power to define by regulation terms otherwise undefined by the statute. *See Slippery Rock*, 983 A.2d at 1239 (citing *Uniontown*, 313 A.2d at 169–70). The 2012 Oil and Gas Act and the other authorizing statutes grant the Board with the authority to promulgate definitions for "public resources" and "other critical communities."

Third, the Coalition argues that *Eagle* is distinguishable because the Solid Waste Management Act contains a clear and unmistakable grant of authority and the 2012 Oil and Gas Act's "plain language precludes the claimed authority to adopt the new public resource definitions." Appellee's Br. 17. That argument fails to

acknowledge that Section 3274 provides the clear and unmistakable authority to promulgate regulations to implement the 2012 Oil and Gas Act consistent with the act's statutory purposes as explained in the Commonwealth's Brief on pages 33–34.

Here, the statutory delegation can be reasonably construed to authorize promulgation of the Public Resource Definitions because the General Assembly's grant of authority is clear and unmistakable and the rule is consistent with the statutory purposes. Promulgation of the Public Resource Definitions was not clearly erroneous. The Coalition does not set forth any valid argument that would establish that the Public Resource Definitions are clearly erroneous and, as such, the Coalition was not entitled to summary relief.

B. The Coalition fails to establish that the Commonwealth lacks authority under any of the authorizing statutes.

To prevail on its lack of authority challenge under the first prong of the *Tire Jockey* test, the Coalition must establish the absence of granted authority from the General Assembly. *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 216 A.3d 448, 470 (Pa. Cmwlth. 2019) ("*MSC IV*"). The Coalition cannot establish the absence of granted authority. The Commonwealth has the authority to promulgate the Public Resource Definitions pursuant to the 2012 Oil and Gas Act, The Clean Streams Law, the Solid Waste Management Act and the Dam Safety Encroachments Act.

To prevail on its *Tire Jockey* challenge, the Coalition must do more than argue that Commonwealth lacks authority under just the 2012 Oil and Gas Act. The

Coalition must establish that none of these statutes provide the necessary grant of authority to the Commonwealth to promulgate the Public Resource Definitions. The Coalition attempts to invalidate the Public Resource Definitions based on a narrow argument that ***the 2012 Oil and Gas Act*** does not authorize the Commonwealth to protect species of special concern and places where children and the general public engage in recreational activities — namely, playgrounds and common areas of a school's property — because those exact terms do not appear in the 2012 Oil and Gas Act. However, as explained in *MSC IV*, "[t]he Coalition's perception of the source authority for [Chapter 78a] is not reality" as the Commonwealth "promulgated [Chapter 78a] to regulate a particular method of natural gas extraction, not to implement a particular statute." *MSC IV*, 216 A.3d at 472.

The Coalition has developed an argument, unsupported by any caselaw, that when the General Assembly, by statute, grants an administrative agency the authority to promulgate regulations to implement that statute, it may only promulgate regulations that mirror the explicit language found in that statute. This argument is even more limited than the test for determining the validity of an interpretative rulemaking or any other policy developed by an administrative agency without having followed the rigorous rulemaking development process.

The Coalition asserts that relying on broad rulemaking authority is somehow violative of the rules of statutory construction. This argument seeks to, again,

muddle the standards for determining the validity of a legislative rulemaking and the rules of statutory construction. Further, it belies logic – especially when the rulemaking authority is explicit, clear and unmistakable in the express language of the statute.

The Clean Streams Law, the Solid Waste Management Act and the Dam Safety Encroachments Act all provide clear and unmistakable rulemaking authority to the Board to promulgate regulations to implement those statutes as discussed in the Commonwealth's Brief at page 28.

The Coalition failed to establish that the Board lacked authority under The Clean Streams Law, the Solid Waste Management Act and the Dam Safety Encroachments Act to promulgate the Public Resource Definitions. The Coalition was not entitled to summary relief.

III. COMMOWNEALTH COURT FAILED TO APPLY THE LEGISLATIVE RULEMAKING TEST TO DETERMINE THE VALIDITY OF THE PUBLIC RESOURCE DEFINITONS.

The Coalition asserts that Commonwealth Court properly analyzed the Public Resource Definitions because Commonwealth Court structured its opinion and started each section under the heading "Statutory Authority." That argument adds nothing to the analysis. The tests for interpretative and legislative rulemakings both require an analysis of statutory authority. As this Court has stated, "all regulations,

whether legislative or interpretative must be consistent with the statute under which they were promulgated." *Slippery Rock*, 983 A.2d at 1241.

The Coalition claims that Commonwealth Court properly applied the standard of review for a legislative rulemaking because the court began its analysis by "[t]urning to the statutory authority for these regulatory provisions." *See* Appellee's Br. 11, *MSC III*, 193 A.3d at 483. However, beyond that cursory proclamation, the Coalition does not, and cannot, point to any part of the Commonwealth Court's opinion where the court properly applied the legislative rulemaking standard.

The Coalition argues that the Commonwealth wanted Commonwealth Court to jump to the third prong — the reasonableness prong — of the *Tire Jockey* test and asserts that this is only part of the analysis where agency deference applies. Both *Tire Jockey* and *Eagle* establish that the first prong of the *Tire Jockey* test involves examining whether the statutory delegation of rulemaking authority may be reasonably construed to authorize the rule and that the agency's interpretation is entitled to great weight unless the rule is clearly erroneous. *See Eagle*, 884 A.2d at 877. Reasonableness is a factor when considering the first prong of the *Tire Jockey* test.

IV. THE COALITION'S PLAIN LANGUAGE INTERPRETATION LIMITS PUBLIC RESOURCE PROTECTION CONTRARY TO THE AUTHORIZING STATUTES AND ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION.

The Coalition now asserts that the Department's obligation to consider the impacts to public resources is limited and restricted only to public ***natural*** resources that are ***managed for conservation purposes*** by ***a federal or state governmental agency*** that are ***maintained on a list*** after a formal ***public notice and comment rulemaking process***. Appellee's Br. 6–7, 18, 21, 23–24, 40–41. The Coalition seeks to read into Section 3215(c) of the 2012 Oil and Gas Act limiting language that does not exist in the statute and is contrary to the plain language, the statutory purposes, rules of statutory construction and Article I, Section 27 of the Pennsylvania Constitution.[3]

[3] Section 3215(c) uses the term "public resources" not the term "public natural resources." If the General Assembly had intended for public resource consideration to apply only to natural resources, it could have used that term. The plain language of Section 3215(c) is broader than "public natural resources" because it does not contain the word natural as a qualifier. Significantly, Article I, Section 27 of the Pennsylvania Constitution uses the term "public natural resources" and, in that context, the drafters intentionally left the term unqualified "suggesting that the term fairly implicates relatively broad aspects of the environment . . .. *Robinson II*, 83 A.3d at 955, *accord*, 1979 Pa. Legislative Journal-House at 2274. As the plurality in *Robinson II* provided: "[T]he concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property." *Robinson II*, 83 A.3d at 955.

A. The Coalition fails to address that recreational areas used by children and the general public are the same general nature or class as publicly owned parks.

The Coalition requests that this Court declare that drillers have no obligation to identify when a proposed drilling location may adversely impact areas where children and the general public recreate located just 200 feet — the distance it takes for an average person to walk 70 steps — from the limit of disturbance of a nearly five-acre well site. The Coalition contends that requiring drillers to identify these non-publicly owned recreational areas that are open to the general public is contrary to plain language of the Section 3215(c) of the 2012 Oil and Gas Act and unreasonable. However, the Coalition fails to direct this Court to any language in the statute that is contrary to including these resources in the Department's consideration of potential impacts from unconventional well drilling. Section 3215(c) certainly does not contain express language that forbids that the Department from considering the potential impacts to such recreational areas.

The Coalition has not established that "common areas of a school's property" and "playgrounds" are not authorized by Section 3274 as part of the Commonwealth's authority to define the undefined term "public resources." These definitions are of the same general class and kind as the listed public resources in Section 3215(c), specifically publicly owned parks. The Coalition has also not

established that these definitions are clearly erroneous or contrary to any express statutory language.

The Commonwealth has established that it added "common areas of a school's property" and "playground" located 200 feet from the well site's limit of disturbance to the list of public resources in 25 Pa. Code Section 78a.15(f)(1) in response to public comments. R. 742a, 1467a. These recreational areas are used by children and the general public in a manner similar to how they use publicly owned parks, one of enumerated public resources in Section 3215(c). Id., *see* 58 Pa.C.S. § 3215(c)(1). The Coalition does not rebut this established reasoning for the inclusion of these public resources.

The Coalition makes a new argument, not previously considered by Commonwealth Court, that the non-exclusive list of public resources in Section 3215(c) of the 2012 Oil and Gas Act, limits consideration of public resources to public ***natural*** resources ***managed for conservation purposes*** by a state or federal governmental agencies. Appellee's Br. 6, 18, 23–24. However, nothing in the plain language of Section 3215(c) suggests that these limitations should apply to the consideration of public resources. Indeed, such a limitation would run contrary to the rule of statutory construction that statutes are to be liberally construed to achieve their objects and promote justice. 1 Pa.C.S. § 1928.

Pursuant to 25 Pa. Code Section 78a.15(f)(1)(i), drillers must identify publicly owned parks within 200 feet of the well site. Upon initial identification of an area in the field, a determination must still be made as to whether the area is publicly or privately owned. A publicly owned park might include hiking trails, picnic areas, swimming areas, playgrounds, and/or athletic fields managed by a municipal, county, State or Federal government. Playgrounds and common areas of school property used by the public for recreation are remarkably similar to what one might find in a publicly owned park. It is a distinction without a difference.

Contrary to the Coalition's arguments about the scope of public resource consideration, not all of the listed public resources in Section 3215(c) are 1) natural resources, 2) monitored by a state or federal agency, 3) part of publicly accessible database, 4) located on public property or 5) established only after a public notice and comment rulemaking process. Section 3215(c)(1) lists publicly owned parks – considered for the impact on recreational uses. Publicly owned parks are not established pursuant to a formal rulemaking process. While some of the public resources on the list may or may not benefit from an existing central repository reflecting efforts to catalog those public resources, such cataloging is not a pre-requisite for every resource, nor a fundamental characteristic of such resources. *Compare* 58 Pa.C.S. § 3215(c)(1) ("Publicly owned parks, forests, game lands and

wildlife areas") with 58 Pa.C.S. § 3215(c) ("Historical and archaeological sites listed on the Federal or State list of historic places").

The Coalition does not rebut the similarity between publicly owned parks and "common areas of a school's property" and "playgrounds". Moreover, identifying "common areas of a school's property" or "playgrounds" does not require drillers to speculate into an unknown universe of possible public resources. The requirement to identify "common areas of a school's property" or "playgrounds" is limited to those that are located within 200 feet, or 70 paces, of a proposed five-acre (or larger) well site. Well permit applicants must identify other public resources and numerous other features in this area and beyond as argued in the Commonwealth's Brief on page 43. Commonwealth Court's findings that these definitions are broad and unreasonable constitute an error of law.

"Common areas of a school's property" and "playgrounds" are of the same general class and nature as publicly owned parks. These definitions are not clearly erroneous or contrary to the statute.

B. Commonwealth Court and the Coalition misapply the standards for determining the validity of other critical communities.

The Coalition requests that this Court declare that drillers have no obligation to address "species of special concern" that appear on a Pennsylvania Natural Diversity Index receipt ("PNDI receipt") for the location of a proposed well site. The Coalition asks this Court to declare that drillers may disregard the PNDI receipt

and the known presence of species that are of conservation concern but not listed as threatened or endangered.

The Coalition contends that defining "other critical communities" as "species of special concern" is contrary to plain language of the Section 3215(c) of the 2012 Oil and Gas Act. However, the Coalition cannot direct this Court to any express language in the statute that is contrary to including these species in the Department's consideration of potential impacts from unconventional well drilling. The 2012 Oil and Gas Act does not contain language that prevents the Department from considering the potential impacts to "species of special concern" known to be located at the proposed well site. Similarly, none of the other authorizing statutes contain language that prohibits the Commonwealth from promulgating regulations to protect species not listed as threatened or endangered. There is no language in these statutes, or Article I, Section 27 of the Pennsylvania Constitution, that directs the Commonwealth only to protect public resources that are listed after a formal rulemaking process.

The Coalition argues that the challenged regulation defined "other critical communities" as "species of special concern" for the first time. Appellee's Br. 37. That argument lacks merit. As discussed above, "other critical communities" have been defined as "species of special concern" on the Department's the Public

Resource Form, in the Department's PNDI Policy and the issue was addressed in *PIOGA*.

The Coalition argues that Commonwealth Court correctly applied the rules of statutory construction and the doctrine of *ejusdem generis*. However, both Commonwealth Court and the Coalition misapply the rules of statutory construction as well as the standards for determining the validity of a legislative rulemaking.

The Coalition does not rebut the Commonwealth's argument that Commonwealth Court erred in finding that "other critical communities" should be defined as "threatened" because it ignored the Section 78a.1 definition of "threatened and endangered species" and the protection of "threatened and endangered species" in Section 78a.15(d). Both Commonwealth Court and the Coalition assert that the exclusion of "threatened and endangered species" in the definition of "other critical communities" means that threatened species are left unprotected. A plain reading of the Chapter 78a regulations reveals the fallacy of that assertion.

The Coalition does, for the first time, concede that the Pennsylvania Natural Heritage Program ("PNHP"), the partnership between the Pennsylvania Department of Conservation and Natural Resources, the Pennsylvania Fish and Board Commission, the Pennsylvania Game Commission and the Western Pennsylvania Conservancy in cooperation with the United States Fish and Wildlife Service that

manages the PNDI database and tracks species for which there is conservation concern,[4] defines and uses the term "species of special concern".[5] [6] Appellee's Br. 39–40. As explained throughout the documents supporting the Chapter 78a rulemaking, the Commonwealth defined "other critical communities" as "species of special concern" to make "appropriate use of information available in the PNDI database from the public resources agencies with the authority, knowledge and expertise to identify and protect species of special concern . . . [and] Section 78a.15(f) outlines a reasonable and appropriate process that provides important information to the Department to evaluate potential impacts . . . ." R. 743a. Commonwealth Court's and the Coalition's plain language arguments and references to species terminology in other statutes not implemented by the Department is unpersuasive. *See* 1 Pa.C.S. § 1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a

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[4] *About PNHP*, Pennsylvania Natural Heritage Program, https://www.naturalheritage.state.pa.us/Overview.aspx (last visited January 7, 2022).

[5] *See Species and Natural Features List*, Pennsylvania Natural Heritage Program, https://www.naturalheritage.state.pa.us/SpeciesFeatures.aspx (last visited January 7, 2022).

[6] PNHP defines the term "Special Concern Species and Resources" as including nonspecies, including features of conservation concern. *See Using the PNHP Species List*, Pennsylvania Natural Heritage Program, https://www.naturalheritage.state.pa.us/SpeciesInfo.aspx (last visited January 7, 2022). The Commonwealth, in response to comments, amended the definition of "other critical communities" to clarify that the term applies only to those species that appear on a PNDI receipt and deleted the provisions in the draft final-form regulations regarding specific areas within the geographical area occupied by threatened and endangered species and significant nonspecies resources. R. 743a.

peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning or definition.") The Coalition has not established that defining "other critical communities" as "species of special concern" is not authorized by Section 3274 as part of the Commonwealth's authority to define the undefined term "other critical communities". Commonwealth Court committed an error of law when it did so.

V. THE REQUIREMENT TO CONSIDER SPECIES OF SPECIAL CONCERN IS NOT AN UNCONSTITUTIONAL SPECIAL LAW BECAUSE IT IS NOT UNIQUE TO UNCONVENTIONAL WELL DEVELOPMENT.

Requiring drillers to identify whether a proposed unconventional well will be located in an area with known species of special concern as identified on a PNDI receipt, notify applicable public resource agencies, and provide information about any proposed measures to avoid, minimize or otherwise mitigate impacts does not create a special law prohibited by Article III, Section 32 of the Pennsylvania Constitution, Pa. Const., art. III, § 32 (prohibition against special laws, as argued by the Coalition.

This Court has explained that it "does not apply Section 32 to divest the General Assembly of its general authority either to identify classes of persons and the different needs of a class, or to provide for differential treatment of persons with different needs." *Robinson II*, 83 A.3d at 987 (citing *Pennsylvania Turnpike*

Commission v. Commonwealth, 899 A.2d 1085, 1094 (Pa. 2006)). The threshold issue, which the Coalition fails to establish or otherwise address, is whether this requirement creates a class or provide differential treatment.

The Coalition incorrectly assumes that the requirements in 25 Pa. Code Section 78a.15(f)(1)(iv) treat the unconventional gas industry differently, *i.e.*, that it is the only earth disturbance industry for which the Department considers impacts upon species other than threatened and endangered species. The Coalition failed establish that the unconventional well development industry is the only industry that is required to identify and address impacts to species of special concern and it remains a material fact in dispute.

To the contrary, the Department requires the equivalent of an environmental analysis or impact analysis for non-threatened and endangered species for mining, *see* 25 Pa. Code Chapters 86–90; dam safety and waterway management, *see* 25 Pa. Code Chapter 105; and waste management, *see* 25 Pa. Code Chapter 271. All require the equivalent of an "environmental analysis" or "impact analysis" that involves consideration of impacts to species other than threatened or endangered species. R. 1197a–1198a, 1205a–1207a.

The Department uses the PNDI database as a means for permit applicants under these various programs to comply with regulatory requirements that require detailed analysis of the proposed activity's impact on "fish and wildlife" or "related

environmental values", just as it does for "other critical communities" in the context of oil and gas development. Id. The exact language describing the species-related requirements may vary among programs, but the common directive to evaluate impacts to a broader array of species than listed threatened or endangered species is clear.

To the extent the Coalition believes the unconventional well industry is being treated differently, the Coalition has offered no evidence to support this assertion. It is a material fact that is in dispute. The Coalition was not entitled to summary judgment.

CONCLUSION

The Commonwealth requests this Honorable Court reverse the decision of Commonwealth Court granting partial Summary Relief to the Coalition invalidating the definitions of "other critical communities," "common areas of school's property," "playgrounds" and "public resource agency" to the extent it included "playground owner" in 25 Pa. Code Section 78a.1 ("Public Resource Definition") and declaring 25 Pa. Code Section 78a.15(g) unconstitutional and void to the extent it requires the Department to consider comments and recommendations submitted by municipalities and to remand this matter to Commonwealth Court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE – WORD COUNT

I, Nels J. Taber, certify that based on the word court system used to prepare the foregoing, that the foregoing contains 5,877 words, exclusive of the caption, table of content and citations, title signature block, and certification. This submission therefore complies with the word count limits of Pa. R.A.P. 2135(a)(1).

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CERTIFICATE OF COMPLIANCE – PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than nonconfidential information and documents.

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