Received 12/15/2021 1:33:35 PM Supreme Court Middle District

Filed 12/15/2021 1:33:00 PM Supreme Court Middle District
69 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

---

69 MAP 2021

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.

BRIEF OF APPELLEE THE MARCELLUS SHALE COALITION

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

---

Jean M. Mosites
PA I.D. No. 206546
Kevin J. Garber
PA I.D. No. 51189
BABST, CALLAND, CLEMENTS
AND ZOMNIR, P.C.
Two Gateway Center
Sixth Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Appellee,
The Marcellus Shale Coalition

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

COUNTER-STATEMENT OF THE CASE

The Marcellus Shale Coalition ("MSC") agrees with the Procedural History of this case as summarized by Appellants, the Department of Environmental Protection ("DEP" or the "Department") and the Environmental Quality Board ("EQB") (collectively, the "Agencies") on pages 5 through 7 of their opening Brief. MSC will adopt the Agencies' naming convention (e.g., *MSC I* through *MSC IV*)[1] for references to the Commonwealth Court's and Supreme Court's previous opinions in this matter.

MSC also agrees with the Agencies' Statement of Facts in Section I ("Development of the Chapter 78a Regulations") and Sections II.A ("Other Critical Communities"), II.B ("Common Areas of a School's Property" and "Playground"), and II.C ("Playground Owners and Municipalities") on pages 11 through 13 of their Brief.

MSC disagrees, however, with the Agencies' characterization, on page 10 of their Brief, that the public resource screening process in 25 Pa. Code § 78a.15(f)–(g) "codified the long-standing process used by the Department, consistent with its Article I, Section 27 obligations, to consider the potential

[1] *Marcellus Shale Coal. v. Dep't of Env't. Prot.*, (Pa. Cmwlth., No. 573 M.D. 2016, filed Nov. 8, 2016) (*MSC I*); *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 185 A.3d 985 (Pa. 2018) (*MSC II*); *Marcellus Shale Coal. v. Dep't of Env't. Prot.*, 193 A.3d 447 (Pa. Cmwlth. 2018) (*MSC III*); *Marcellus Shale Coal. v. Dep't of Env't. Prot.*, 216 A.3d 448 (Pa. Cmwlth. 2019) (*MSC IV*).

impacts a proposed well location might have on public resources and to ensure compliance with its statutory obligations." Appellants' Br. 10. This characterization is factually inaccurate and misleading in a variety of ways.

First, the public resource screening process imposed by 25 Pa. Code § 78a.15(f)–(g), which requires well permit applicants to provide notice and comment opportunities to various public resource agencies, was entirely new in 2016.[2] The well permit application process before 2016 did not include such notice and comment provisions for public agencies. *See* 25 Pa. Code § 78.15, which simply requires applicants to submit forms furnished by the Department with information required by the Department. The 2012 Oil and Gas Act, 58 Pa.C.S. § 2301–3504 ("Act 13"), specifies notifications required in conjunction with the well permit application process; none of the statutory provisions requires notice to public resource agencies. 58 Pa.C.S. § 3211(b)(2).

Second, since the Pennsylvania Oil and Gas Act of 1984, Dec. 19, P.L. 1140, No. 223, 58 P.S. §§ 601.101–.605, *repealed by* Act 13, the Department has been required to consider impacts of a proposed well on certain public resources.

[2] To provide clarity, MSC's brief will use the phrase "public resource agency" when referring to the agencies so defined in 25 Pa. Code § 78a.1. MSC's brief will use the phrase "jurisdictional agency" when referring to the state or federal agencies authorized by statute to propose and finalize species protected status listings pursuant to notice and comment rulemaking. Jurisdictional agencies are limited to the Pennsylvania Fish and Boat Commission ("PFBC"), the Pennsylvania Game Commission ("PGC"), the Department of Conservation and Natural Resources ("DCNR"), and the United States Fish and Wildlife Service ("USFWS"). *See also* R. 1231a–1233a (2013 PNDI Policy app. D) (Jurisdictional Agency List).

In the early 2000's, the Department developed a form used by applicants to identify the public resources listed in the statute. R. 1319a (Coordination of a well location with public resources). The requirement to use the Pennsylvania Natural Diversity Inventory ("PNDI") online database to identify non-listed species in the well permit application process began in 2009 through the Department's PNDI policy. The Department revised the PNDI policy in 2013, after Act 13 became law. R. 1190a–1211a. Neither the PNDI policies nor the Department's well permitting practice, however, has ever required mitigation of impacts to non-listed species.

In response to a Right-to-Know request for well permits with conditions imposed under Act 13 Section 3215(c), the Department provided a well permit package that reflected a "hit" for the timber rattlesnake, a non-listed species, but the well permit was not conditioned to protect the species. R. 1305a–1318a. The Department cannot identify a "long standing process" to impose obligations on well permittees to mitigate impacts to non-listed species.

The Department's Deputy Secretary for Oil and Gas, Mr. Scott Perry, testified at the injunction hearing in this matter that the Department did not adopt its policy regarding its consideration of non-listed species until 2013, three years before promulgating the final Chapter 78a regulations. *See* R. 484a–485a. The Commonwealth Court took particular note of this testimony. *See MSC III*, 193

A.3d at 477 (citing Mr. Perry's testimony "that the rule requiring consideration of species, which are neither endangered nor threatened, was adopted in 2013 pursuant to a departmental policy.") (emphasis added).

Third, the new obligations to identify common areas of a school's property and playgrounds were also entirely new in the 2016 regulations. *Compare* 25 Pa. Code § 78a.1 *with* § 78.1. The Department has never required identification of these public or private properties in the well permit process or developed forms that required such information.

The record and the plain language of the regulation before and after the revisions, as well as the well permitting forms and policies developed by the Department, demonstrate the factual inaccuracy of the Commonwealth's assertion. The public resource screening process created in Sections 78a.1 and 78a.15 imposed numerous new obligations.

SUMMARY OF THE ARGUMENT

The public resource regulations before this Court for review were enjoined by the Commonwealth Court in November 2016, shortly after being promulgated in October 2016. *MSC I*, No. 573 M.D. 2016. This Court affirmed the injunction with respect to the public resource definitions in 2018. *MSC II*, 185 A.3d 985. Shortly after that affirmance, the Commonwealth Court ruled on the merits, holding that the challenged public resource definitions were without statutory authority and were invalid. *MSC III*, 193 A.3d 447. This Court should likewise affirm that decision. The Department and the EQB far exceeded the scope of their statutory authority in promulgating revised regulations applicable to the well permit process for unconventional oil and gas wells.

There is no case that determines the outcome of this matter. This is a pure issue of statutory construction, and the rules of statutory interpretation and construction provide the guidelines for the legal analysis. The goal of such analysis is to be true to the intent of the General Assembly when it adopted Section 3215(c) of Act 13. 58 Pa.C.S. § 3215(c). The plain language is the best guide to that intent and decides the questions presented.

The plain language of the statute—"public resources" and "other critical communities" as well as the other listed public resources to be considered by the Department in the well permit application process—uses common words known to

the permittees, to the public, and to the courts. The public resource definitions in the regulation, however, have no factual or legal basis in any statute, are untethered to the language in Act 13, and introduce extraordinary new notions regarding the nature and scope of "public resources."

As explained below, the addition of "common areas of a school's property" and "playgrounds" to the statutory list of public resources is improper and unauthorized because these resources are not like the public resources in the statute. If the Agencies have authority to expand the list, such additions must be similar to those provided by the General Assembly. The key features of the statutory list include natural resources, like forests, rivers, and drinking water sources. Playgrounds to be found in neighborhoods, shopping centers and McDonald's restaurants are not natural resources. Nor are they publicly owned or managed for conservation purposes.

As explained below, defining "public resource agency" to include playground owners exceeds any statutory authority of the Agencies, making this definition void and unenforceable. In addition, most playground owners in Pennsylvania are private entities and individuals without responsibility for ensuring the public trust under the Environmental Rights Amendment of the Pennsylvania Constitution, PA. CONST. art. I, § 27, a fundamental distinction between playground owners and the other defined public resource agencies.

Also as explained below, species of special concern are not "other critical communities" because they are not like the rare and endangered species specified by the General Assembly, the legal status of which is determined by state and federal agencies charged with the protection of species. These agencies have not afforded legally protected status to non-listed species of special concern. The Department has no authority to elevate non-listed species to a level of protection achieved only after rigorous and scientific notice and comment rulemaking. The plain language of the statute tells us that non-listed species are not rare; they are not endangered; they are not critical. The definition is unauthorized and invalid.

Finally, the requirement in Section 78a.15(g) that the Department consider comments on well permit applications submitted by municipalities is unconstitutional following this Court's decision in *Robinson Township v. Commonwealth*, 83 A.3d 901, 985 (Pa. 2013) (*Robinson II*), which invalidated Section 3215(d) of Act 13, the authority under which the Department promulgated Section 78a.15(g). With no valid statutory for Section 78a.15(g), the regulation is unconstitutional and unenforceable.

In sum, the Agencies argue that the Commonwealth Court applied the wrong standard for the review of legislative rulemaking, failed to afford the agencies with deference, and misapplied the rules of statutory interpretation and construction. Each of these arguments fails. There is no dispute that the challenged regulations

are legislative rules that must be invalidated because statutory authority is lacking. This is a pure question of law, subject to de novo review, where deference cannot be afforded given the nature and significant departure from prior practice regarding the newly defined public resources. The Agencies claim they merely codified longstanding practice. This is erroneous as explained above, but even if true, a longstanding practice must be invalidated when it exceeds the statutory authority the General Assembly conferred on them.

ARGUMENT

I. THE COMMONWEALTH COURT PROPERLY ANALYZED THE REGULATIONS AS A LEGISLATIVE RULEMAKING

The Agencies ask this Court to reverse the decision below because, they argue, the Commonwealth Court improperly commingled the tests for analyzing legislative and interpretive rulemakings and that this failure pervades the decision in *MSC III*. This argument is unpersuasive and inaccurate for several reasons.

First, MSC never contended the challenged regulations were anything other than a legislative rulemaking to be decided pursuant to the applicable standard for reviewing legislative rulemakings. *See* MSC's Brief in Support of Application for Summary Relief on Count I of the Petition regarding the Scope and Standard of Review, R. 1090a ("To determine the validity of legislative regulations, a court analyzes whether the regulation (1) was adopted within the legislative grant of power to the agency; (2) was issued pursuant to proper procedure; and (3) is reasonable."); R. 1101a ("Under the first prong for reviewing the legality of legislative regulations, the Court considers whether the regulation was adopted within the statutory authority granted to the agency."); R. 1117a ("Under the second criterion for the review of legislative regulations, the Court considers whether the regulation was issued pursuant to proper procedure."); R. 1142a ("The

final prong of the three-part test for reviewing legislative regulations is whether the regulation is reasonable.").

Neither MSC nor the Commonwealth briefed or argued MSC's application for summary relief in the Commonwealth Court as an interpretive rulemaking. MSC agrees this is case of legislative rulemaking. The Department's regulations created new duties, which is the touchstone of a legislative rule. *Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741 (Pa. 1998).

Second, when an agency adopts a legislative regulation pursuant to its rulemaking power under a statute, the three part test applied by the courts is whether the agency has statutory authority for the regulation, whether the regulation was promulgated pursuant to proper procedure, and whether it is reasonable. *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38 (Pa. 2006); *Eagle Environmental II, L.P. v. Commonwealth, Dep't Env't Prot.*, 884 A.2d 867 (Pa. 2005); *Rand v. Pa. State Bd. of Optometry*, 762 A.2d 392, 394 (Pa. Cmwlth. 2000). Both MSC and the Commonwealth Court accepted and agreed on the three-part test for legislative rulemaking.

In its analysis, the Commonwealth Court cited the legislative rulemaking test at the outset and distinguished it from interpretive rulemaking. *MSC III*, 193 A.3d at 462–63. The Court structured its opinion by beginning its analysis of each issue under the heading "Statutory Authority" and then determining whether the

Agencies had legislative authority for the challenged regulation under the first step of the legislative rulemaking standard. For example, concerning the definition of "other critical communities," the Court stated "[w]hat the General Assembly meant by 'other critical communities' and whether the regulatory definition of this term exceeds the scope of the statute is a matter of statutory construction." *MSC III*, 193 A.3d at 470–71.

Likewise, the Court began its analysis of the definition of public resources by "[t]urning to the statutory authority for these regulatory provisions." *Id.* at 483. The Court properly applied the standard of review for a legislative rulemaking and determined that the Department does not have statutory authority to include non-listed species of special concern in the definition of "other critical communities;"[3] to include "common areas of a school's property" and "playground" as public resources;"[4] or to elevate "playground owners" as private entities to be public resource agencies.[5]

[3] "Absent statutory authority for 'species of concern,' as identified on the PNDI, we conclude that the regulation exceeds the scope and purpose of Act 13 and is unenforceable." *MSC III*, 193 A.3d at 476.

[4] "We agree with the Coalition that they [i.e., common areas of a school's property and playgrounds] are not within the "same general class or nature as their statutory counterparts." *MSC III*, 193 A.3d 480.

[5] "The Agencies have no authority to elevate private entities as public agencies responsible for ensuring the public trust." *MSC III*, 193 A.3d 485.

The Agencies mischaracterize the Commonwealth Court's analysis. They wanted the Commonwealth Court to have jumped immediately to the third prong of the legislative rulemaking standard, the only part of the test where agency deference applies—without first determining the necessary statutory authority.[6] When a court concludes that statutory authority is lacking for a legislative rulemaking, however, it need not proceed to the other steps in the analysis. The first step may be the beginning and the end of the analysis. *See Rand v. Pennsylvania State Bd. of Optometry*, 762 A.2d 392, 394 (Pa. Cmwlth. 2000) ("The regulation fails under the first prong of the test because it exceeds the legislatively granted power, so it will not be necessary to examine the second and third prongs.").

If, however, a court finds that an agency's regulation is within its statutory authority, the court must then go on to examine the remaining prongs of the three-part test—whether the regulation was issued pursuant to proper procedure and is reasonable—if the challenging party raised those arguments. *See Popowsky v. Pa.*

[6] MSC challenged the public resource regulations as unauthorized by statute, adopted improperly, and unreasonable. In its analysis of the first part of the test for legislative rulemaking, the Commonwealth Court considered the unreasonable effects of the new definitions. *MSC III*, 193 A.3d at 471 (citing 1 Pa. C.S. § 1922(1)). This was not an analysis conducted under the third prong; it was part of the analysis of legal authority, which must presume that the General Assembly did not intend a result that is "absurd, impossible of execution, or unreasonable." The court's statutory analysis proceeded under the threshold question regarding the validity of legislative regulations and did not reach the third prong of the test.

Pub. Util. Comm'n, 910 A.2d 38, 54 (Pa. 2006) (considering whether the regulations at issue were within the agency's delegated power and were reasonable where the challenging party conceded the procedural validity prong).

If the Commonwealth Court had used an interpretive rulemaking standard of review, it would have discussed whether the Department's regulations "merely explain or offer specific conforming content" to Act 13 or existing regulations. In other words, the Court would have regarded the challenged regulations as policy rather than promulgated regulations having the force of law. The Court applied the correct standard and fully recognized that the regulations were not an interpretive rulemaking.

II. THE PUBLIC RESOURCE DEFINITIONS EXCEED STATUTORY AUTHORITY

The heart of the question on appeal is whether the General Assembly granted the Department and EQB the authority to promulgate their new regulatory definitions of "common areas of a school's property," "playground," "other critical communities" or "public resource agency" in 25 Pa. Code § 78a.1, definitions that substantially alter the well permit application process under 25 Pa. Code § 78a.15. This is a pure question of law, as this Court recognized in *MSC II* ("Insofar as

issues of statutory interpretation are concerned, however, our review is *de novo*."). *MSC II*, 185 A.3d at 500.[7]

The Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501–1991, provides the guiding principles for the analysis of this matter. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921(a). The Commonwealth Court correctly applied this principle to its analysis of the challenged regulations, adhering to the letter of the law rather than disregarding it under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b). The Agencies would have this Court consider broad grants of authority under the purpose statements of its enabling statutes. Only when the words are not explicit, however, should a court consider the object to be obtained or the administrative interpretations of such statutes. 1 Pa.C.S. § 1921(c)(4) and (8).

It is black-letter law that an administrative agency may not exceed the authority the General Assembly grants to it by statute; regulations that exceed

[7] The Agencies also contend the record must be viewed in the light most favorable to them as the nonmoving parties. Appellants' Br. 17. The Agencies, however, have pointed to no disputed issue of material fact. Where there is no dispute to any material issues of fact, this Court determines whether the Commonwealth Court committed an error of law in granting summary relief. *Pennsylvania Med. Soc. v. Dep't Pub. Welfare*, 39 A.3d 267, 276–77 (Pa. 2012). Analysis of the question of law, in contrast to review of the factual record, is not to be conducted in the light most favorable to the Agencies.

statutory authority are invalid. *Ins. Fed'n of Pa. v. Commonwealth, Dep't Ins.*, 889 A.2d 550, 555 (Pa. 2005) (invalidating a Pennsylvania Department of Insurance regulation that required the arbitration of insurance disputes where the agency's statutory authority was restricted to approving or rejecting insurance contracts without express authority to require arbitration); *Deoria v. State Athletic Comm'n*, 962 A.2d 697, 700–01 (Pa. Cmwlth. 2008) (holding that the State Athletic Commission exceeded its authority by adopting a regulation that required the Commission to arbitrate disputes between boxers and managers where the relevant statute authorized the Commission to regulate contracts but did not address arbitration); *Rand v. Pa. State Bd. of Optometry*, 762 A.2d 392, 394 (Pa. Cmwlth. 2000) (invalidating regulation setting forth requirements for optometrist to obtain certification to administer therapeutic agents because it exceeded the legislatively granted power).

The Agencies cite *Eagle Environmental* for a narrower statement of the necessary evaluation of statutory authority, that when "determining whether a rulemaking power has been delegated 'we are not limited to the letter of the law, but must look to the purpose of the statute and its reasonable effect'" and that an agency's interpretation of its enabling statute is entitled to great weight. Appellants' Br. 24. (citing *Eagle Environmental II, L.P. v. Commonwealth, Dep't*

Env't Prot., 884 A.2d 867, 877–78 (Pa. 2005)). This framework for statutory analysis must be qualified in at least two ways.

First, the facts and statutory context of *Eagle Environmental* distinguish it from the present case in fundamental ways. The *Eagle Environmental* Court acknowledged that waste facilities like landfills are of particular concern to communities and are within a highly regulated industry to mitigate economic and environmental impacts. *Eagle Environmental*, 884 A.2d at 878. Producing oil and gas well sites are not waste facilities but are highly regulated to ensure restoration after construction and strict water handling during operation of the wells. *See*, *e.g.*, 25 Pa. Code §§ 78a.53, 78a.65 and 78a.69.

As for statutory authority, the Solid Waste Management Act contains two express provisions that are not in Act 13. Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §§ 6018.101–6018.1003. The SWMA expressly states that it is to be liberally construed and it has express provisions regarding economic impacts to communities. § 6018.901 (Construction of act); § 6018.102 (Legislative finding; declaration of policy). When this Court considered if the harms benefit test created by regulation was within the statutory authority of the SWMA, it looked to these provisions. *Eagle Environmental*, 884 A.2d, at 878.

Act 13 does not have a statement requiring liberal construction. Among the stated purposes, the General Assembly expressly balanced the purposes of the act to optimize the development of oil and gas resources. *See* 58 Pa.C.S. § 3202(1) (Declaration of Purpose). In addition, there is no mention of schools, playgrounds, or special concern species in Act 13. These omissions are in stark contrast to the statutory provisions in *Eagle Environmental* through which the legislature signaled the necessary considerations for landfill permits.

Second, the legislature's delegation of rulemaking power must be "clear and unmistakable" because a "doubtful power does not exist." *Gilligan v. Pa. Horse Racing Comm'n*, 422 A.2d 487, 490 (Pa. 1980); *Green v. Milk Control Comm'n*, 16 A.2d 9, 9 (1940). Rather than assuming that all agency regulation is authorized if it is directed to the general purpose of the statute, this latter principle must apply here because the plain language of the statute precludes the claimed authority to adopt the new public resource definitions.

Courts do "not defer to an administrative agency's interpretation of the plain meaning of an unambiguous statute because statutory interpretation is a question of law for the court." *Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 677 (Pa. 2020). *See also Seeton v. Pa. Game Comm'n*, A.2d 1028, 1037 (Pa. 2007) ("deference never comes into play when the statute is clear").

As explained below, the Commonwealth's public resource definitions are unlawful because they are contrary to the plain language and intent of the authority the General Assembly delegated in Act 13, which did not alter the relevant provisions of Section 3215(c) that have been in place since 1984. In addition, the public resource definitions are facially unreasonable.

A. The New Definitions of "Common Areas of a School's Property" and "Playground" Exceed Statutory Authority and are Unreasonable

The Commonwealth Court correctly held that the Agencies exceeded their statutory authority when they improperly added new "public resources" to include "common areas of a school's property" and "playgrounds." These definitions fail to adhere to the limits in the plain language of the statute, which lists public resources that primarily include natural resources like forests, rivers, species, natural landmarks, archaeological sites and drinking water sources. The only exception to this class of public resources being natural resources are historical sites listed on federal or state lists of historic sites. Playgrounds and schools are neither natural nor listed by state or federal agencies. They are beyond the scope of the plain language limitation in Section 3215(c) of Act 13.

1. The Commonwealth Court Properly Employed Statutory Interpretation and Construction Principles to Invalidate these Definitions

The Department improperly expanded the list of "public resources" in Section 3215(c) of Act 13 to include newly defined "common areas of a school's property" and "playgrounds." 25 Pa. Code § 78a.1. Act 13 does not define or mention either term. *See* 58 Pa.C.S. §§ 2301–3504. The statutory public resources the Department must consider in the well permit process consist of:

> (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; and
> (6) sources used for public drinking supplies in accordance with subsection (b).

58 Pa.C.S. § 3215(c).

Under the challenged regulation, "Common areas of a school's property" means

> An "area on a school's property accessible 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."

A "playground" is

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

25 Pa. Code § 78a.1.

The threshold inquiry in the legislative rulemaking standard of review is determining whether the definitions of "common areas of a school's property" and "playground" were adopted within the legislative grant of power to the EQB. *See Girard Sch. Dist. v. Pittenger*, 392 A.2d 261, 262–64 (Pa. 1978). "Substantive rulemaking is a widely used administrative practice"[8] but "the power and authority exercised by an administrative agency in its rule-making must be conferred by language that is clear and unmistakable and the regulatory action must be within the strict and exact limits defined by the statute." *Pennsylvania Med. Soc. v. Commonwealth, St. Bd. Med.*, 546 A.2d 720, 722 (Pa. Cmwlth. 1988); *see also Green v. Milk Control Comm'n*, 16 A.2d 9, 9 (Pa. 1940) ("The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist"); *Deoria v. State Athletic Comm'n*, 962 A.2d 697, 700 (Pa. Cmwlth. 2008) ("An agency must act within the strict and exact limits as statutorily defined"). The newly created, open-ended definitions of common areas of school property and playgrounds are not within the limits authorized by Act 13.

[8] *Eagle Env't II, L.P. v. Commonwealth, Dep't Env't Prot.*, 884 A.2d 867, 877 (Pa. 2005) (quoting *Process Gas Consumers Grp. v. Pa. Pub. Util. Comm'n*, A.2d 1315, 1320 (Pa. 1986)).

The key import of the plain language of Section 3215(c) is that these statutory public resources are public in nature; that is, they are monitored, regulated or protected by a governmental entity. For example, the Department of Conservation and Natural Resources maintains lists of historical and archaeological sites, publicly owned parks, forests and wildlife areas, and rare and endangered species.[9] The Pennsylvania Game Commission maintains a list of state game lands.[10] The National Park Service has a list of national natural landmarks.[11] As the Commonwealth Court concluded, governmental entities manage these public resources and ensure their conservation under the Environmental Rights Amendment.[12] PA. CONST. art. I, § 27.

---

[9] Historic Places, PA. DEP'T CONSERVATION & NAT. RES., https://www.dcnr.pa.gov/Recreation/WhereToGo/HistoricPlaces/Pages/default.aspx (last visited Dec. 6, 2021); Local Parks, PA. DEP'T CONSERVATION & NAT. RES., https://maps.dcnr.pa.gov/localparks/ (last visited Dec. 6, 2021); Find A Forest, PA. DEP'T CONSERVATION & NAT. RES., https://www.dcnr.pa.gov/StateForests/FindAForest/Pages/default.aspx (last visited Dec. 6, 2021); Pennsylvania's Rare, Threatened, and Endangered Plants, PA. DEP'T CONSERVATION & NAT. RES., https://www.dcnr.pa.gov/Conservation/WildPlants/RareThreatenedAndEndangeredPlants/Pages/default.aspx (last visited Dec. 6, 2021).

[10] Pennsylvania State Game Lands, PA. GAME COMM'N, https://www.pgc.pa.gov/HuntTrap/StateGameLands/Pages/default.aspx (last visited Dec. 6, 2021).

[11] National Natural Landmarks Directory, NAT'L PARK SERV., https://www.nps.gov/subjects/nnlandmarks/nation.htm (last visited Dec. 6, 2021).

[12] The Commonwealth Court's analysis is consistent with this Court's analysis of the Environmental Rights Amendment in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson II*). *MSC III*, 193 A.3d 480.

The Agencies cite Section 3274 of Act 13 as allowing the Department to add public resources that are of the same general class and nature as the list of public resources in Section 3215(c). Appellants' Br. 51. They cite *Dep't of Env't Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962 (Pa. 2014) for the proposition that when a statute introduces a list with the word "include," as does Section 3215(c), a court interprets the list as non-exhaustive. MSC does not dispute this doctrine, but in *Cumberland*, this Court carefully explained that although the word "including" is widely accepted "to be considered [a] word[s] of enlargement," it "should not be construed in [its] widest context" under the statutory construction doctrine of *ejusdem generis* ("of the same kind or class"). *Cumberland*, 102 A.3d at 976. This Court further explained that:

> [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.

Id.

Under these principles, this Court held that the Department has the power to interpret and enforce the Mine Safety Act only in a way that expands the list at issue to include events of the "same general class or nature as those expressly set forth in [the Mine Safety Act]." *Id.* at 977.

The Commonwealth Court correctly followed this Court's instruction regarding the interpretation of non-exhaustive lists and applied the doctrine of *ejusdem generis* in recognizing that statutory authority "is not unfettered." *MSC III*, 193 A.2d 472. *See also City of Harrisburg v. Prince*, 219 A.3d 602, 618 (Pa. 2019) ("[O]ur rules of statutory construction require us to interpret that more general phrase by reference to the preceding specific examples."); *Steele v. Statesman Ins. Co.*, 607 A.2d 742, 743 (Pa. 1992) (quoting BLACK'S LAW DICTIONARY 270 (5th ed. 1983)) ("[W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to the persons or things of the same general kind or class as those specifically mentioned.").

The plain language interpretation of the statute requires any expansion of the public resources list to be limited to items like the preceding specific examples. Common areas of a school's property and playgrounds are not like the preceding specific examples and are not within the same class or nature as the statutorily listed public resources. They are not natural resources, and they are not owned or managed by federal, state or local agencies.

The differences are obvious and insurmountable. One cannot argue that a swing set in a public area of a residential neighborhood or on a school playground

is natural or is similar to historic sites listed by state and federal agencies. Playgrounds may be community recreational assets, but they are not managed to ensure conservation of natural resources. They are unlike any of the specific public resources listed in Act 13 and are unauthorized by the statute.

As for statutory construction, the words of the statute should also be read to require similar legal effect. For a permit applicant to comply with the new regulation, one must consider the differences imposed by the expansion of the list of public resources. This analysis yields the same result as the initial interpretation of the plain meaning of "public resources"—the new definitions are not within statutory authority because the obligations they impose are dramatically different than those imposed by the consideration of the public resources listed in the statute. Such a result cannot be what the General Assembly intended.

For example, nearly any school—career and technical centers, charter schools, driver training schools, vocational schools, and seminaries— meets the broad definition of "school." A publicly accessible picnic table or basketball hoop would bring a school property within the regulation. *MSC III*, 193 A.3d at 480. In discovery, the Department itself could not clarify whether these schools are public resources. R. 1293a. ("The Department objects to this Interrogatory as vague and ambiguous because the term 'schools' is not defined in Section 78a.1 other than in the definition of 'Common areas of a school's property'. . . . Pennsylvania's

schools have many affiliations and levels of academics, but the schools listed in this regulation (i.e., elementary, secondary, and postsecondary) typically have outdoor facilities accessible to the general public for recreational purposes. If the schools listed in this Interrogatory are elementary, secondary, and postsecondary and also have property that is made accessible to the general public for recreational purposes, then such school would be subject to this regulation.").

The Commonwealth Court observed that the list of schools "is seemingly endless as any institution providing some form of educational services would ostensibly qualify as a "school" under the regulatory definition." *MSC III*, 193 A.3d at 480. Any person attempting to comply with the new regulation would reach the same conclusion.

The same broad scope is true of the defined "playgrounds." The Department admitted during discovery that it does not maintain a list of playgrounds (R. 1277a–1278a); it does not know whether any public or private entity maintains a list of playgrounds (R. 1279a); and that the number of potential playgrounds is unknown (R. 1277a). Given the nature of the statutory list, the General Assembly did not intend for the Agencies to expand the list of public resources or public resources agencies to include this diverse universe of private locations or entities.

The Commonwealth Court observed that the definition of playground "is so broad as to defy quantification and compliance . . . it also included virtually any

area open to the public for recreational purposes, including . . . shopping centers, movie theaters, sports stadiums, amusement parks, and golf courses." *MSC III*, 193 A.3d 480–81. *See also* R. 658a–659a (counsel for Department explaining to the Commonwealth Court that the definition of playground could extend to a mall, shopping center, car dealership, restaurant, or "your choice on a business."). Under the new definition, a playground at a McDonald's restaurant qualifies as a public resource, clearly not something the General Assembly intended to protect under Act 13.

In its analysis, the Commonwealth Court interpreted the plain language of the regulation to conclude that the new public resources were not of like kind with those public resources listed in the statute. *MSC III*, 193 A.3d at 483–85. The Commonwealth Court's analysis and conclusion was consistent with this Court's decisions and instruction. *Schappell v. Motorists Mut. Ins. Co.*, 934 A.2d 1184, 1187 (Pa. 2007) (in interpreting regulations, as in interpreting statutes, the plain language of the regulatory text is "paramount."). *See also S & H Transp., Inc. v. City of York*, 210 A.3d 1028, 1038 (Pa. 2019). When analyzing regulatory text, "[w]ords and phrases should be understood according to their common and approved usage," and courts will afford these words their plain meaning unless the text is ambiguous. *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1027–28 (Pa. 2018); *S & H Transp.*, 210 A.3d at 1038. The plain

language of the regulation creates a new obligation that is not authorized by the statute.

The Commonwealth Court also considered the legal effect of the new public resources obligations and adhered to the statutory construction principle of avoiding a result that is "absurd, impossible of execution or unreasonable." *MSC III*, 193 A.3d at 471 (quoting 1 Pa. C.S. § 1922(1)). In determining legislative intent, one must consider the result—an unreasonable result is not within the granted statutory authority because it was not intended by the General Assembly. 1 Pa.C.S. § 1922(1).

The new open-ended definitions of common areas of school property and playgrounds impose obligations that are absurd, impossible of execution or unreasonable, a result that cannot have been intended by the General Assembly, and is therefore beyond the scope of statutory authority. In addition, only if the regulation "contains reasonable standards to guide prospective conduct does it satisfy the requirements of due process." *Watkins v. State Bd. of Dentistry*, 740 A.2d 760, 764 (Pa. Cmwlth. 1999). Sections 78a.15 (f) and (g) fail to provide reasonable standards for either permit applicants or permit reviewers and are unlawful.

2. Neither the Declaration of Purpose nor the Grant of General Rulemaking Power Authorizes the Department's Definitions of Common Areas of a School's Property or Playground

The Agencies argue that the Department has broad authority under Section 3274 to define common areas of school property and playgrounds as they did because the definitions are reasonable, not an expression of a whim, and not in bad faith; that the Commonwealth Court failed to defer to the Department's rulemaking; and that material facts in dispute preclude summary relief.[13] None of these arguments has merit.

First, Section 3274 simply provides that "the Environmental Quality Board shall promulgate regulations to implement this Chapter." 58 Pa.C.S. § 3274. Broad statutory grants of rulemaking authority are not a license to go beyond the bounds of the statute, to exceed the authority granted by the General Assembly. In *Northwestern Youth Services, Inc. v. Commonwealth, Dep't Pub. Welfare*, 66 A.3d 301(Pa. 2013), this Court held that general statutory language giving an agency the power to audit the recordkeeping of nonprofit entities did not authorize the agency to impose affirmative, extensive and specialized cost-reporting requirements (general rulemaking and other agency authority could not "be read to reasonably

[13] The Agencies also argue that the Commonwealth Court failed to recognize the difference between legislative and interpretive rulemaking. MSC addressed this argument in Part I, above.

subsume a specialized, affirmative, and *extensive cost-reporting requirement"*). *Northwestern Youth Servs.*, 66 A.3d at 315.

The Agencies also contend the general statutory delegations of rulemaking power in Act 13; the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L 1987, No. 394, *as amended*, 35 P.S. 691.1–.1001; the Solid Waste Management Act ("SWMA"); and the Dam Safety and Encroachments Act ("DSEA"), Act of Nov. 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1–.27, authorize the public resource definitions because the "declaration of purposes" for these acts is to broadly protect the environment. Appellants' Br. 27–29. None of these broad grants of authority authorizes the specific public resource regulations invalidated by the Commonwealth Court.

Relying on general rulemaking authority and a declaration of purpose to implement statutes that do not pertain to oil and gas drilling has no limiting principle and would provide a blank check to the Agencies to write any regulation that purports to protect the environment.[14] This position clearly is contrary to the delegation of powers doctrine. *See Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–34 (Pa. 2017) (explaining the limitations set

[14] The duty of the EQB under the DSEA, for example, is to promulgate regulations for the engineering design, operation and maintenance of dams and reservoirs. Dam Safety and Encroachments Act, Act of Nov. 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1–.27 Those are not public resources of the nature and kind described in Section 3215(c) of Act 13.

by the Constitution on the General Assembly's ability to grant authority to agencies). Neither the CSL, SWMA, nor DSEA provides any express or implied authority to expand the list of public resources to be considered in the well permit application process.

Second, the Agencies regularly conflate the first and third prongs of the legislative rulemaking standard throughout their brief. The threshold legal question before the Commonwealth Court was whether the regulatory definitions of "common areas of a school's property" and "playground" are within the authority of Section 3215(c) of the statute. That is a pure question of law. No deference is given where the language is clear on its face.

The Agencies cite *Tire Jockey Service, Inc. v. Commonwealth, Department of Environmental Protection*, 915 A.2d 1165 (Pa. 2007) for support, but that case is inapposite. *Tire Jockey* involved the Department's interpretation of a regulation (i.e., the definition of "waste" in 25 Pa. Code § 287.1) not whether the Department had authority to promulgate the definition it did under the SWMA. Neither party disputed that the regulation was consistent with the statute. *Id.* at 1186–87. Here, the Commonwealth Court construed Act 13 to determine whether it provides authority to define common areas of a school's property and playgrounds the way the Department defined them and concluded that such authority was lacking.

The Agencies are asking this Court to ignore the Commonwealth Court's proper interpretation of the plain language of Section 3215(c) and adopt the Department's definitions of common area of a school's property and playground because the Department claims to have developed them in good faith. Good or bad faith is not the legal test. Even looking to the purpose of the statute, courts cannot "ignore the text of the statute in pursuit of its spirit." *Golden Gate Nat'l Senior Care*, 194 A.3d at 1027–28; 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Act 13 expressly states its first purpose is to permit "optimal development of oil and gas resources" consistent with protections of health, environment, public safety and property. Act 13's statement of purpose does not provide a broad grant of authority to impose new, broad, unprecedented obligations in the well permit process.

Finally, without identifying any specific material facts it claims are in dispute, the Agencies assert that the Commonwealth Court "speculated without evidence" that playgrounds could include shopping centers, movie theaters, golf courses and McDonald's restaurants. Appellants' Br. 56. "Evidence" is not needed for this conclusion, which is not speculation; it is the plain language interpretation of the regulation, reflected in the record. *See* Section II.A.1, above. The Commonwealth Court analyzed whether the Department's definitions of

common areas of a school's property and playground are of the same kind and class as the list of public resources in Section 3215(c) of Act 13. Such analysis requires an evaluation of the plain meaning of words of a statute or regulation, not evidence.

It is undisputed that "the goal of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly" and the best indicator of this intent is the plain language. *Golden Gate Nat'l Senior Care*, 194 A.3d at 1034 (quoting 1 Pa.C.S. § 1921(a)). In addition, the plain language should be interpreted in its common usage unless there are specialized terms. *See id.* at 1027–28; 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.").

Neither Act 13 nor any other statute provides statutory authority for the new public resource definitions, which are unlawful and unreasonable on their face.

B. Including Playground Owners in the Definition of Public Resource Agency Exceeds Statutory Authority and is Unreasonable

The Department has defined a "public resource agency" to include playground owners. 25 Pa. Code § 78a.1. That definition is void and unenforceable because there is no statutory authority for it and because it is unreasonable.

1. There is No Statutory Authority to Designate "Playground Owners" as Public Agencies

Many private entities own playgrounds as defined in Section 78a.1. Playgrounds include any "outdoor area provided to the general public for recreational purposes," i.e., shopping centers, theaters, sports stadiums, amusement parks, and McDonald's restaurants. The Department's regulation purports to make public agencies from owners of these private properties. The Department's counsel admitted at the injunction hearing that a public resource agency could extend to a mall, shopping center, car dealership, or any choice of business. R. 658a–659a.

Under Pennsylvania law an "agency" is any "Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of such political subdivision of local authority." Administrative Law and Procedure Act, 2 Pa.C.S. § 101 (Definitions). The Agencies have no legal authority to designate private entities as public resource agencies. In fact, the Department's Deputy Secretary for Oil and Gas, Mr. Scott Perry, stated the Department was not familiar with playground owners being an agency as defined in other statutes. R. 473a–474a.

Further, private owners of playgrounds are not trustees under the Environmental Rights Amendment, which specifically says "the Commonwealth"

shall conserve and maintain Pennsylvania's public natural resources. PA. CONST. art. I, § 27. Thus, only the Commonwealth has statutory duties under the ERA. The Commonwealth Court concluded, correctly, that "playground owners are not 'trustees' with any duties or obligations to protect the environmental trust under [the Environmental Rights Amendment] or Act 13 . . . [and therefore the Department and EQB] have no authority to elevate private entities as public agencies responsible for ensuring the public trust." *MSC III*, 193 A.3d at 485.

2. Including Playground Owners as Public Resource Agencies is Unworkable and Therefore Unreasonable

Defining public resource agencies to include playground owners is unreasonable and therefore also fails the third prong of the legislative rulemaking standard.

Each of the six categories of public resources listed in Section 3215(c) of Act 13[15] is designated, monitored, regulated and/or protected by some governmental entity that can easily be identified and notified of an application for a well permit. *See MSC III*, 193 A.3d at 479. By contrast there is no list of playground owners. The Deputy Secretary for Oil and Gas admitted at the

[15] Section 3215(c) consists of (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; and (6) sources used for public drinking supplies. 58 Pa.C.S. § 3215(c).

injunction hearing that playground owners are not a singular agency and that no other statute identifies playground owners as public agencies. Instead, there are "multiple, different playground owners since there are multiple, different counties and multiple, different municipalities." R. 473a–474a. This creates thousands of unknown, unidentified and unlisted public resource agencies across Pennsylvania.

As an example, consider publicly accessible "green space" areas frequently found in housing developments that have homeowners' associations ("HOAs"). Residents walk dogs, play ball, eat lunch, and conduct many other activities in these green spaces. They are "outdoor areas provided to the general public for recreational purposes" and therefore are playgrounds by definition. 25 Pa. Code § 78a.1. However, identifying and notifying the appropriate point of contact might be extremely difficult if even possible. Some HOAs have governing boards of directors, others have loose affiliations of residents who manage public spaces. Composition of these boards and affiliations changes frequently.

Under the rules of statutory interpretation, the General Assembly cannot have intended to authorize an absurd result; the granted authority must fall within reasonable constraints. As part of its analysis of statutory authority, the Commonwealth Court properly invalidated and enjoined the definition of public resource agencies to the extent it included playground owners as unauthorized by

statute, in part because it is unduly burdensome and unreasonable. *MSC III*, 193 A.3d at 485.

On appeal, the Agencies simply argue the Commonwealth Court did not analyze this issue as a legislative rulemaking, which is inaccurate, and that it is not overly burdensome to identify playground owners. That position is undercut by the Department's own admissions in discovery and at the injunction hearing that the number of playgrounds is unknown (R. 1277a); that it does not maintain a count or list of playgrounds (R. 1277a–1278a); that it does not know whether there is a list of playgrounds within the meaning of Section 78a.1 (R. 1279a); that the regulatory definition includes community playgrounds like a homeowners' association public area and McDonald's restaurants (R. 474a, 1295a); and that there are "multiple, different playground owners since there are multiple, different counties and multiple, different municipalities" (R. 474a). These admissions illustrate that the number and type of playground owners as public agencies are unknown and unknowable, which is the very definition of an unreasonable regulation.

The Commonwealth Court properly concluded that adding playground owners as a public resource agency is unlawful because there is no statutory authority. It is also unreasonable on its face.

C. The Definition of "Other Critical Communities" Exceeds Statutory Authority, Violates the Commonwealth Documents Law and is Unreasonable

Section 3215(c)(4) of Act 13 requires the Department to consider the impact of a proposed well on "habitats of rare and endangered flora and fauna and other critical communities."[16] The challenged regulations defined "other critical communities," for the first time, to include any "species of special concern identified on a PNDI receipt." 25 Pa. Code § 78a.1. The phrase "species of special concern" does not appear in Section 3215(c) or elsewhere in Act 13. The new definition would impose new, uncertain, unpredictable, and unauthorized obligations on permittees.

As with the other public resource definitions, the Commonwealth Court analyzed the Department's new definition of "other critical communities" as a matter of statutory interpretation and construction. *MSC III*, 193 A.2d 470–71 ("What the General Assembly meant by 'other critical communities' and whether the regulatory definition of this term exceeds the scope of the statute is a matter of statutory construction."). The Court properly declared "other critical

[16] The 2012 Oil and Gas Act (Act 13) does not define "other critical communities." The same term was used but not defined in Section 205 of the Pennsylvania Oil and Gas Act of 1984. *See* Pennsylvania Oil and Gas Act of 1984, Dec. 19, P.L. 1140, No. 223, 58 P.S. § 601.205, *repealed by* Pennsylvania Oil and Gas Act of 2012, 58 Pa.C.S. §§ 2301–3504 (current section at 58 Pa.C.S. § 3215).

communities" to be beyond "the scope and purpose of Act 13" (*Id.* at 476) and declared the special concern species provisions to be in violation of the CDL. *Id.* at 477.

1. PNDI is a Changing Database That is Not Itself Subject to any Notice or Comment Requirements

Section 78a.1 defined "other critical communities" as:

> (i) Species of special concern identified on a PNDI receipt, including plant or animal species:
>
> (A) In a proposed status categorized as proposed endangered, proposed threatened, proposed rare or candidate.
>
> (B) That are classified as rare or tentatively undetermined.
>
> (ii) The term does not include threatened and endangered species.

25 Pa. Code § 78a.1. (emphasis added).

The PNDI database that Pennsylvania Natural Heritage Program ("PNHP") manages is an online database repository of various categories of species, with approximately 30,000 detailed digital occurrence records.[17] Both listed and non-listed species are identified on a PNDI receipt when a well permit applicant uses the PNDI Environmental Review Tool to view information in a proposed project area.

[17] How We Work, PA. NAT. HERITAGE PROGRAM, https://www.naturalheritage.state.pa.us/Methodology.aspx (last visited Dec. 6, 2021). ("PNHP") explains that it "collects and stores location and ecological information about rare plants, rare animals, unique plant communities, significant habitats, and geologic features in Pennsylvania." *Id.* PNHP is partnership between DCNR, PGC, PFBC and the Western Pennsylvania Conservancy. *Id.*

PNDI includes species that are listed as threatened and endangered under federal and state statutes.[18] It also includes non-listed species of special concern. Several Pennsylvania jurisdictional agencies use various standards and procedures provide legally protected status to the listed species within the PNDI database. R. 475a–477a. Neither the Department nor EQB is an agency with authority to list species or enter them into the PNDI database. Species of special concern is not a category among state legal status codes authorized for use by the jurisdictional agencies.[19]

There are currently 2,195 species in the PNDI database, of which 396 are designated as Special Concern Species and Resources.[20] Some of the Special Concern Species are not biological species at all, but are ecosystems, including the "floodplain scour community," "Great Lakes region scarp woodland," and "Hemlock palustrine forest."[21] Some of the Special Concern Species are even

---

[18] The jurisdictional agencies with authority to list species take such action under various federal and state statutes. *See* Endangered Species Act of 1973, 16 U.S.C. § 1531–44; Wild Resource Conservation Act, Act of June 23, 1982, P.L. 597, No. 170, 32 P.S. §§ 5301–14 (Section 5307—Wild Plant Management); Fish and Boat Code, 30 Pa.C.S. §§ 101–7214 (Section 102 – Definitions and Section 2305 Threatened and Endangered Species); Game and Wildlife Code, 34 Pa.C.S. §§ 101–2965 (Section 102 – Definitions and Section 2167 Endangered or Threatened Species).

[19] Rank and Status Definitions, PA. NAT. HERITAGE PROGRAM, https://www.naturalheritage.state.pa.us/rank.aspx (last visited Dec. 14, 2021).

[20] *See* Species and Natural Features List, PA. NAT. HERITAGE PROGRAM, http://www.naturalheritage.state.pa.us/SpeciesFeatures.aspx (last visited Dec. 14, 2021).

[21] Riverside Ice Scour Community Fact Sheet, PA. NAT. HERITAGE PROGRAM, http://www.naturalheritage.state.pa.us/factsheets/16011.pdf (last visited Dec. 14, 2021); Great Lakes Region Scarp Seep Fact Sheet, PA. NAT. HERITAGE PROGRAM,

listed as "proposed" special concern species. PNHP defines special concern species as:

> plants, wildlife, or ecological features that are not currently listed as threatened or endangered by a jurisdictional agency, but are identified as at risk and are present in the Pennsylvania Conservation Explorer. These include:
> - Species with a current State Status of Rare
> - Candidate, tentatively undetermined, special concern populations, or unlisted species with a Proposed State Status of Rare, Threatened, or Endangered
> - Taxa and features of conservation concern, but lacking regulatory protections[22]

(emphasis added). Other than the state status of Rare, the special concern species are not listed and are lacking regulatory protections.

Threatened and endangered species are subject to formal notice and comment rulemaking and rigorous scientific review under state and federal laws. Species of special concern are not. There is no documented process of identifying and listing special concern species. As this Court observed in *MSC II*,[23] Mr. Perry admitted at the injunction hearing that "[t]hreatened or endangered species listings have a much more rigorous [listing]process" that involves notice and comment

---

http://www.naturalheritage.state.pa.us/factsheets/16040.pdf (last visited Dec. 14, 2021); Hemlock Palustrine Forest Fact Sheet, PA. NAT. HERITAGE PROGRAM, http://www.naturalheritage.state.pa.us/factsheets/16028.pdf (last visited Dec. 14, 2021).

[22] Using the PNHP Species Lists, PA. NAT. HERITAGE PROGRAM, https://www.naturalheritage.state.pa.us/SpeciesInfo.aspx (last visited Dec. 12, 2021).

[23] *MSC II*, 185 A.3d 504.

rulemaking, while species of special concern "[are] not subject to rulemaking" and are not populated through notice and comment rulemaking procedures. R. 475a–476a. The Department has no authority or control over the contents of the PNDI database. R. 1282a, 1301a–1302a. With respect to non-listed special concern species, PNHP updates the PNDI database without notice or the opportunity for comment.[24]

Well permit applicants use the PNDI database to screen projects for potential impacts to listed species. R. 1357a. If the PNDI receipt identifies a "Potential Impact" to a species, the applicant coordinates with the appropriate jurisdictional agency to avoid or mitigate impacts. R. 1200a. After coordination with jurisdictional agencies, permit applicants might obtain "clearance letters" for submission to the Department with a well permit application. R. 1200a–1201a. Clearance letters from agencies might contain measures to avoid, minimize or mitigate impacts to either threatened and endangered species, and/or species of special concern. **Measures related to non-listed species are recommended, not required.** R. 1201a.

In fact, Mr. Perry testified that the jurisdictional resource agencies do not necessarily have authority to require mitigation to special concern species. R.

[24] *See* R. 1181a (Department's Deputy Secretary for Oil and Gas, Mr. Scott Perry testified that species of special concern are "not subject to rulemaking" and are not populated through notice and comment rulemaking procedures.).

485a. The new regulation would give the Department the power to impose obligations on well permittees with respect to non-listed species that the enabling statutes do not confer on the jurisdictional agencies. This cannot be within the authority that the General Assembly conferred on the Department.

2. The Definition of Other Critical Communities is Void Because There is No Legal Authority to Require Protection of "Species of Special Concern"

Section 3215(c) of Act 13 directs the Department to consider the impact of a proposed well on "habitats of rare and endangered flora and fauna and other critical communities" but the statute does not define "other critical communities." 58 Pa.C.S. § 3215(c). The Department defined "other critical communities" to include "species of special concern identified on a PNDI receipt." 25 Pa. Code § 78a.1. Neither Section 3215(c) nor Act 13 mention or define the phrase "species of special concern." Thus, the questions of what the General Assembly intended by using the phrase "other critical communities" and whether it delegated authority to include "species of special concern" are matters of statutory construction. *MSC III*, 193 A.3d at 470–71.

Using the fundamental principles of the Statutory Construction Act—including ascertaining and effectuating legislative intent (1 Pa.C.S. § 1921(a)) and giving the statute its obvious meaning whenever the language is clear and unambiguous (1 Pa.C.S. § 1921(b))—together with the doctrine of *ejusdem*

generis, the Commonwealth Court concluded that, within the context of Section 3215(c), the key to the meaning of the phrase "other critical communities" are the descriptive terms "rare," "endangered" and "critical." *MSC III*, 193 A.3d at 470–76.

If species of special concern cannot properly be considered to be within a class of "rare," "endangered" or "critical," the definition is unauthorized and invalid. *See also* 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 peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.").

Because the General Assembly did not define "other critical communities" it was necessary and appropriate for the Commonwealth Court to apply the rules of statutory construction. *Frank Burns, Inc. v. Interdigital Commc'ns Corp.*, 704 A.2d 678, 680 (Pa. Super. Ct. 1997) ("The [Wage Payment and Collections Law] provides no statutory definition of the term 'employee.' Where a statute does not supply a definition for a term, we must apply the rules of statutory construction. 1 Pa.C.S. § 1502(a)(1). [sic] Under these rules, technical words are to be construed according to their 'peculiar and appropriate meaning.' 1 Pa.C.S. § 1903(a).").

In this statutory context, the term "other" must mean that any "critical communities" are on par with rare or endangered species. The term "critical" is also used in the phrase "Critical habitats" under the federal Endangered Species Act, which are limited to specific areas within the geographic areas where threatened or endangered species live. Endangered Species Act of 1973, 16 U.S.C. § 1532; R. 1190a–1211a. Critical habitats are the essential components of the larger geographic range. The General Assembly's use and the federal definition of the term "critical" support the Commonwealth Court's conclusion that special concern species, with no scientifically determined risk and no listing by any state or federal agency, cannot be within the plain meaning of "other critical communities."

There is no scientific certainty about the nature of the risk to special concern species—they are neither endangered nor even threatened. Contrast this uncertainty with the definition of "endangered," which means that a species is actually threatened with extinction. Game and Wildlife Code, 34 Pa.C.S. § 102 (Definitions); Fish and Boat Code, 30 Pa.C.S. § 102 (Definitions).

Further, the new definition of "other critical communities" includes species of special concern that are "in a proposed status" as threatened or endangered or their classification is undetermined. 25 Pa. Code § 78a.1. A species in a proposed status is not in as high of a risk category as a species that is "rare," "endangered"

or within a "critical" habitat. Elevating such species to protections on par with species listed by the jurisdictional agencies cannot be what the General Assembly intended with it used the phrase "other critical communities."

Under the plain language of the statute, "other critical communities" must be critical. There is no ambiguity in that term. The Merriam-Webster dictionary defines "critical" as indispensable or vital. *Critical*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014). The Agencies cannot claim that species which have not undergone the detailed process of evaluation to be listed by any state or federal jurisdictional agency are indispensable or vital. The jurisdictional agencies themselves have reached no such conclusion. It is clearly erroneous and an expression of whim for the Agencies to define critical communities to include non-listed special concern species.

Finally, as the Commonwealth Court observed, the Department's exclusion of threatened species from the definition of "other critical communities" yields the illogical conclusion that the General Assembly did not intend to protect threatened species. *MSC III*, 193 A.3d 475.

The Agencies take issue with the Commonwealth Court's analysis, asserting that the Court interpreted the Act 13 definition of "other critical communities" both as an unambiguous phrase (therefore deserving a plain meaning analysis) and as an

ambiguous phrase (requiring a statutory construction analysis). Appellants' Br. 36. The Agencies again mischaracterize the Commonwealth Court's opinion.

The legal question is the meaning of the statutory term "other critical communities." The Court began by examining the plain language of Section 3215(c)(4). It interpreted those terms according to rules of grammar and common usage, in accordance with 1 Pa.C.S. § 1903(a), and in the context of federal and state species protection statutes, which is a common and permissible method of statutory construction. *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1027–28 (Pa. 2018) ("The paramount goal of statutory interpretation is to give effect to the intentions of the General Assembly. 1 Pa.C.S. § 1921(a). To accomplish this, we consider the statutory language at issue not in isolation, but in the context in which it appears."). The Commonwealth Court concluded the General Assembly intended the term "other critical communities" to be on par with rare or endangered species. Species of special concern fall well below that level. *MSC III*, 193 A.3d at 475.

The Agencies also take issue with the Commonwealth Court's application of this Court's balancing of economic interests and environmental protection in *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013) (*Robinson II*). This Court stated that "economic development cannot take place at the expense of an unreasonable degradation of the environment." *Robinson II*, 83 A.3d at 954–55.

But a trustee's duties under the Environmental Rights Amendment "to conserve and maintain public natural resources do not require a freeze on the existing public natural resources stock; rather, . . . the duties to conserve and maintain are tempered by legitimate development . . ." *Id.* at 958.

The Commonwealth Court recognized that a key purpose of Act 13 is to permit the optimal development of oil and gas consistent with protecting health, safety and the environment.[25] *MSC III*, 193 A.3d. at 475. Distorting the statute to claim authority for the protection of non-listed species that clearly are not on par with rare and endangered species upsets the very balance the General Assembly established between development and environmental protection. There is no balance in the Department's argument, which ignores the purpose the statute and the *Robinson II* equation.

The Department's definition of "other critical communities" as "special concern species identified on a PNDI receipt" is contrary to the plain language of the statute and therefore is without statutory authority.

[25] 58 Pa.C.S. § 3202(1) (The purposes of this chapter are to: (1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.").

3. The Commonwealth Court Correctly Held the Defined Term "Other Critical Communities" to be Unlawful

The Agencies assert that the Commonwealth Court "failed to start from a presumption of reasonableness" and improperly "substituted its discretion" for that of the Department regarding "other critical communities" in 25 Pa. Code § 78a.1. Appellants' Br. 37. The Commonwealth Court did not substitute its discretion for that of the Agencies, because neither the Court nor the Agencies have "discretion" to adopt or allow regulations that exceed statutory authority. The Court interpreted the plain language of the statute, exercising its judicial function,[26] and concluded the Agencies exceeded their delegated authority.

Again, the Department and EQB have conflated the first and third elements of the legislative rulemaking standard. The first step is to determine statutory authority. *See Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.*, 983 A.2d 1231, 1239 (Pa. 2009). The Commonwealth Court did just that and determined that there is no statutory authority to define "other critical communities" to include "species of special concern." Once a court determines there is no statutory authority, it does not need to evaluate if a regulation is reasonable, the element for which an agency may be accorded deference. Neither

[26] *See Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.*, 983 A.2d 1231, 1239 (2009).

this Court nor the Commonwealth Court must reach the third element of the standard of review if the regulation is invalidated on the first step.

On the other hand, if a court finds statutory authority for a regulation, it must proceed to the other parts of the test for regulatory validity. To succeed, a regulation must meet all three components; to fail, the regulation may fail on any one of the three.

If this Court concludes that the Department has statutory authority for its public resource regulations, it should proceed to determine whether the regulations are reasonable. There is ample evidence in the record and on the face of the regulations to conclude that they fail on the third step as well, in spite of deference that may be given to the Agencies.

4. Requirements Related to "Species of Special Concern" Create a Binding Norm and Violate the Commonwealth Documents Law

The Commonwealth Documents Law ("CDL") requires an agency:

> [G]ive . . . public notice of its intention to promulgate, amend or repeal any administrative regulation. Such notice shall include:
> (1) The text of the proposed administrative regulation, except any portions thereof omitted pursuant to section 4073 (relating to matter not required to be published), prepared in such a manner as to indicate the words to be added or deleted from the presently effective text thereof, if any.
> (2) A statement of the statutory or other authority under which the administrative regulation or change therein is proposed to be promulgated.

> (3) A brief explanation of the proposed administrative regulation or change therein.
> (4) A request for written comments by any interested person concerning the proposed administrative regulation or change therein.
> (5) Any other statement required by law.

The Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, 45 P.S. §§ 1102–1611 (emphasis added).

When regulations change, the public must be provided with notice and an opportunity to comment on such changes. The purpose of the CDL is to provide "an important safeguard against the unwise or improper exercise of discretionary administrative power and includes public notice of a proposed rule, request for written comments, consideration of such comments, and hearings as appropriate." *Commonwealth v. Colonial Nissan, Inc*, 691 A.2d 1005, 1009 (Pa. Cmwlth. 1997).

Regulations that bypass the CDL's notice and comment requirements "are a nullity." *Auto. Servs. Councils of Pa. v. Larson*, 474 A.2d 404, 405 (Pa. Cmwlth. 1984) ("A bypass of the Commonwealth Documents Law's notice provisions would significantly limit the public's input as to future proposed regulations. We therefore hold that this regulation, not being properly promulgated, is a nullity"); *see also Hillcrest Home v. Commonwealth, Dep't of Pub. Welfare*, 553 A.2d 1037, 1040 (Pa. Cmwlth. 1989) ("It is well settled that agency regulations must be promulgated pursuant to the CDL in order to have the force and effect of law").

The Agencies contend that the required use of PNDI to evaluate potential impacts on species under Section 78a.15(f) is a "static" process and therefore the regulation complies with the CDL because only the outcome differs for each permit application. Appellants' Br. 42–46. The Agencies then assert that because permit conditions imposed by the Department can be challenged before the Environmental Hearing Board, the outcome does not evade review.[27]

It is not utilization of the PNDI database that MSC challenges. The regulation violates the CDL because each revision of the special concern species listed in the PNDI database is an unlawful amendment to the Chapter 78a regulation.

Where the mere appearance of non-listed species on PNDI receipt alters the rights and obligations of the permittee, triggering an obligation to consult with jurisdictional agencies and propose mitigation of impact to such species, the well permitting regulation creates evolving obligations without notice and comment rulemaking. Threatened or endangered species in the PNDI database are only legally protected for their particular status after notice and comment rulemaking by the jurisdictional agencies. The Department violates the CDL each time it revises

[27] The other site-specific conditions the Department identifies that comprise a permit application (e.g., proximity to water supplies, identity of landowners and coal owners) are among features expressly identified in Act 13 with respect to the well permit process. The Agencies cite the specific statutory authority for each. Appellants' Br. 43.

the PNDI database by simply elevating non-listed species to a newly protected status.

There is nothing in Act 13 or elsewhere to indicate that the General Assembly intended special concern species to have legally afforded protections without notice and comment rulemaking that applies to all state and federally protected species. The Department admits that it does not incorporate other databases of other environmental features or species into regulations. R. 482a–483a. It cannot do so here.

Evaluating these circumstances, the Commonwealth Court properly concluded:

> Here, the requirements related to "species of special concern" identified on a PNDI receipt violate the Documents Law because they create a binding norm through a changing PNDI database that is not populated through notice and comment rulemaking procedures.

MSC III, 193 A.3d at 477.

Violating the CDL and adopting a definition of "other critical communities" that has no basis in fact or law is unlawful and unreasonable on its face. This Court should affirm the Commonwealth Court's invalidation of the definition of "other critical communities" in 25 Pa. Code § 78a.1.

5. Including "Special Concern Species" in the Definition of "Other Critical Communities" violates the Pennsylvania Constitution, Article III, Section 32.

In its briefing before the Commonwealth Court, MSC argued that the special concern species provisions violate the Pennsylvania Constitution's prohibition against special laws. R. 166a–167a. The Commonwealth Court did not reach this argument because it invalidated the definition of "other critical communities" as beyond the Agencies' legal authority to promulgate regulations. If this Court holds that the Agencies had legal authority to create new legal protections for non-listed species that no jurisdictional agency charged with protection of species has, the Court should invalidate the definition as violating the prohibition against special laws. PA. CONST. art. III, § 32.

When reviewing a legislative enactment to determine if it violates Article III, Section 32:

> Our constitutionally mandated concerns are to ensure that the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and rest[s] upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation. A legislative classification must be based on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition.

Robinson Twp. v. Commonwealth, 147 A.3d 536, 573 (Pa. 2016) (*Robinson IV*).

The Court further noted the demands of such classification:

> A classification will, therefore, not violate Article III, Section 32, if it is one based on 'necessity . . . springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes and imperatively demanding legislation for each class separately that would be useless and detrimental to the others.'

Id. (quoting *Allegheny County v. Monzo*, 500 A.2d 1096, 1105 (Pa. 1985)).

The new obligations related to special concern species are not based on any necessity unique to this industry; there is no manifest peculiarity setting this activity apart from other earth disturbance activities of public or private entities, whether they be residential, commercial or industrial.

In sum, 1) there is no legitimate state interest in allowing the Department or EQB to create new legally mandated protections for species where neither agency has jurisdiction over species and the species to be protected are not listed by notice and comment rulemaking by the jurisdictional state or federal agencies with the authority and expertise to make such decisions, *see Commonwealth v. Colonial Nissan, Inc*., 691 A.2d 1005, 1009 (Pa. Cmwlth. 1997) ("The process by which regulations are promulgated provides an important safeguard against the unwise or improper exercise of discretionary administrative power and includes public notice of a proposed rule, request for written comments, consideration of such comments, and hearings as appropriate"); and 2) the requirement that unconventional well operators must protect unlisted species is not reasonably based on any difference between the unconventional well industry and other industries that justifies

dissimilar treatment. *See Robinson IV*, 147 A.3d at 576 ("the Commonwealth has not identified any difference between the oil and gas industry and the myriad of other industries operating within our Commonwealth . . . and we cannot reasonably hypothesize any such justification"); and 3) Section 78a.15(f) bears no fair and substantial relationship to the overall objectives the General Assembly sought to achieve in its adoption of Act 13. There is no reasoned justification to require the unconventional well industry to protect non-listed species where Act 13 does not regulate species and no other law or regulation imposes such obligations on oil and gas operations. *See Robinson IV*, 147 A.3d at 581 (regulation violated Article III, Section 32 because it did not have a "fair and substantial relationship to the legislative objectives of Act 13").

Lacking legal authority and violating Pennsylvania's prohibition against special laws, the definition of "other critical communities" is void and unenforceable.

III. THE COMMONWEALTH COURT CORRECTLY ENJOINED THE REQUIREMENT FOR THE DEPARTMENT TO CONSIDER COMMENTS BY MUNICIPALITIES ON WELL PERMIT APPLICATIONS

MSC challenged the requirement under Section 78a.15(g) for the Department to consider comments on well permit applications submitted by public resource agencies, where the definition of "public resource agency" includes "municipalities." 25 Pa. Code §§ 78a.1 and 78a.15(g). The Commonwealth Court

correctly held this requirement to be unconstitutional and unenforceable, reasoning that because this Court invalidated Section 3215(d) of Act 13[28] in its *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013) (*Robinson II*) decision, there is no underlying authority for this requirement. *MSC III*, 193 A.3d at 484.

The Agencies contend that even though this Court struck down Section 3215(d), the Commonwealth Court misread *Robinson II* and the Department's consideration of municipal comments nevertheless is authorized by surviving sections of Act 13 and the Clean Streams Law, the Solid Waste Management Act, and the Dam Safety and Encroachments Act. That argument is incorrect.

The Commonwealth Court did not misread *Robinson II*. This Court plainly held that Section 3215(d) violates the Environmental Rights Amendment. *Robinson II*, 83 A.3d at 985, 1000. The Commonwealth Court cited and discussed the very pages of this Court's opinion invalidating Section 3215(d). *MSC III*, 193 A.3d at 483–84.

The Agencies are trying to save the regulation through the back door. Section 3215(d) of Act 13 was the direct statutory authorization for the Department to consider comments on well permit applications submitted by municipalities—it

[28] Section 3215(d) states: "Consideration of municipality and storage operator comments. The department may consider the comments submitted under section 3212.1 (relating to comments by municipalities and storage operators) in making a determination on a well permit. Notwithstanding any other law, no municipality or storage operator shall have a right of appeal or other form of review from the department's decision." 58 Pa.C.S. § 3215(d).

provided that "the department may consider comments submitted under section 3212.1 [by municipalities] in making a determination on a well permit."

With section 3215(d) now gone, the Agencies assert that new authority springs to life through a combination of Section 3202 (general purpose of Act 13), Section 3215(c) (public resources) and Section 3274 (general delegation of rulemaking power). As discussed in Section II.A.2 above, general rulemaking authority and a declaration of purpose are not a license to adopt any regulation that it purports to protect the environment, particularly when the very statutory provision purportedly authorizing the Department's regulation has been declared unconstitutional. That would violate the delegation of powers principle. *See Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833–34 (2017) (explaining the limitations set by the Constitution on the General Assembly's ability to grant authority to agencies). This is particularly salient regarding the Commonwealth's argument concerning the Clean Streams Law, the Solid Waste Management Act, and the Dam Safety and Encroachments Act, none of which pertains to oil and gas drilling.

In conclusion, any regulation promulgated pursuant to an unconstitutional statute or statutory provision must fail, as there is no valid statutory authority for that regulation. *See Northwestern Youth Servs., Inc. v. Commonwealth, Dep't Pub. Welfare*, 66 A.3d at 310 ("Commonwealth agencies have no inherent power to

make law or otherwise bind the public or regulated entities. Rather, an administrative agency may do so only in the fashion authorized by the General Assembly."). As explained by the Commonwealth Court, "[d]espite their best intentions, courts may not rewrite a statute or insert words to make it conform to constitutional requirements,"[29] and the same is true for agencies, who may only act "within the strict and exact limits defined by the statute" that granted rulemaking power to the agency. *Pennsylvania Med. Soc. v. Commonwealth, St. Bd. Med.*, 546 A.2d 720, 722 (Pa. Cmwlth. 1988). Regulations promulgated pursuant to facially unconstitutional provisions are invalid and there are no exceptions to this rule. *See Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, A.2d 1033, 1043 (Pa. 2006) ("[A]n unconstitutional statute is ineffective for any purpose."); *MSC III*, 193 A.3d 447, 484 (Pa. Cmwlth. 2018) ("Thus, we are constrained to conclude that Section 78a.15(g)'s requirement . . . fails absent statutory authority.").

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the Opinion and Order of the Commonwealth Court.

[29] *MSC III*, 193 A.3d at 484.

Respectfully submitted,

BABST, CALLAND, CALLAND
AND ZOMNIR, P.C.

By /s/ Jean M. Mosites
Jean M. Mosites
PA I.D. No. 206546

By /s/ Kevin J. Garber
Kevin J. Garber
PA I.D. No. 51189

Two Gateway Center
Sixth Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Appellee,
The Marcellus Shale Coalition

Date: December 15, 2021

CERTIFICATION OF COMPLIANCE PURSUANT
TO Pa. R.A.P. 2135(d)

The undersigned hereby certifies that the Brief of Appellee The Marcellus Shale Coalition complies with the 14,000 word count limit set forth in Pa. R.A.P. 2135(a). This certification is based on the word count of the word processing system used to prepare the brief.

s/ Jean M. Mosites
Jean M. Mosites

Babst, Calland, Clements
and Zomnir, P.C.
Two Gateway Center
Sixth Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Appellee,
The Marcellus Shale Coalition

December 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2021, a true and correct copy of the foregoing was served electronically on Appellants, as follows:

Diana J. Stares, Chief Counsel
Nels J. Taber
Elizabeth A. Davis
Department of Environmental Protection
Office of Chief Counsel
400 Market Street, 16th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464

Robert A. Reiley
Director, Bureau of Regulatory Counsel
Counsel for Environmental Quality Board
400 Market Street, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464

s/ Jean M. Mosites
Jean M. Mosites

Babst, Calland, Clements
and Zomnir, P.C.
Two Gateway Center
Sixth Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Appellee,
The Marcellus Shale Coalition