1

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

No. J-55-2022

Supreme Court of Pennsylvania

April 19, 2023

ARGUED: September 15, 2022

Appeal from the Order of the Commonwealth Court at No. 573 MD 2016 dated August 12, 2021.

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

OPINION

DONOHUE, JUSTICE

In this appeal as of right, we are asked to pass upon the breadth of the legislative rulemaking authority given to the Department of Environmental Protection (the "Department") and the Environmental Quality Board (the "Board") (collectively, the "Agencies") by the General Assembly in the Pennsylvania Oil and Gas Act of 1984.[1] The Agencies submit that the Commonwealth Court erroneously concluded that they exceeded their authority and consequently struck down certain regulations designed to aid the Agencies in information gathering attendant to the issuance of permits for new

2

unconventional gas wells. For the following reasons, we find that the General Assembly intended to give the Agencies the leeway to promulgate the challenged regulations and that those regulations are reasonable. We therefore reverse the Commonwealth Court.

I. Procedural History

The instant petition for review was one of many lawsuits concerning Act 13 of 2012, which amended Pennsylvania's Oil and Gas Act. "Act 13 comprises sweeping legislation affecting Pennsylvania's environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale." *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 913 (2013) (OAJC). The oil and gas industry uses two primary methods to extract natural gas, both of which "inevitably do violence to the landscape." *Id*. at 914. In enacting Act 13, "the General Assembly has made a policy decision respecting encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation[.]" *Id*. at 928.

Act 13 included the grant of authority by the General Assembly to the Agencies to promulgate regulations for unconventional gas wells. On December 14, 2013, the regulations were first published for public comment. Over 28,000 public comments were received and considered, with 429 individuals testifying across twelve public hearings. In 2016, the Board published regulations pertaining to applications for a permit to drill an unconventional gas well.

On October 13, 2016, the Marcellus Shale Coalition (the "MSC") filed a Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief (the "Petition"). The Petition raised seven counts, only one of which is at issue in this appeal.[2]

3

That count pertained to portions of the regulations set forth at Sections 78a.1 and 78a.15. Each challenged regulatory provision

interacts to some degree with Section 3215 of the Oil and Gas Act of 2012,[3] titled "Well location restrictions." 58 Pa.C.S. § 3215. The following portion of that statute directs the Agencies to consider certain "public resources" when deciding whether to approve a well:

> **(c) Impact.--**On making a determination on a well permit, the department shall consider the impact of the proposed well on **public resources**, including, but not limited to:
>
> (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**.

4

> (5) Historical and archaeological sites listed on the Federal or State list of historic places.
>
> (6) Sources used for public drinking supplies in accordance with subsection (b).

58 Pa.C.S. § 3215(c) (emphases added).

The regulations governing applications for a well permit require applicants to submit the applications "electronically to the Department on forms provided through its web site and contain the information required by the Department to evaluate the application." 25 Pa. Code § 78a.15(a). The required information includes information pertaining to specific "public resources[,]" with corresponding obligations to notify any applicable "public resource agency" managing those public resources. *Id.* § 78a.15(f). In turn, other regulations expand on the concepts of "public resources" and "public resource agencies." Beginning with "public resources," the General Assembly did not separately define that term in Act 13, nor did the Agencies in the regulations. Instead, within Section 78a.15(f)(1), the Agencies listed eight specific "public resources," two of which are challenged by the MSC. The first, found in Section 78a.15(f)(1)(iv), is "other critical communities." The term "other critical communities" is defined in the "Definitions" regulation as follows:

> *Other critical communities* -
>
> (i) Species of special concern identified on a [Pennsylvania Natural Diversity Inventory ("PNDI")] receipt,[4] including plant or animal species:

5

> (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.

The second, found in Section 78a.15(f)(1)(vi), applies to proposed well sites "[w]ithin 200 feet of common areas on a school's property or a playground." Like "other critical communities," the term "common areas of a school's property" was not defined by

6

the General Assembly, but it is defined in the regulations. It is defined as "[a]n 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." 25 Pa. Code § 78a.1. "Playground" is separately defined as either an "outdoor area provided to the general public for recreational purposes," or

"community-operated recreational facilities." *Id*.

If the proposed well "may impact" any of these "public resources," the applicant "shall notify the applicable public resource agency, if any[.]" 25 Pa. Code § 78a.15(f). The notification requirements are delineated by regulation:

> (2) The applicant shall notify the public resource agency responsible for managing the public resource identified in paragraph (1), if any. The applicant shall forward by certified mail a copy of the plat identifying the proposed limit of disturbance of the well site and information in paragraph (3) to the public resource agency at least 30 days prior to submitting its well permit application to the Department. The applicant shall submit proof of notification with the well permit application. From the date of notification, the public resource agency has 30 days to provide written comments to the Department and the applicant on the functions and uses of the public resource and the measures, if any, that the public resource agency recommends the Department consider to avoid, minimize or otherwise mitigate probable harmful impacts to the public resource where the well, well site and access road is located. The applicant may provide a response to the Department to the comments.

25 Pa. Code § 78a.15(f)(2).

As used in the regulations, the term "public resource agency" does not refer exclusively to government entities. *But see* 2 Pa.C.S. § 101 (section of Administrative Law and Procedure title defining "agency" as "a government agency"). Instead, the Agencies defined the term to include both governmental agencies and private actors (albeit limited to private actors responsible for managing a corresponding regulatory "public resource"):

> An entity responsible for managing a public resource identified in § 78a.15(d) or (f)(1) (relating to application requirements) including the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, the United States Fish and Wildlife Service, the United States National Park Service, the United States Army Corps of Engineers, the United States Forest Service, counties, **municipalities and playground owners**.

25 Pa. Code § 78a.1 (emphasis added).

Finally, the regulation codified at 25 Pa.Code § 78a.15(g) specifies that the Department will consider several factors before issuing a permit based on potential impacts to public resources:

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

25 Pa. Code § 78a.15(g).

8

II. Agency Law

Before examining the specific challenges to these regulations and the Commonwealth Court's opinion, a brief overview of agency law principles is helpful. "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[.]" *Nw. Youth Servs., Inc. v. Commonwealth, Dep't of Pub. Welfare*, 66 A.3d 301, 310 (Pa. 2013).

The General Assembly typically authorizes an agency to wield legislative rulemaking powers "by way of recourse to procedures prescribed in the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act." *Id*.[5]"These enactments comprise the core of Pennsylvania's scheme for notice-and-comment rulemaking by administrative agencies and legal and regulatory review by the Attorney General and the Independent Regulatory Review Commission[,]" *id*. at 305 n.2, and regulations promulgated under those circumstances represent "the product of an exercise

9

of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body, and [are] valid and as binding upon a court as a statute," *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission*, 730 A.2d 935, 942 (Pa. 1999), provided that the rule meets three requirements.

Specifically, the rule must be "(a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *Tire Jockey Serv., Inc. v. Commonwealth, Dep't of Env't Prot.*, 915 A.2d 1165, 1186 (Pa. 2007) (citation and footnote omitted). Notably, "[p]roperly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high measure of deference-often denominated *Chevron*[6] deference-by reviewing courts." *Nw. Youth Servs.*, 66 A.3d at 311 (citation omitted).[7] We add that Pennsylvania administrative law principles are rooted in federal precedents. *Id*. at 313 n.16 (noting that "Pennsylvania decisions in the administrative-law field are so closely grounded upon earlier federal cases"); *see also Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 686 (Pa. 2020) (Wecht, J., concurring) ("In matters of agency deference, this Court historically has chosen (by volition rather than by command) to take its cues from federal law.") (citations omitted). As noted above, the term "*Chevron* deference" refers to the United States Supreme Court's seminal decision in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), which stated that federal law had "long recognized that

10

considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.]" *Id*. at 844 (footnote omitted).

Importantly, when a legislative branch "has directly spoken to the precise question at issue[,]" that unambiguous intent must be followed by both courts and the agency. *Id*. at 842-43. However, where the legislative branch has not directly addressed the issue, a different rule applies:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnotes omitted).

This Court has never declared that we follow federal agency law principles in lockstep. Agency issues appear in a dizzying array of contexts and "[a] pervading question in this field, of course, is how much deference is due in any given context." *Harmon v. Unemployment Comp. Bd. of Rev.*, 207 A.3d 292, 308 (Pa. 2019) (Saylor, C.J, concurring). Various Justices, including the author of this opinion, have expressed the view that our courts should, if not must, depart from federal law in some circumstances. *Id*. at 309 ("In my view, while an administrative agency's interpretation of a statute is one of many factors that a court may consider when interpreting an ambiguous statute, it is not entitled to any deference in the interpretative process.") (Donohue, J., concurring); *id*. at 310 ("As I have explained in the past, I do not agree that reviewing courts should afford what often amounts to unqualified deference-*i.e.*, *Chevron* deference-to an executive-branch agency's interpretation of an ambiguous statute.") (Wecht, J., concurring)

(footnote omitted); *Commonwealth, Dep't of Educ. v. Empowerment Bd. of Control of Chester-Upland Sch. Dist.*, 938 A.2d 1000, 1014 (Pa. 2007) (Baer, J., concurring) ("While I agree that the Secretary enjoys a great deal of latitude in administering the Code, I do not believe that ... administrative interpretations forwarded for the first time in connection with adversarial litigation, are entitled to any more weight than any other litigant's argument[.]").

Our *Crown Castle* decision recognized that this Court has never expressly adopted the federal *Chevron* approach; instead, we have said that *Chevron* "is indistinguishable from our own approach to agency interpretations of Commonwealth statutes." *Crown Castle*, 234 A.3d at 679 n.11 (quoting *Seeton v. Pa. Game Comm'n*, 937 A.2d 1028, 1037 n.12 (Pa. 2007)). While the term *Chevron* does not appear in the briefs, the parties invoke that principle and its rationale. Agencies' Brief at 25 ("Courts must accord deference to an agency promulgating a legislative rulemaking.") (indirectly citing *Chevron*); MSC's Brief at 49 (asserting that even if this Court finds statutory authority, the regulations still fail) ("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."). As a result, our analysis will draw on federal law for its persuasive value where appropriate.

III. The Commonwealth Court Decision

The MSC challenged the regulations at issue as "unlawful, illegal, void and unenforceable" for a variety of reasons. Petition for Review, 10/13/2016, at 9, ¶ 34. The fundamental proposition advanced within the Petition was that these regulations served to "inject[] an entirely new, back door, 'pre-permitting' scheme into the oil and gas well

permitting process without statutory authority." *Id*. at 12, ¶ 38. The MSC contended that four specific definitions-public resource agencies, common areas of school property, playgrounds, and other critical communities-are unlawful. "There is no statutory authority for Section 78a.15(f) or the related definitions in Section 78a.1." *Id*. at 14, ¶ 44-a. The MSC argued that "Act 13 does not authorize newly defined 'public resource agencies' or others not referenced in Act 13 to comment upon or object to a well permit application[.]" *Id*. ¶ 44-c. The central premise underlying the MSC's arguments for all four challenges was that, absent express statutory authority, the Agencies were limited to employing the Section 3215 criteria.

The Commonwealth Court acknowledged that substantive rulemaking by agencies is a widely used administrative practice but cautioned that this "authority is not unfettered." *Marcellus Shale Coalition*, 193 A.3d at 462-63.

> Where an agency creates a rule pursuant to its interpretative powers, "a court shall only defer to the rule if it is reasonable and

> 'genuinely tracks the meaning of the underlying statute.'" *Bailey*, 801 A.2d at 500 (quoting *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 712 A.2d 741, 743 (1998)). A court cannot substitute its own judgment for that of the agency. *Uniontown Area Sch. Dist.*, 313 A.2d at 169. However, no deference is due where an agency exceeds its legal authority or its interpretation is clearly erroneous. *See Tire Jockey*, 915 A.2d at 1186; [*Eagle Environmental II, L.P. v. Department of Environmental Protection*, 884 A.2d 867, 878 (Pa. 2005)]

Id. at 462-63.

The Commonwealth Court began its substantive analysis by addressing the statutory authority conferring legislative rulemaking powers to the Agencies. Section 3274 contains an express grant: "The Environmental Quality Board shall promulgate

13

regulations to implement this chapter." 58 Pa.C.S. § 3274. Additionally, Sections 3211 and 3212 "provide express requirements for well permit applicants to provide notice to certain enumerated parties and objection opportunities for a subset of such parties." *Marcellus Shale Coalition*, 193 A.3d at 465; *see also* 58 Pa.C.S. §§ 3211-3212. Additionally, the Commonwealth Court recognized that the "[w]ell location restrictions" codified at Section 3215 were a pertinent source of authority. *See* 58 Pa.C.S. § 3215.

"*Other critical communities*"

Starting with the Agency's definition of "other critical communities," the panel explained that the Chapter 78a defined the term for the first time to include any "species of special concern" as identified on a PNDI receipt. The panel addressed the validity of the regulation by reference to traditional tenets of statutory construction. "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." *Marcellus Shale Coalition*, 193 A.3d at 470-71. The Commonwealth Court stated that its analysis was "also guided by the doctrine of ejusdem generis, which means 'of the same kind or class.'" *Id*. at 472 (quoting *Dep't of Env't Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014)).

The court commenced its analysis by observing that "key modifiers of the specified items are 'rare,' 'endangered' and 'critical.'" *Id*. Additionally, the panel observed that the term "other critical communities" had not appeared in other statutory contexts, but the term "critical habitat" has. *Id*. Using the common and approved usage of those terms, the court essentially concluded that the General Assembly intended consideration of something threatened with extinction or in a crisis state.

14

The opinion then applied the ejusdem generis canon of construction to determine whether the Agencies' regulatory term "species of special concern" within the definition of "other critical communities" was "of the same general nature or class as the statutory items listed" in Section 3215(c). *Id*. at 473. It determined that the regulatory definition was "not quite on par with the statute's terms," and that the regulation itself states that "species of special concern" refers to species that are "'proposed' to be endangered or threatened, or their status is undetermined." *Id*. Therefore, "[i]t does not appear that 'species of special concern' is of the same general nature or class as the statutory items listed." *Id*.

The court concluded that its interpretation was logical "when one considers the purpose of Act 13 and the balance that must be struck between oil and gas and environmental interests." *Id*. at 475. The court cited the purpose of the Act, which is "to permit the optimal development of oil and gas resources in this Commonwealth consistent with the

protection of the health, safety, natural resources, environment and property of the citizenry." *Id*. (citing 58 Pa.C.S.§ 3802). "By creating obligations tied to species of special concern, which are not at the same level of risk as threatened or endangered species, the regulation upsets the balance between industry and the environment strived for in Act 13." *Id*. at 476.

The Commonwealth Court also determined that the regulatory definition of "other critical communities" violates the Documents Law, 45 P.S. §§ 1102-1208. Citing 45 P.S. §§ 1201 (explaining the public notice requirements that an agency must follow when it promulgates, amends, or repeals an administrative regulation) and 1202 (stating, inter alia, that, before an agency takes action on or changes a regulation, it must review and

15

consider written comments and hold public hearings), the intermediate court observed that the Documents Law mandates that an agency must enact a regulation through formal notice and comment procedures to ensure that the regulation has the full force of law; otherwise, the regulation is a nullity. *Id*. The court opined that, 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."[8] *Id*. at 477.

The Commonwealth Court bolstered this conclusion by highlighting that, unlike resources included in the PNDI database, threatened and endangered species must endure formal regulatory review procedures. According to the court, "provisions tied to the PNDI receipt effectively allow third parties to make changes to the regulation without meeting the requirements of formal rulemaking." *Id*. These third parties include the Department of Conservation and Natural Resources, the Game Commission, the Fish

16

and Boat Commission, and the Pennsylvania field office of the United States Fish and Wildlife Service.

The Commonwealth Court reasoned that the "insertion of obligations tied to an ever-changing list of species creates requirements that evolve over time while evading public notice and comment rulemaking." *Id*. In the intermediate court's view, the regulation improperly evades "rulemaking formalities by engaging in policymaking through non-legislative avenues." *Id*. The court, therefore, held that the "special concern species" provisions violate the Documents Law.

"*Common areas of a school's property and a playground*"

The Commonwealth Court next addressed whether the requirement "to identify and provide information concerning 'common areas of a school's property or a playground' in a well permit application as well as the definition of these terms in Section 78a.1 is unlawful and unenforceable." *Id*. at 478. As with the foregoing analysis, the court addressed whether "common areas of a school's property and a playground" were of the same kind or class as the items contained in the General Assembly's statutory list of "public resources." *Id*. The court determined that the statutory items were all of the same general class or nature "in that they are all public in nature, albeit not necessarily publicly owned." *Id*. at 479. For example, buildings on the historic register "may be located on privately owned property, but they are not purely private property." *Id*. (citing *Robinson Township*, 83 A.3d at 955). It reasoned, however, that these two items-the common areas of a school's property and a playground-were not of the same class:

> Although common areas of a school's property and playgrounds may share some similarities with the public resources listed in Section 3215(c), we agree with the [MSC] that they are not within the "same general

class or nature as"

17

their statutory counterparts. With regard to schools, virtually any school would fall within the definition of "school," such as career and technical centers, culinary schools, charter schools, community colleges, private-licensed school, driver-training school, vocational schools, etc. The list is seemingly endless as any institution providing some form of educational services would ostensibly qualify as a "school" under the regulatory definition. As for the recreational aspect, a mere picnic table and bench or basketball hoop accessible to the public would bring the school's property within the purview of the regulation.

As for playgrounds, again the definition is so broad as to defy quantification and compliance. The definition embraces publicly and privately owned "playgrounds." It obviously includes children's playgrounds, sports fields, and picnic sites. However, it also includes virtually any area open to the public for recreational purposes, including commercial enterprises, such as shopping centers, movie theaters, sports stadiums, amusement parks, and golf courses. Even a playground adjoining a McDonald's eatery would qualify as a "public resource" under the regulation. The sheer diversity of these resources renders the regulation unreasonable.

Id. at 480-81.

Playground owners and municipalities as "public resource agencies"

Finally, the Commonwealth Court determined that the Agencies' definition of "playground owners" as a "public resource agency" entitled to comment exceeded the scope of the statute. It also determined that "municipalities" could be defined as a "public resource agency," but struck the regulation requiring the Department to consider municipality input.

Beginning with the latter regulation, the Commonwealth Court held that Section 78a.15(g)(4) was invalid. The regulatory definition of "public resource agency" includes municipalities, and thus, this regulation requires the Department to consider any comments submitted by the municipality. With respect to municipalities, the

18

Commonwealth Court explained that subsection (d) of Section 3215 is a specific grant of statutory authority for agency action regarding municipality comments. However, in *Robinson Township*, this Court held that Section 3215(d) was unconstitutional because it did not obligate the Department to consider comments from municipalities. *Marcellus Shale Coalition*, 193 A.3d at 483 (citing *Robinson Township*, 83 A.3d at 984). The Commonwealth Court observed that the regulation "appears to succeed where Section 3215(d) of Act 13 failed by providing that the Department 'will' consider such comments and recommendations," but "because the Supreme Court enjoined application and enforcement of Section 3215(d), there is no statutory authority for the regulation." *Id*. at 484. Absent statutory authority, that portion of the regulation failed.

Separately, the Commonwealth Court examined whether the definition of "public resource agency" was valid. As to the inclusion of municipalities, the court determined that its inclusion "is within the power bestowed under Act 13" because, as a local governmental unit, a municipality has trustee duties under the Environmental Rights Amendment.[9] *Id*. at 485. That regulation was also reasonable because identifying the

19

municipality in which the well will be located is readily ascertainable. "Municipalities have identifiable points of contact for notification purposes. Thus, the inclusion of municipalities in the definition is not unreasonable." *Id*.

The Commonwealth Court struck the inclusion of playground owners as a public resource agency upon consideration of the same concepts. Unlike municipalities, playground owners "are not 'trustees' with any duties or obligations to protect the environmental trust under Article I, Section 27 of the Pennsylvania Constitution or Act 13. The Agencies have no authority to elevate private entities as public agencies responsible for ensuring the public trust." *Id*. The Commonwealth Court added:

> Moreover, playground owners are not readily identifiable. For starters, the regulatory definition bears an internal ambiguity. The actual "owner" of the playground may not necessarily be the "entity responsible for managing" the playground. *See* 25 Pa. Code § 78a.1. For instance, a playground may be owned by one entity and managed by another. Under the definition, it is unclear which would be the "public resource agency" for notification purposes.
>
> Under either interpretation, identifying and notifying the appropriate contact may be impossible, if not extremely burdensome. Unlike the other public resources listed in Section 3215(c), "playgrounds" are not governed by singular government agencies that can be easily identified and notified during the well permitting process. A "playground owner" may be a corporation, homeowners' association, estate, trust, or private citizen. Even if the playground owner is identified, the point of contact for such private "owners" may be unknown, unidentified, or unlisted. Requiring a permit applicant to identify and notify "playground owners" is unduly burdensome and unreasonable. And, considering our problem with the regulatory definition of "common areas of a

20

> school's property" and "playgrounds," as discussed above, the definition of "public resource agency" to the extent it includes owners of such recreational areas fails by extension. For these reasons, we conclude that the addition of "playground owners" as a public resource agency is unlawful and unenforceable.

Id. (footnote omitted).

IV. Issues Presented

The Agencies appealed and present the following questions for our review:

a. Did the Commonwealth Court improperly grant partial summary relief by declaring that the definitions of "other critical communities," "common areas of a school's property," and "playground," as set forth in 25 Pa. Code § 78a.1, are void and unenforceable?

b. Did the Commonwealth Court improperly grant partial summary relief by declaring that including "playground owners" in the definition of "public resource agency," as set forth in 25 Pa. Code § 78a.1, is void and unenforceable?

c. Did the Commonwealth Court improperly grant partial summary relief by declaring that the

> Department's consideration of comments and recommendations submitted by municipalities as "public resource agencies," as provided for in 25 Pa. Code § 78a.15(g), is unconstitutional and unenforceable because the Supreme Court's decision in *Robinson Township v. Commonwealth* ... invalidated ... Section 3215(d)?

Agencies' Brief at 4.

V. Parties' Arguments

Agencies

The Agencies assert that the Commonwealth Court misapplied agency law principles by employing principles germane only to interpretive, rather than legislative, rulemaking. A regulation adopted under legislative powers "is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b)

21

issued pursuant to proper procedure, and (c) reasonable." *Tire Jockey*, 915 A.2d at 1186. The Agencies point out that the regulations went through all legislative rulemaking requirements, Agencies' Brief at 20-21, and the Commonwealth Court rejected the MSC's claim that the promulgation procedure was flawed. Therefore, the first two prongs are satisfied, and the only remaining question was whether the challenged regulations are reasonable.

The Agencies argue that when examining the challenged definitions, the Commonwealth Court did not address the reasonableness of the regulations. Instead, the court "improperly commingled the legislative and interpretative rulemaking tests." *Id.* at 21. This is evident from the opinion's conclusion that the Agencies' regulations "do[ ] not track the statute," which the Agencies state is a concept relevant only to interpretive rulemaking. *See Pa. Hum. Rels. Comm'n v. Uniontown Area Sch. Dist.*, 313 A.2d 156, 169 (Pa. 1973) ("An interpretative rule ... depends for its validity not upon a law-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets."). Here, though, the question is not whether the Agencies' expansion of "public resources" tracks the meaning of the statute enacted by the legislature but instead simply whether the Agencies were authorized to add items to the list of "public resources" and "public agencies," and, if so, whether the additions were reasonable.

Viewing the legal question as a pure question of legislative rulemaking, the Agencies argue that their Chapter 78a regulations constituted a valid exercise of their authority, which was granted to the Agencies via several statutory sources. *See* Agencies' Brief at 22. The Agencies cite *Eagle Environmental II, L.P. v. Department of Environmental Protection,*

22

884 A.2d 867 (Pa. 2005), as a case establishing that agencies can have broad powers based on statutory purpose. *Eagle Environmental* "established two core principles of administrative law. First, a regulation, by definition, may, and should, be more detailed and specific than a statute. Second, a regulation falls within an agency's granted authority so long as it is encompassed by the intended purposes of the statute and the agency's rulemaking authority." Agencies' Brief at 25 (citing *Eagle Environmental*, 884 A.2d at 879). The Agencies contend that the challenged regulations are encompassed by the intended purposes of the Oil and Gas Act.

The Agencies then ask this Court to determine that the regulations are reasonable. They emphasize that because the General Assembly conferred "broad rulemaking authority[,]" the regulations are entitled to great deference. The Agencies explain in detail how the regulations are consistent with the purposes of the authorizing statutes. They contend that each challenged definition serves a screening function that ensures that the Department possesses all the information it needs to consider potential impacts of a proposed

unconventional well. The Agencies state that they must consider a large amount of data to protect the public from the potential harms from drilling activities, and the Agencies also note that they have constitutional duties related to the Article I, Section 27 trust. The information demanded by the regulations facilitates the balancing that is the purpose of the Oil and Gas Act.

The panel's determination that the terms were void and unenforceable stemmed, in the Agencies' view, from its failure to recognize that the Agencies possessed broad legislative rulemaking authority. The Commonwealth Court could strike down the regulations under the first prong of the legislative rulemaking test only if the Agencies

23

exceeded their powers. If the Agencies did not exceed those powers, then the balance to be struck between oil and gas development and environmental interests is for the agency to decide.

The Agencies additionally assert that their definition of "other critical communities" is a reasonable implementation of their obligations. A deputy secretary testified that the "other critical communities" definition promulgated "codif[ied] the practice in place prior to the rulemaking." Agencies' Brief at 40. Additionally, the PNDI database itself reflects decisions from other agencies-the Department of Conservation and Natural Resources, Pennsylvania Fish and Boat Commission, and the Game Commission-that certain species are of concern. The Agency's decision to adopt their views "reflects a measured and appropriate extension of the non-exhaustive statutory list under Section 3215(c) due to the features they share with other listed resources." *Id*.

Regarding the Commonwealth Court's conclusion that this portion of the regulations violates the Documents Law, the Agencies characterize the court's interpretation of this act as "extreme." *Id*. at 44. The Agencies agree that the Documents Law dictates that agencies must give public notice when they intend to promulgate, amend, or repeal regulations. Indeed, the Agencies observe that, "[w]hen an agency creates a 'binding norm,' for example through a policy statement or guidance document, without following this formal rule making process, it is considered an improperly promulgated regulation, beyond an agency's authority." *Id*.

The Agencies submit that the Commonwealth Court erred by concluding that their incorporation of the PNDI process in the definition of "other critical communities" created an improper "binding norm." The Agencies note that PNDI receipts will be unique to every

24

potential well site; however, they suggest that the court incorrectly concluded that this type of process in a regulation can be characterized as imposing an improper binding norm simply because the outcomes of the process will vary on a case-by-case basis.

Regarding the inclusion of "municipalities and playground owners" as public resource agencies, the Agencies reiterate their fundamental argument that their regulatory powers are quite broad, and there were viable statutory sources of authority for these regulations.

MSC

The MSC responds that the Commonwealth Court did not commingle the legislative and interpretative tests as indicated by the opinion's structure. It argues that the court clearly distinguished legislative rulemaking "from interpretive rulemaking. The [c]ourt structured its opinion by beginning its analysis of each issue under the heading 'Statutory Authority' and then determining [sic] whether the Agencies had legislative authority for the challenged regulation under the first step of the legislative rulemaking standard." MSC's Brief at 10-11 (citation omitted). Additionally, if the court "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." *Id*. at 13. Thus, the MSC argues, the Commonwealth Court did not fundamentally misapply agency law.

The MSC submits that the Commonwealth Court correctly decided that the Agencies exceeded their statutory authority. "The heart of the question on appeal is whether the General Assembly granted the [Agencies] the authority to promulgate their new regulatory definitions of 'common areas of a school's property,' 'playground,' 'other

25

critical communities' or 'public resource agency' in 25 Pa. Code § 78a.1[.]" MSC's Brief at 13. According to the MSC, the new regulatory definitions "substantially alter the well permit application process[.]" *Id*. Addressing the legislative grant of rulemaking authority, the MSC argues that the Commonwealth Court's result is correct. The MSC cites *Insurance Federation of Pennsylvania v. Commonwealth, Department of Insurance*, 889 A.2d 550, 555 (Pa. 2005), *Deoria v. State Athletic Commission*, 962 A.2d 697 (Pa. Commw. 2008), and *Rand v. Pennsylvania State Board of Optometry*, 762 A.2d 392 (Pa. Commw. 2000), as three cases establishing that agencies must be clearly authorized to wield the asserted powers.

The MSC describes *Eagle Environmental* as expressing "a narrower statement of the necessary evaluation of statutory authority," which relied on the purpose of the statute and its reasonable effects. MSC's Brief at 15. It further distinguishes *Eagle Environmental* on several grounds, as discussed later in more detail. The MSC also avers that a "delegation of rulemaking power must be 'clear and unmistakable' because a 'doubtful power does not exist.'"*Id*. at 17 (citation omitted). As to the interaction between the regulatory definition of "other critical communities" and the Documents Law, the MSC essentially agrees with the Commonwealth Court's conclusion that the regulation violates the law due to the fluid nature of the PNDI database and the fact that changes to the database are not subject to any notice or comment requirements. MSC's Brief at 38-42; *id*. at 49-52.

VI. Analysis

Although stressed by the Agencies, we do not find it helpful to parse the Commonwealth Court's analysis to determine whether it "commingled" the legislative

26

rulemaking or interpretive rulemaking tests. This type of analysis loses sight of the key question, which is simply whether the Agencies acted within their statutory grant of authority. If the statute makes a clear grant of authority, then neither a court nor the agency can disregard the clearly expressed intent of the General Assembly.

The Agencies argue that this is a legislative rulemaking case and not an interpretive rulemaking case. The MSC acknowledges that point and insists that the Agencies want to skip to reasonableness review without addressing statutory authority. Whether we label this a legislative rulemaking dispute or an interpretive rulemaking dispute (with the relevant interpretation involving the statutes that purportedly authorize the legislative rulemaking), at the end of the day the **only** point that matters is whether the Agencies were authorized to act.

The Agencies unquestionably have the authority to promulgate regulations, and therefore we must simply determine how much regulatory leeway the General Assembly intended to confer. *See* Agencies' Brief at 14 (stating that the "Commonwealth Court failed to analyze the Public Resource Definitions in accordance with *Tire Jockey*"); MSC's Brief at 10 (explaining that "MSC agrees this is case of legislative rulemaking"). Provided that the Agencies were authorized to promulgate the regulations, the regulations are valid so long as they are reasonable. *See Tire Jockey Serv., Inc.,* 915 A.2d at 1186.

A.

Statutory ability to define "public resources"

The first issue relates to whether the Commonwealth Court erred by striking the Agencies' definitions of "other critical communities," "common areas of a school's

27

property," and "playground." Each of these definitions involves 25 Pa. Code §§ 78a.15 and 78a.1. For ease of discussion, we review the relevant language here.

Section 78a.15(f)(1) applies to an "applicant proposing to drill a well at a location that may impact a public resource," followed by eight items that qualify as a "public resource." *See* 25 Pa. Code §§ 78a.15(f)(1)(i)-(viii). Of these eight, the MSC challenged two. The first is Section 78a.15(f)(1)(iv), which applies to well permits "[i]n a location that will impact other critical communities." The second challenged definition is set forth at Section 78a.15(f)(1)(vi) and applies to proposed well sites "[w]ithin 200 feet of common areas on a school's property or a playground." The definitions section of the regulations defines the key terms "other critical communities," "common areas of a school's property," and "playground." *See* 25 Pa. Code § 78a.1.

This Commonwealth follows the *Chevron* approach, which asks at the outset whether the General Assembly "has directly spoken to the precise question at issue. If the intent … is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent[.]" *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Commonwealth Court's analysis ascertained a limitation on the Agencies' regulatory authority in Act 13 by the General Assembly's use of the phrase "including, but not limited to" in Section 3215(c). To determine whether the General Assembly clearly limited the Agencies' ability to define additional "public resources" by the use of this phrase, we naturally begin with the statutory text.

"Our standard of review for questions of statutory interpretation is de novo and our scope of review is plenary." *Matter of Priv. Sale of Prop. by Millcreek Twp. Sch. Dist.*,

28

185 A.3d 282, 290 (Pa. 2018) (citation omitted). "In general, the best indication of legislative intent is the plain text of the statute." *Commonwealth v. Griffith*, 32 A.3d 1231, 1235 (Pa. 2011). This raises the question of what statutory provision is being examined. The General Assembly conferred broad regulatory powers upon the Agencies, as indicated by Section 3274's express grant: "The Environmental Quality Board shall promulgate regulations to implement this chapter." 58 Pa.C.S. § 3274.

However, regarding these three challenged definitions, the focus throughout this litigation has understandably centered on Section 3215 ("Well location restrictions"), and its instruction to the Agencies to "consider the impact of the proposed well on public resources," followed by the generic language "included, but not limited to," which is then followed by six specific items.[10] 58 Pa.C.S. § 3215(c). In the absence of other statutory language, the broad grant within Section 3274 may serve as the enabling statute, arguably lessening the need to closely scrutinize what effect Section 3215 has within the

29

broader legislative scheme. However, Section 3215(e) specifically directs the Board to develop regulatory criteria concerning "public resources:"

> **(e) Regulation criteria.--**The Environmental Quality Board shall develop by regulation criteria:
>
> (1) For the department to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c) and

> for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.
>
> (2) For appeal to the Environmental Hearing Board of a permit containing conditions imposed by the department. The regulations shall also provide that the department has the burden of proving that the conditions were necessary to protect against a probable harmful impact of the public resources.

58 Pa.C.S. § 3215(e).

By specifically instructing the Agencies to develop criteria for "conditioning a well permit based on its impact to the public resources identified under subsection (c)," the General Assembly imposed a requirement, on the otherwise broad conferral of regulatory powers. In practical effect, this requirement functions as a limitation of sorts; absent subsection (e), the Agencies would, as far as the regulatory statutory scheme is concerned, be free to ignore any potential impacts to "public resources." Its presence requires the Agency to develop specific regulatory criteria concerning "the public resources identified under subsection (c)[.]" *Id.* The consequent question is whether Section 3215 operates as any limitation on the Agencies' powers to add "public resources" other than those specified in subsection (c).

30

To answer that, we agree with the Commonwealth Court that we must determine whether Sections 3215(c) and (e) reflect unambiguous expressions of legislative intent precluding the challenged definitions. The Commonwealth Court apparently concluded that Section 3215(c) was an unambiguous limitation, largely by applying an ejusdem generis analysis to determine whether the "public resources" added by the Agencies were sufficiently similar to the six items selected by the General Assembly such that the General Assembly would have approved of the Agencies' additions. *See Marcellus Shale Coalition*, 193 A.3d at 472 ("[I]tems that are not of the same general nature or class as those enumerated should not be included. The critical inquiry is whether items are of the 'same general class or nature' as the included items.") (citations omitted). The MSC asks the Court to accept the ejusdem generis analysis as revealing the definitive manifestation of legislative intent. "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's Brief at 23.

The difficulty with this position is that the MSC does not argue that the Agencies were categorically prohibited from defining additional "public resources." Instead, the MSC claims that the additional items exceed the statutory bounds via the ejusdem generis doctrine. Yet, the General Assembly easily could have eliminated any question regarding the scope of the Agencies' authority by drafting language such as: "On making a determination on a well permit, the department shall consider the impact of the proposed well on the following public resources." That neither Section 3215 nor any other statutory

31

provision explicitly binds the Agencies to a "floor" invariably means that the Agencies were permitted to go farther.[11]

B.

Statutory "public resources" and the Environmental Rights Amendment

Before addressing the role of the "including, but not limited to" language and the ejusdem generis doctrine, we first discuss the factor that we deem decisive in ascertaining legislative intent. The Commonwealth Court recognized that the term "public resources" is rooted in the Environmental Rights Amendment ("ERA"). The "statutory concept of 'public resources' embodied in Act 13 and the Public Resource Regulations derives from Article I,

Section 27 of the Pennsylvania Constitution." *Marcellus Shale Coalition*, 193 A.3d at 469. Indeed, Act 13 expressly states that one of its purposes is to "[p]rotect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa.C.S. § 3202(4).

Importantly, in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017), a majority of this Court adopted the *Robinson Township* framework and held that the ERA "grants two separate rights to the people of this Commonwealth." One is the "'right' of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment."

32

Robinson Township v. Commonwealth, 83 A.3d 901, 951 (Pa. 2013). The ERA as a whole "accomplishes two primary goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights." *Id*. at 950.

The first clause of the ERA, which establishes the first right of the citizens, "affirms a limitation on the state's power to act contrary to this right. While the subject of the right certainly may be regulated by the Commonwealth, any regulation is 'subordinate to the enjoyment of the right[.]'" *Id*. at 951 (citations omitted).

> The terms "clean air" and "pure water" leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters. Moreover, the constitutional provision directs the "preservation" of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.
>
> Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people's Section 27 reservation of right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.

Id. at 951-52.

The second clause deliberately "left unqualified the phrase public natural resources, suggesting that the term fairly implicates relatively broad aspects of the

33

environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns." *Id*. at 955. "The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law." *Id*.

This Court has not been asked to definitively resolve what would qualify as a "public resource," and it is perhaps impossible to do so. The ERA "directs the 'preservation' of

broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach" to protect the environment. *Id*. at 951. The six delineated "public resources" in Section 3215(c) reflect this holistic approach, as the General Assembly did not instruct the Agencies to develop criteria to protect "clean air" or the "esthetic values" of the environment.

Instead, it chose to define six specific items that do not share any obvious commonalities. The inclusion of "[p]ublicly owned parks, forests, game lands and wildlife areas," i.e., governmental property used for recreation and enjoyment of nature, has little in common with privately-owned structures that are the subject of other provisions. As this Court recently explained in *U.S. Venture, Inc. v. Commonwealth*, 255 A.3d 321 (Pa. 2021), the term "public" can, in context, refer either to government-owned or something that is open to or otherwise accessible by the general public. *Id*. at 331. Section 3215(c) includes items that could be closed to the public, and the Commonwealth Court's observation that the statutory items "are not purely private property" is at least partially incorrect.

34

Consider (c)(3), "National natural landmarks." The federal National Natural Landmarks Program's website states that nearly one-third of the 602 current National Natural Landmark sites are owned by private parties.[12] Likewise, the statutory (c)(5) item refers to historical and archaeological sites on the Federal or State list of historic places. By way of example, Fallingwater, the famous home designed by Frank Lloyd Wright, is on the federal registry and was donated by the Kaufmann family to the nonprofit conservation organization Western Pennsylvania Conservancy. While that organization permits the public to tour the home and its grounds, that benefit is due to the generosity of the Kaufmann family and the Western Pennsylvania Conservancy.[13] Thus, the statutory list includes buildings owned by private actors, with no apparent requirement that the public be allowed to access the resource at all.

The ERA's conception of "public resources" as embracing "broadly defined values of the environment," *Robinson Township*, 83 A.3d at 951, which includes historic and esthetic values, comports with the items enumerated by the General Assembly in Section 3215(c). Its list of "public resources" does not neatly break down into "purely private" and "purely public" categories. As shown, even a privately-owned piece of property closed to

35

the public can qualify as a "public resource" per Section 3215(c). In light of the ERA, this is not surprising. Its concept of "public resources" encompasses resources essential to the quality of the life of Pennsylvania citizens, a concept that is not cabined by public or private ownership.

Nor is it cabined by natural or man-made categories. The Concurring Opinion challenges the premise that Section 3125(c) has anything whatsoever to do with the ERA, apparently concluding that it is absurd to find that Section 3125's reference to "public resources" has anything to do with the "public natural resources" protected by the ERA. *See* Concurring Op. at 12 (Wecht, J.) (accusing the Majority of "stuffing Section 3125(c) into the ERA's ill-fitting clothes").

We respectfully disagree with our learned colleague. If the ERA is an ill-fit, the General Assembly did not think so; it declared that one of the purposes of Act 13 is to "[p]rotect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa.C.S. § 3202(4). It is difficult to imagine what provision of our charter that the General Assembly referenced if not the ERA. It is consistent with the ERA's holistic approach and Act 13's declared purpose of protecting "values secured by the Constitution of Pennsylvania" to conclude that the reference to "public resources" in Section 3215(c), while not parroting the ERA's language, was designed to

afford the Agencies a great degree of leeway in adding additional "public resources" consistent with the constitutional provision.

The assertion that an architectural masterpiece like Fallingwater is obviously **not** protected by the ERA is startling. Concurring Op. at 12. In the Concurrence's view, Gettysburg could be described as a mere tract of land or the Liberty Bell a decorative

36

adornment. But for decades, this Court has recognized that the ERA "reflects a state policy encouraging the preservation of historic and aesthetic resources." *United Artists' Theater Cir., Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993); *id*. (concluding that an ordinance was consistent with the ERA because it was dedicated to preserving and protecting "buildings, structures, sites, objects, and districts of historic, architectural, cultural, archeological, educational and aesthetic merit"); *see also Commonwealth v. Nat'l Gettysburg Battle Tower, Inc*., 311 A.2d 588, 592 (Pa. 1973) (opining that, after ratification of the ERA, "for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern[]").

Suggesting that a site such as Fallingwater is not protected by the ERA rolls back almost 50 years of precedent by reading out of the ERA any protection of historic or aesthetic value that is created by humans. We, on the other hand, honor our precedent and recognize that the General Assembly intended to permit the Agencies, in exercising their fiduciary duties, to add items that "fall within the ERA's conception of a 'public resource.'" Majority Op. at 39.

For its part, the Commonwealth Court recognized that the term "public resource" derives from the ERA. However, in resolving the question of legislative intent, the Commonwealth Court did not consider that the General Assembly, by using statutory language referencing the ERA's conception of "public resources," which itself is broad and undefined, intended for the Agencies to have a large degree of regulatory flexibility

37

in defining those additional resources.[14] Moreover, it is consistent with legislative intent to interpret the statutory term "public resources" in a fashion consistent with the ERA because both the General Assembly and the Agencies are themselves trustees under the ERA. *See Pa. Env't Def. Found*., 161 A.3d at 931 n.23 ("Trustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality."). The fact that the Agencies are required to consider their trustee duties in making decisions on well permits supports the conclusion that the General Assembly, in listing specific items within Section 3215(c) that defy categorization as privately-owned or publicly-accessible, intended for the Agencies to provide additional protections geared towards protecting the quality of life of Pennsylvania citizens and otherwise effectuating the ERA's purpose.[15]

38

An ejusdem generis analysis is not appropriate

The Commonwealth Court and the MSC both narrowly focus on the language "including, but not limited to" in Section 3215(c) as a basis to conclude that the General Assembly did not authorize the Agencies to add the challenged "public resources" to the list based on the ejusdem generis doctrine. "Under our statutory construction doctrine ejusdem generis ('of the same kind or class'), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801, 806 (Pa. 1996) (per curiam) (citations omitted).[16] Ejusdem generis, like any other

principle of statutory construction, is simply a method employed to ascertain legislative intent. However, the fact that a statute employs language which often justifiably results in using that principle does not mean that it is the appropriate means to determine legislative intent, particularly where, as here, statutory language is clear. As we stated in *Commonwealth v. Sitkin's Junk Co.*, 194 A.2d 199 (Pa. 1963), "the ejusdem generis rule … yields if the result of its application is to arrive at a conclusion 'inconsistent with the manifest intent of the Legislature.'" *Id*. at 203 (internal quotation marks and citation omitted). *See also Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020) ("[W]hile ejusdem generis is a useful tool of statutory construction, such tools are used for the sole purpose of determining the intent of the General Assembly. Ejusdem generis must yield in any

39

instance in which its effect would be to confine the operation of a statute within narrower limits that those intended by the General Assembly when it was enacted.").

We find that ejusdem generis plays no role in the statutory analysis. In ascertaining legislative intent, we always start with the plain text. "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." 1 Pa.C.S. § 1921(b). The plain text "including, but not limited to" language does not define "public resources." Instead, it lists the public resources for which the Agencies **must** develop regulatory criteria. The "including, but not limited to" language clarifies that the General Assembly did not intend to limit the Agencies' powers to only those public resources.

The Commonwealth Court's ejusdem generis analysis is myopic because it asks whether the additional "public resources" as defined by the Agencies could fit within the six statutory items codified at Section 3215(c)(1)-(6). This analysis would perhaps be controlling if the term "public resources" did not already carry a legally significant meaning.[17] *See* 1 Pa.C.S. § 1903(a) (explaining that courts must construe "technical words and phrases and such others as have acquired a peculiar and appropriate meaning … according to such peculiar and appropriate meaning or definition"). Here, as the Commonwealth Court correctly recognized, "public resource" derives from the ERA. As a result, an ejusdem generis analysis is misplaced.

40

We further highlight that in *Department of Environmental Protection v. Cumberland Coal Resources, LP*, 102 A.3d 962 (Pa. 2014), we summarized the conditions that justify using ejusdem generis to discern legislative intent:

> In sum, the 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. at 976.

This is not a situation where Section 3215(c) can plausibly be interpreted as a definitional section because "public resources" already has a defined meaning within the statutory framework of the Oil and Gas Act: public resources as understood by the ERA. The statutory language demands that regulatory criteria be developed regarding at least the six specific "public resources" that could be impacted by a proposed well. The insertion of the "not limited to" language ensured that the Agencies, in their discretion, could determine that other "public resources," as contemplated by the ERA, warranted the same treatment.

In discerning legislative intent, it is important to recognize that the conferral of legislative power here authorizes the Agencies, charged with regulating the unconventional gas well industry, to adopt regulations to do so. Had

the General Assembly wished to impose stricter limits on the Agencies, the language "included, but not limited to" could have been eliminated.[18] The Legislature knows "to speak in plain

41

terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). Here, the General Assembly spoke capaciously.

For these reasons, we conclude that the plain text signals the intent to confer the Agencies with the legislative power to protect additional "public resources" at their discretion. *See Robinson Township*, 83 A.3d at 955 (stating that the drafters of the second clause of the ERA "seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law"). The General Assembly simply chose to let the Agencies, in the field of their subject-matter expertise, define those additional resources when regulating this industry.[19]

Because the term "public resource" is rooted in the ERA, we hold that the proper test is whether the items chosen by the Agencies fall within the ERA's conception of a "public resource." Here, all three do.

42

C.

"*Other critical communities*" *as a public resource*

1. Analysis of regulatory language

"Other critical communities" is defined as follows:

(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.

Plants or animal species that meet the (i)(A) or (B) criteria are "public resources" as contemplated by the ERA. It is understandable that the Agencies would proceed with caution with plants or animal species that are already at risk.[20] We stated in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289, 310 (Pa. 2021), that the ERA "unmistakably conveys to the Commonwealth that when it acts as a trustee

43

it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born." We held that the current citizens and the generations yet to come are "simultaneous beneficiaries" who are entitled to "the conservation and maintenance of the public natural resources." *Id*. at 311. A species that is presently in a proposed state of risk could be thrust into further jeopardy by nearby unconventional well development. We do not agree with the Commonwealth Court's notion that the Agencies were required to wait until a species reaches an even higher threat threshold as a prerequisite to protection where the interest of future generations of citizens must be considered.

2. Documents Law

We further scrutinize this portion of the regulations given the Commonwealth Court's conclusion that it violates the Documents Law. Importantly, the intermediate court did not conclude that the Agencies generally failed to follow the public notice requirements of the Documents Law in promulgating the various

regulations at issue in this case. Rather, the court held (and the MSC argues) that, because the regulatory definition of "other critical communities" includes the utilization of PNDI receipts and because third-party agencies regularly supplement the PNDI database without the changes being vetted by the formal rulemaking functions, the definition runs afoul of the Documents Law's requirement that an agency must give public notice of its intention to amend a regulation. *See* 45 P.S. § 1201 (stating that an agency must give "public notice of its intention to promulgate, amend or repeal any administrative regulation").

By way of background, the Department's sister agency, the Department of Conservation and Natural Resources ("DCNR"), is statutorily required:

44

> [t]o undertake, conduct and maintain the organization of a thorough and extended survey of this Commonwealth for the purpose of inventory, survey and elucidation of the ecological resources of this Commonwealth, to gather and digest information from sources within and outside this Commonwealth and to put the results of the survey into a form convenient for reference. The ecological survey should identify the significant natural features of this Commonwealth and the species which comprise these features.

71 P.S. § 1340.305(a)(10). The DCNR fulfils its obligations in this regard by, inter alia, maintaining the PNDI database through the Pennsylvania Natural Heritage Program ("PNHP"). *See generally* PNHP website at https://www.naturalheritage.state.pa.us (last visited Feb. 23, 2023). The Department, in turn, "requires applicants for most permits throughout Pennsylvania to utilize PNHP's [PNDI] database, accessible through the online Conservation__Explorer." *Id.* at https://www.naturalheritage.state.pa.us/methodology.aspx (last visited Feb. 23, 2023). Indeed, the Department generally "uses PNDI as the primary source of information during the permit review process for the protection of threatened and endangered or species of special concern." *Id.*

With this background in mind, we reject the Commonwealth Court's holding that the inclusion of the PNDI process in the regulatory definition of "other critical communities" amounts to a continuing, de facto amendment of the regulation, exposing it to endless public notice requirements. To be clear, our case law prohibits an agency from regulating by creating binding norms through procedures, such as issuing statements of policy, that evade the public notice requirements of the Documents Law. *See*, *e.g.*, *Lopata v. Com., Unemployment Comp. Bd. of Review*, 493 A.2d 657 (Pa. 1985) (concluding that a Bureau of Unemployment Compensation bulletin was invalid because it did not simply offer

45

generalized guidelines or articulate statements of policy; rather, the bulletin amounted to a binding rule of law that failed to conform to the requirements of the Documents Law). That is not what occurred in the instant matter.

There is no dispute that the identification of species of special concern by way of a PNDI receipt was included in the regulatory definition of "other critical communities" when the regulations proceeded through the formal rulemaking procedures. The Agencies did not alter the manner in which that well-established process works. Instead, the Agencies gave appropriate public notice of the manner in which species of special concern were to be identified for purposes of information gathering in the pre-permitting stages of unconventional oil and gas wells. While the PNDI receipt information may vary by site and over time, the basis for inclusion in the statutorily mandated database does not. It would indeed be illogical to require an inventory of the special ecological features of our Commonwealth but prohibit the Department from referencing it when considering permit applications. We, therefore, hold that the

Commonwealth Court erred by concluding that the regulatory definition of "other critical communities" violates the Documents Law.[21]

46

D.

"Common areas of a school's property" and "playgrounds" as a public resources

"Common areas of a school's property" and "playgrounds" likewise qualify as public resources as contemplated by the ERA. As the Agencies explained, these items were not initially included but were added after receiving public commentary. Agencies' Brief at 52. The Agencies decided to promulgate the definition because they "are frequently used for outdoor recreation, similar to parks." *Id.*

Unadulterated outdoor recreation space is a basic component of quality of life and encompassed in the broadly defined values of the environment protected by the ERA. An unconventional gas well near spaces used by the public for recreational purposes could threaten the ambient air quality and cause significant noise pollution. *See Robinson Township*, 83 A.3d at 937-38 (recounting an affidavit of homeowner living approximately 1,500 feet from drilling operations; "traffic caused significant noise pollution … Air quality also became degraded, beginning 'to smell of rotten eggs, sulfur, and chemicals'"); *id*. at 1005 ("As Challengers duly note, these industrial-like operations include … noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials,

47

[and] constant bright lighting at night[.]") (Baer, J., concurring). Whether those environmental effects are present in any given drilling operation is not relevant. The point is simply that the Agencies' decision to account for those concerns in deciding whether to grant a permit near sites where the public engages in recreational activity is consistent with legislative intent.

E.

Eagle Environmental

Finally, we agree with the Agencies that *Eagle Environmental* supports our determination that these regulations are valid products of legislative rulemaking and must be afforded a high degree of deference. In *Eagle Environmental*, the Board adopted a "harms/benefits test" as part of the permitting process for waste disposal facilities pursuant to the Solid Waste Management Act ("SWMA"). That test applied after a finding that mitigation measures for environmental harms were adequate, as the applicant then was required to "demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms." *Eagle Environmental II, L.P. v. Dep't of Env't Prot.*, 884 A.2d 867, 871 (Pa. 2005). One of the issues presented was whether the agency had the power to dictate the harms/benefits test. The challengers argued that "if the legislature intended to impose [the test], it would have done so in clear and unmistakable language as in other statutes." *Id*. at 876-77. The Court concluded that the agency properly enacted the harms/benefit test. In so doing, we recognized that "the overriding goal of the SWMA and Act 101 was to establish a comprehensive state and local solid waste management program, involving permits for disposal facilities, which

48

would provide the necessary disposal facilities and also protect the environment and the public … while encouraging conservation and recycling." *Id*. at 878.

The harms/benefits test at issue in *Eagle Environmental* shares some key similarities with the definitions of "public resource" challenged by the MSC. While the MSC attacks each regulation separately, the overall thrust of its argument is that the Agency is imposing more regulatory obstacles to securing an

unconventional gas well permit than the General Assembly envisioned. The harms/benefit test was similarly criticized: "In regard to the argument that Article I, Section 27 provides authority for the Harms/Benefits Test, Appellants assert that no further balancing is required in that the legislature made the basic policy choice of balancing the potential impact of landfills on the public's health and safety and the environment with the need for waste disposal facilities by requiring compliance with engineering principles and environmental standards." *Id*. at 877. We disagreed, concluding that the test "allows for the infinite variations of factors and considerations which will present themselves in various petitions for permits." *Id. at* 879. We concluded that the agencies were authorized to enact the regulations even absent any reference to the ERA.

The MSC's attempts to distinguish *Eagle Environmental* are unconvincing. It first argues that the Agencies cite *Eagle Environmental* as establishing "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[.]" MSC's Brief at 15 (quotation marks and citation omitted).

49

The MSC argues that "[t]his framework for statutory analysis must be qualified in at least two ways." *Id*. at 16. The first is that *Eagle Environmental* is factually distinguishable because that case involved waste facilities, which "are of particular concern to communities and are within a highly regulated industry," whereas "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." *Id*. The MSC further argues that the statutory schemes are likewise distinguishable. Specifically, the SWMA "contains two express provisions that are not in Act 13." *Id*. Those are a statutory command that its provisions be liberally construed, and statutory provisions regarding economic impacts to communities. "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." *Id*. Act 13, however, does not contain either type of provision.

Further, the MSC argues that the second distinguishing feature is that the asserted regulatory power in this case is more doubtful than the power wielded in *Eagle Environmental*.

> 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.

Id. at 17.

We are not persuaded by either distinction. Beginning with the industries at issue-waste facilities versus oil and gas drilling-it is obvious that both industries are "of

50

particular concern" to their local community, and to those in proximity of the drilling activities, unconventional oil and gas wells seem to raise as at least as many concerns as landfills. Additionally, it is illogical to conclude that an agency authorized to regulate the industry cannot regulate because the General Assembly has already regulated the matter. That would be true if the statutory text foreclosed the assertion of the authority, but it does not.

Indeed, the General Assembly chose to bestow regulatory authority upon the Agencies

in the first place, and agencies are given that authority precisely because some issues are so highly complex and technical that the legislative branch approves of the agency addressing the complexities. When reviewing agency action, the expertise of the agency is a consideration in determining whether the General Assembly intended for the agency to act. *Cf. Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (holding that *Chevron* applies due to "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question"). The Agencies possess that expertise, and the lengthy notice-and-comment period, which included over 28,000 public comments for the Agencies' consideration and the long review process following those comments, indicates that the process worked exactly as the General Assembly intended. As the *Chevron* Court remarked, agencies may "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865-66 (1984). We find that is the case here. The General Assembly

51

intentionally permitted the Agencies, which possess the requisite subject-matter expertise, to identify additional public resources in need of consideration. Similarly, as in *Eagle Environmental*, the "infinite variations of factors and considerations" were understandably left to the Agencies to sift through.

We are also persuaded that the General Assembly intended for the Agencies to enact these regulations because there is no "mismatch" between the Agencies' asserted power and the statutory scheme. That concept serves to distinguish cases that the MSC relies on to establish that the Agencies exceeded their statutory authorization, such as *Deoria* and *Insurance Federation of Pennsylvania.*

Deoria involved the State Athletic Commission ("SAC"). *Deoria v. State Athletic Comm'n*, 962 A.2d 697 (Pa. Commw. 2008). The SAC is required by law to approve contracts between a boxer and the manager. The SAC approved a contract between Harry Yorgey and his manager James Deoria. About two years later, the parties had a contractual dispute over Yorgey's fight schedule. Deoria and Yorgey met with the executive director of the SAC to discuss the dispute. The director upheld the contract, finding that Doeria did not breach its terms.

At Yorgey's request, the full SAC held a hearing. The Commission "affirmed the decision of the Executive Director to the extent that the contract remains in effect in substantial part. However, the Commission modified the second and fifth provisions of the contract[.]" *Id.* at 699. The Commonwealth Court ultimately agreed with Deoria that the Commission had no authority under the Boxing Act to resolve contract disputes. The court found that the Boxing Act authorized the Commission to "govern[ ] the form, content and ultimate approval of boxer-manager contracts," but it conferred no authority to

52

adjudicate contractual disputes. *Id.* at 701. The panel determined this was a "jurisdictional" issue.

> Despite these enumerated powers and duties, the Boxing Act is silent with regard to the Commission's jurisdiction to resolve or arbitrate contractual disputes. While contracts are subject to the approval of the Commission, neither the Boxing Act nor the rules and regulations of the Commission governing boxing give the Commission explicit or implicit jurisdiction or authority to resolve contractual disputes between boxers and managers. Pursuant to the Boxing Act, the only express authority for Commission hearings is in connection with a recommendation by the executive

> director regarding the suspension or revocation of a permit or license.

Id.

Deoria is a clear example of an agency straying from its statutory authority. The General Assembly enumerated specific powers and duties, but the relevant statutory conferrals of legislative rulemaking were "silent with regard to the Commission's jurisdiction to resolve or arbitrate contractual disputes." *Id.* Notably, the *Deoria* Court addressed whether the SAC possessed "explicit or implicit jurisdiction or authority to resolve contractual disputes between boxers and managers." *Id*. The statutory text did foreclose that assertion of authority because it did not give the SAC the power to resolve contractual disputes. Additionally, there is little reason to think that the General Assembly intended for an agency to resolve contractual disputes, which requires answering a question of law. The SAC strayed far outside its wheelhouse in aggrandizing the power to determine legal contractual disputes. The same cannot be said of the Agencies' regulations here. There is an obvious mismatch in having the SAC resolve questions of law that are not present in this case. The regulatory decisions made by the Agencies are squarely within their subject-matter expertise.

53

In *Insurance Federation of Pennsylvania,* this Court determined that the Department of Insurance exceeded its regulatory authority. *Ins. Fed'n of Pa. v. Dep't of Ins.*, 889 A.2d 550 (Pa. 2005). The dispute started when Liberty Mutual Insurance Company filed a proposed revision to its private passenger insurance policies seeking to eliminate arbitration for uninsured and underinsured motorist claims. The Insurance Department rejected the policy and determined that arbitration is required. The Insurance Federation of Pennsylvania filed a petition for declaratory judgment. This Court determined that the Insurance Department could not demand arbitration. As sources of legislative rulemaking authority, the opinion stated that the General Assembly requires all non-exempt vehicles to carry insurance, and, pursuant to the Insurance Department Act, requires all policies to be approved by the Insurance Commissioner. Additionally, the Uninsured Motorist Act requires all policies to include provisions for uninsured motorist coverage unless rejected by the insured, and in 1984, the Motor Vehicle Financial Responsibility Law set standards for what must be included in insurance policies, including the requirement that uninsured and underinsured motorist coverage provisions must be offered (even if they could be waived). Taken together, these laws require that "a policy must include a provision for [uninsured] and [underinsured] insurance in order to be approved by the Insurance Commissioner." *Id*. at 554.

These statutes did not expressly grant the Insurance Department with the authority to require mandatory binding arbitration. Thus, the Court asked "whether the Insurance Department has the implied authority" to promulgate that regulation. *Id.* The Commonwealth Court accepted the Insurance Commissioners' conclusion that the Motor Vehicle Financial Responsibility Law declared a public policy that arbitration is the fastest

54

and least expensive method of accomplishing the goal of aiding innocent victims. *Id*. (stating that the panel "deferred to the Insurance Commissioner's expertise"). This Court, however, did not specifically pass on that judgment. "Salient or not, the public policy … does not create an implied legislative mandate allowing the Insurance Department to change the normal course of judicial proceedings simply because arbitration is less costly and less time-consuming than traditional litigation." *Id*. at 555. The Court determined that there was no "substantive provision of the law" requiring mandatory binding arbitration. As a result, the agency "overstepped its legislative mandate." *Id*.

The *Insurance Department* decision is about implicit authority. As we have explained at length, the specific statutory authorizations within Section 3215 grant the Agencies power to

expand the list of "public resources." This is therefore a case of how far the Agencies may go, whereas *Insurance Department* is about whether the Agencies could address the subject matter at all.[22]

55

We thus reject the assertion that *Eagle Environmental* permits courts to engage in a "narrower evaluation" of statutory authority. The question is always whether the agency has exceeded its authority. *Eagle Environmental*, like this case, required a determination of whether the General Assembly intended for the agency to have the asserted power. Context matters, of course, but there is no "narrower" or "looser" evaluation. The absence of a provision demanding that the Oil and Gas Act be construed in a liberal manner is simply one factor in the contextual analysis, which here includes consideration of the express guarantees of the ERA.

Similarly, our conclusion that the Agency has statutory authorization to identify these three "public resources" respects legislative intent. Determining whether the three additional items are valid would require the balancing of competing policy concerns, a task that courts are ill-equipped to do. Consider the Commonwealth Court's conclusion regarding the definition of "other critical communities." The panel stated that its "interpretation is logical when one considers the purpose of Act 13 and the balance that must be struck between oil and gas and environmental interests." *Marcellus Shale Coalition*, 193 A.3d at 475. Aside from the fact that this analysis is misplaced in the context of a plain language statutory analysis (because it cites factors that apply only when the words of the statute are not explicit, *see* 1 Pa.C.S. § 1921(c)(1) (permitting a court to examine the "occasion and necessity for the statute")), the goal of striking a balance between industry and the environment was intentionally left in the hands of the

56

Agencies. By attempting to determine whether the regulations promote the Oil and Gas Act's balancing, the court assumed a power that was entrusted to the Agencies in their expertise. For all the foregoing reasons, we conclude that the three challenged regulations do not exceed the Agencies' statutory authorizations.

F.

Reasonableness

The question remains whether the three regulatory definitions are reasonable. In *Pennsylvania Human Relations Commission v. Uniontown Area School District*, 313 A.2d 156 (Pa. 1973), we set forth the following points of law.

> A court, in reviewing such a regulation, 'is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action . . . involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.'

Id. at 169 (quoting *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232 236-37 (1936)).

The Commonwealth Court's belief that the regulations "upset[ ] the balance between industry and the environment" is just an alternative way of saying that they are "unwise or burdensome or inferior to another." *Marcellus Shale Coalition*, 193 A.3d at 476. That weighing is for the agencies, not the courts. We may strike the regulations only if they are fundamentally at odds with the statutory scheme. These are not. The statutory conception of "public resources," with its link to the ERA, demonstrates that these

definitions are reasonable.

57

Moreover, as stated in *American Telephone & Telegraph*, courts must pay attention to what the regulations are designed to promote. *Am. Tel. & Tel.*, 299 U.S. at 237. Here, these three regulations only serve the Agencies' information gathering requirements and simply require the applicants to submit more information if the proposed well "may impact" those public resources. That additional information has an obvious connection to the Agencies' unquestioned power to issue permits. The goal it seeks to achieve is to allow the Agencies to make a more reasoned determination of whether, or under what, if any, conditions, the permits should issue. The regulations are not designed to interfere with the development of unconventional gas well sites.

The MSC's primary argument attacking the reasonableness of these definitions, particularly the "other critical community" definition, is that those definitions are "an expression of whim for the Agencies to define critical communities to include non-listed special concern species." MSC's Brief at 45. Their arguments simply repackage the assertion that the Agencies lacked statutory authority to promulgate the regulations. *Id.* at 47 ("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."). These arguments are invitations to courts, under the guise of a reasonableness analysis, to balance those objectives ourselves. If the General Assembly wishes to curtail the Agencies' powers in this regard, it can clearly do so by removing the Agencies' ability to add "public resources" to the list.

Finally, the MSC agrees with the Commonwealth Court that the regulation concerning schools and playgrounds is unreasonable because, for example, "the list of

58

schools is seemingly endless as any institution providing some form of educational services would ostensibly qualify as a 'school' under the regulatory definition." MSC's Brief at 25. The Agencies, however, accurately highlight that the list is not endless, a "permit applicant seeking to drill a new unconventional well[] need only look 200 feet from the proposed limit of disturbance of a nearly five acre well site to see whether a neighboring feature may fit the definition of a 'playground' or 'common area' of a school that is open to the public." Agencies' Brief at 57. We are persuaded by the Agencies' position that ascertaining whether these features are within the small-scale boundaries of a proposed new unconventional well is not nearly as burdensome as the Commonwealth Court has suggested. In fact, the burden borders on de minimis.

G.

"Playground owners" as a "public resource agency"

The second issue is whether the Agencies were permitted to include a "playground owner" as a "public resource agency." Unlike the designation by the Agencies of additional public resources, there is no specific statutory provision concerning "public resource agencies." As a result, the generic rulemaking authorization becomes pertinent.

The Commonwealth Court concluded that the Agencies lacked statutory authorization to include "playground owners" as a valid "public resource agency," in part because entities that manage playgrounds are not "agencies" in the traditional understanding of the term. That is correct, but irrelevant. The fact that the Agencies chose to use the term "public resource agency" and included private actors within that definition is perhaps a less than optimal choice, but the label attached makes no difference in terms of agency authority.

59

The MSC additionally submits that these

definitions lack statutory authorization because "[o]ne 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." MSC's Brief at 23-24. This again is an inaccurate and misplaced ejusdem generis argument, ignoring the value of unadulterated outdoor recreation opportunities.

In addition to our general rejection of the ejusdem generis tool, its use is even more inappropriate here because there is no specific statute addressing public resource agencies. Indeed, the MSC does not challenge the balance of the regulatory provision, which lists specific governmental agencies like the United States Fish and Wildlife Service as a "public resource agency." Thus, our determination that a "playground" is a valid public resource effectively resolves this legal challenge because the "owner" of that resource is responsible for it.

The MSC additionally agrees with the Commonwealth Court that "playground owners" are not trustees and, therefore that Agencies lacked statutory authority to "elevate" their status. *See Marcellus Shale Coalition,* 193 A.3d at 485 ("The Agencies have no authority to elevate private entities as public agencies responsible for ensuring the public trust."). This fundamentally misconstrues what the regulation does. The Agencies are not elevating "playground owners" to trustee status. Instead, the Agencies, as trustees themselves, have determined that it is appropriate in discharging their regulatory duties to seek the input of certain actors when a well may affect the regulated public resources. In the absence of specific limitations on the Agencies' authority in this

60

regard, we conclude that the general conferral of rulemaking authority provides a valid statutory source for this regulation. *See generally Eagle Environmental*, 884 A.2d 867. Accordingly, we find that the regulation is both within the statutory regulation and reasonable.

H.

The Section 78a.15(g) regulation

Lastly, we address the Commonwealth Court's holding that this regulatory provision, which permits commentary from the defined "public resource agencies," is invalid. The Commonwealth Court identified a statutory restriction on the Agencies in Section 3215(d), which states:

> **(d) 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).

As the court stated, we struck this statute as invalid in *Robinson Township*. However, the basis for doing so was that the statute was not sufficiently deferential to municipality concerns. We described Section 3215(d) as a "further blanket accommodation of industry and development … limit[ing] the ability of local government to have any meaningful say respecting drilling permits and well locations in their jurisdictions." *Robinson Township*, 83 A.3d at 973-74. We declared the subsection unconstitutional for the following reasons:

> Section 3215(d) marginalizes participation by residents, business owners, and their elected representatives with

61

> environmental and habitability

> concerns, whose interests Section 3215 ostensibly protects. *See* 58 Pa.C.S. § 3202 (Declaration of purpose of chapter). The result is that Section 3215 fosters decisions regarding the environment and habitability that are non-responsive to local concerns; and, as with the uniformity requirement of Section 3304, the effect of failing to account for local conditions causes a disparate impact upon beneficiaries of the trust. Moreover, insofar as the Department of Environmental Protection is not required, but is merely permitted, to account for local concerns in its permit decisions, Section 3215(d) fails to ensure that any disparate effects are attenuated. Again, inequitable treatment of trust beneficiaries is irreconcilable with the trustee duty of impartiality. *See Hamill's Estate,* 410 A.2d at 773; 20 Pa.C.S. § 7773.
>
> Calling upon agency expertise to make permit decisions that comply with the Commonwealth's trustee obligations does not dissipate the structural difficulties with a statutory scheme that fails both to ensure conservation of the quality and quantity of the Commonwealth's waters and to treat all beneficiaries equitably in light of the purposes of the trust.

Robinson Township, 83 A.3d at 984.

The Commonwealth Court recognized that the regulations cured the flaw by mandating the Department to consider municipalities' comments. Where the court erred was by finding that *Robinson Township*'s decision obliterated statutory authorization to promulgate regulations regarding municipalities. The general conferral of rulemaking authority is still intact and thus no "additional" authorization is needed. *See Marcellus Share Coalition,* 193 A.3d at 484.

Moreover, even if we accept that Section 3215(d) can be read as a **restriction** on the Agencies' powers, which is a questionable proposition given that *Robinson Township* suggested in dicta that the Department would still be "permitted" to consider municipality commentary, the fact remains that *Robinson Township* determined that the municipalities were not given sufficient say in the process. We fail to see how the General Assembly's

attempt to unconstitutionally limit a municipality's participation can be read to deprive the Agencies of their regulatory powers to provide an opportunity for municipalities to have their concerns considered in the permitting process. Critically, the Commonwealth Court's resolution also risks placing the Agencies in the position of violating their trustee duties. Therefore, as with the previous issue, we find that the Agencies have authority via their general rulemaking powers to enact this regulation. We agree with the Agencies that "Section 78a.15(g), which is authorized by surviving sections of the 2012 Oil and Gas Act … succeeds where Section 3215(d) of the 2012 Oil and Gas Act failed." Agencies' Brief at 66.

VII. Conclusion

The Commonwealth Court deemed invalid and unenforceable several regulations promulgated by the Agencies that serve primarily to aid the Agencies in information gathering attendant to the issuance of permits for unconventional gas well operations. For all of the reasons set forth above, we find that the Agencies did not exceed their legislative rulemaking powers in enacting the challenged regulations, and so, we reverse the Commonwealth Court's order.

Chief Justice Todd joins the opinion and Justice Dougherty joins Parts I-V and VI(C)(2) of the opinion.

Justice Dougherty files a concurring and dissenting opinion.

Justice Wecht files a concurring and dissenting opinion.

Justice Mundy files a dissenting opinion.

The Late Chief Justice Baer did not participate in the decision of this matter.

Justice Brobson did not participate in the consideration or decision of this matter.

63

CONCURRING AND DISSENTING OPINION

DOUGHERTY, JUSTICE

I join Parts I-V as well as Part VI(C)(2) of the Opinion of the Court. I agree that the Agencies did not exceed their rulemaking powers by enacting 25 Pa. Code §78a.1, which defines "[o]ther critical communities." Like Justice Wecht, however, I would assess the rulemaking authority of the Agencies "through ordinary principles of statutory construction[,]" including use of an *ejusdem generis* analysis. Concurring and Dissenting Opinion at 2 (Wecht, J.). As such, I concur only in the result as to this issue. An *ejusdem generis* analysis also leads me to agree with Justice Mundy that the Agencies exceeded their rulemaking power by enacting 25 Pa. Code §78a.15(f)(1)(vi), which includes "common areas on a school's property or a playground" as public resources because "they 'do not share the same attributes as the other public resources identified in [58 Pa.C.S. §3215(c).]'"

64

Dissenting Opinion at 5-6 (Mundy, J.), *quoting Marcellus Shale Coalition v. Dep't of Environmental Protection*, 193 A.3d 447, 481 (Pa. Cmwlth. 2018). By extension, I would also hold the Agencies exceeded their rulemaking authority by including private owners of such areas in the definition of "[p]ublic resource agency" codified at 25 Pa. Code §78a.1. For these reasons, I concur in part and dissent in part.

65

CONCURRING AND DISSENTING OPINION

WECHT, JUSTICE

My views of this case align with much of the Lead Opinion's thoughtful reasoning. Nonetheless, I am unable to agree with certain analytical choices that it has elected to make along the way. Specifically, I disagree with the categorical rejection of *ejusdem generis*. Instead of applying this familiar principle, the Lead Opinion chooses to favor an assumption that the General Assembly, in using the term "public resources" in Section 3215(c) of Act 13,[1] necessarily intended to incorporate all "public *natural* resources" within the meaning of the Environmental Rights Amendment to the Pennsylvania Constitution.[2]

66

The scope of legislative rulemaking authority provided to the Department of Environmental Protection and the Environmental Quality Board should be assessed through ordinary principles of statutory construction and by reference to our existing administrative law jurisprudence, rather than through invocation of the ERA.[3]Additionally, with regard to one sub-issue-the regulatory incorporation of a database through which protected species may be added in the absence of formal rulemaking procedures-my views align with those expressed by Justice Mundy. Accordingly, I concur in part and dissent in part.

In numerous previous decisions, I have expressed my long-held view that judicial interpretation of statutes should not be controlled by "deference" to the readings suggested (much less demanded) by administrative agencies.[4] The question presented here is of a different shade. Here, we are not so much concerned with the Agencies' interpretation of Act 13, or any purported need to defer thereto, but rather with the substantive validity of properly promulgated "legislative" rules.[5] It is well-established that,

67

"when an agency adopts a regulation pursuant to its legislative rule-making power . . . it is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable."[6] In my previous writings on administrative law matters, I likewise have distinguished the application of deference to agencies' statutory interpretation from "agency rulemaking power, which is robust, and which is entitled to a healthy judicial respect."[7]

In the present matter, there is no dispute that the Agencies promulgated the challenged regulations pursuant to the proper notice-and-comment procedures prescribed by the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act.[8] Accordingly, the validity of the regulations hinges upon

68

the first and third prongs of the *Tire Jockey* test-to wit, whether they were "adopted within the agency's granted power" and whether they are "reasonable."[9]

I. Scope of the Agencies' Granted Power

A central challenge in evaluating the validity of a regulation is determining whether its provisions fall "within the agency's granted power."[10] As the Lead Opinion notes, this is the "key question" at the heart of the instant dispute.[11] In answering similar questions, this Court's precedents have tended to focus principally upon the existence of an enabling statute[12] that authorizes or directs an agency to promulgate regulations, in conjunction with an analysis of whether the regulations are consistent with the statute that the agency seeks to implement. Several of our past cases concerning the validity of legislative regulations are instructive.

Pennsylvania Human Relations Commission v. Uniontown Area School District[13]concerned the authority of the Pennsylvania Human Relations Commission to promulgate a regulation defining "*de facto* segregation" as used in the Pennsylvania Human Relations Act.[14] This Court concluded that the agency's authority derived from its delegated legislative, rather than interpretive powers, and that the agency's enabling statute evidenced a "legislative intent to empower the Commission to do a good deal more than

69

merely interpret" the governing statute.[15] The agency's power emanated from the statutory language authorizing the agency to "adopt, promulgate and rescind rules and regulations to effectuate the policies and provisions of [the] act," and to "formulate policies to effectuate the purposes of [the] act."[16] In light of this language, and because the agency's definition was consistent with the policies expressed in the statute, we upheld the regulation "as within the legislative powers conferred" by the General Assembly.[17]

In *Eagle Environmental II, L.P. v. Department of Environmental Protection*,[18] we considered, *inter alia*, whether the EQB was empowered to adopt a "harms/benefits" test as part of the permitting process for waste disposal facilities-a test not directly imposed by statute. Because the agency's test was consistent with the purposes of the Solid Waste Management Act[19] and the Municipal Waste Planning, Recycling and Waste Reduction Act,[20] we held that the regulation was "authorized by the general grant of authority" provided to EQB by the agency's enabling provisions, which empowered it "to establish rules and regulations to accomplish the purposes" of those acts.[21] And although we subsequently discussed the ERA and the statutes' reference thereto among their statements of purpose, we also made clear that the harms/benefits test "would be within

70

the authority granted by the Acts even without reference to implementation of Article 1, Section 27."[22]

In *Slippery Rock Area School District v. Unemployment Compensation Board of Review*,[23] this Court considered whether the Department of Labor and Industry could, by regulation, define the undefined statutory term "reasonable assurance" that a substitute teacher would return to work the following academic year as having been offered a position "substantially economically equivalent in terms of wages, benefits, and hours to the previous year's position."[24] In finding that the agency was so authorized, we relied primarily upon the statutory enabling language providing that it "shall have power and authority to adopt, amend, and rescind such rules and regulations . . . as it deems necessary or suitable."[25] This enabling provision indicated that the scope of the agency's authority was "broad and encompasses the delegated legislative power to define by regulation terms otherwise undefined by the statute."[26]

More recently, in *Bucks County Services*, this Court addressed a challenge to numerous regulations promulgated by the Philadelphia Parking Authority concerning the operation of partial rights taxicabs within the City of Philadelphia.[27] Although our primary focus was upon the "reasonableness" prong of the *Tire Jockey* test, we noted that the first prong-the scope of the agency's power-was "satisfied because [the agency] is

71

authorized by [53 Pa.C.S. § 5722] to promulgate regulations relating to taxicab service in the City."[28]

In each of these decisions, this Court analyzed the scope of an agency's authority to adopt a given regulation by highlighting the existence of an enabling statute, and by further ascertaining whether the regulation was generally consistent with the overarching statutory scheme that the agency sought to implement. Although the enabling statutes occupied a position of primacy in the analysis, that latter criterion is likewise critical. And necessarily, this requires some degree of judicial interpretation of the statutes that the agency is charged with administering. As this Court stated in *Slippery Rock Area School District*:

> Clearly the legislature would not authorize agencies to adopt binding regulations inconsistent with the applicable enabling statutes. *See* 1 Pa.C.S. § 1922(1) ("the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable"). Indeed, all regulations, whether legislative or interpretive "must be consistent with the statute under which they were promulgated." *Popowsky v. Pennsylvania Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006).[29]

And as the Supreme Court of the United States more recently (and more pithily) put it: "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[30]

A balance must be struck. A court reviewing the validity of regulations necessarily must engage in its own statutory interpretation analysis in order to determine whether the

72

regulations are "consistent with the statute under which they were promulgated."[31] Yet, an agency empowered to implement a statute through its legislative rulemaking prerogative must be allowed the flexibility to do so without fear that a court may strike down its properly promulgated regulations merely because the court differs with the agency on some minor point of statutory interpretation.[32] As we previously have explained, "substantive rulemaking is a widely used administrative practice, and its use should be upheld whenever the statutory delegation can reasonably be construed to authorize it."[33] This does not mean that we must afford unqualified "deference" to an agency's statutory interpretation-a jurisprudential shortcut of which I continue to disapprove.[34] But it does mean that, in conducting our own statutory construction, we

must maintain a "healthy judicial respect" for the intent of the General Assembly to imbue the agency with rulemaking authority, as expressed in the enabling statute.[35] In practice, when a statute is equally amenable to two constructions-one that would permit the agency's regulation and one that would not-any "deference" to the agency effectively should take the form of a "tiebreaker," rather than any substantive limitation upon the court's duty and prerogative to independently interpret the statute.[36]

73

Turning to the instant case, as the Lead Opinion details, we are asked to determine whether the Agencies were empowered to add certain items to the list of "public resources" identified in Section 3215(c) of Act 13,[37] and to provide a definition for one of the undefined terms in that list. As our previous cases teach, the analysis begins with the enabling statute. Section 3274 provides that the "Environmental Quality Board shall promulgate regulations to implement this chapter."[38] Unquestionably, this provision grants the EQB regulatory authority over the chapter in which Section 3215(c) appears.[39]

Critically, Section 3215(c) provides that the relevant "public resources" include, but are not limited to, those identified in the statutory list.[40] This is an unambiguous

74

expression of the General Assembly's intent that the list it provided is nonexclusive.[41]And as Section 3274, the enabling statute, vests in the EQB the authority to promulgate regulations to implement Section 3215, it is clear that the EQB is the entity empowered to add items, through its rulemaking power, to the nonexclusive statutory list.

This much is uncontroversial, and I discern no basis for disagreement between the Lead Opinion and myself up to this point in the analysis. Where I part ways with the Lead Opinion is in its identification of "the factor" that it deems "decisive in ascertaining legislative intent."[42] The Lead Opinion, echoing a comment made by the Commonwealth Court below, concludes that the General Assembly's reference to "public resources" in Section 3215(c) is "rooted in" the ERA.[43] Although the Lead Opinion concedes that the "ERA's conception of 'public resources' . . . is broad and undefined,"[44] and indeed suggests that it is "perhaps impossible" to "definitively resolve what would qualify as a 'public resource'" under the ERA,[45] the Lead Opinion nonetheless finds that the General Assembly clearly intended to incorporate into Section 3215(c) all that this (purportedly) constitutional phrase is meant to encompass.

75

The principal problem with this rationale is that, despite its repeated invocation of "the ERA's conception of 'public resources,'"[46] the Lead Opinion glosses over the fact that the ERA does not, in fact, refer to "public resources." Rather, the ERA speaks of "public *natural* resources."[47] This reveals an obvious flaw in the Lead Opinion's reasoning. Its attempt to find symmetry between the statute's use of the phrase "public resources" and the ERA's use of the phrase "public natural resources" fails to account for the General Assembly's inclusion of plainly "non-natural" resources within Section 3215(c). Specifically, among the "public resources" listed in Section 3215(c) are "[h]istorical and archaeological sites listed on the Federal or State list of historic places."[48] To appreciate just how "non-natural" many of the items which fall into this category are, one need only consult the National Register of Historic Places, as maintained by the National Park Service.[49] As just a very small sampling of such historic sites located in Pennsylvania, consider whether the following constitute public *natural* resources within the meaning of the Environmental Rights Amendment: the Smithfield Street Bridge in Pittsburgh; the Ajax Metal Company Plant in Philadelphia; the Hampden Fire House in Reading; the King of Prussia Inn in King of Prussia; the Stegmaier Brewery in Wilkes-Barre; or the Merion Cricket Club in Haverford. It appears to me that these

places are not of the sort intended to be protected under the ERA, which speaks of our citizens' right

76

to "clean air," "pure water," and the "natural, scenic, historic and esthetic values of the environment."[50]

The Lead Opinion identifies a similar example but does not acknowledge this inconsistency. In its effort to demonstrate the error in the Commonwealth Court's conclusion that Section 3215(c) cannot include items of "purely private property," the Lead Opinion points to Fallingwater, Frank Lloyd Wright's feat of architectural design in Fayette County.[51] Because Fallingwater is owned by a private nonprofit conservation organization, yet clearly is encompassed within Section 3215(c)(5)'s reference to federally listed historic places, the Lead Opinion concludes that items falling within the Section 3215(c) list need not be publicly owned.[52] I wholly agree. But what the Lead Opinion fails to acknowledge is that the inclusion of Fallingwater-an impressive *manmade* structure-just as persuasively demonstrates that items falling within Section 3215(c) also need not be "natural."[53] Necessarily, then, such items need not be "public natural resources" within the meaning of the ERA.[54]

77

Put simply, equating Section 3215(c) with the ERA is underinclusive. It fails to explain the General Assembly's inclusion of items within Section 3215(c) that would not fall within the ERA.[55] Although the Lead Opinion refers to the "ERA's conception of 'public resources'" (omitting the word "natural") as "embracing 'broadly defined values of the environment,'" and stresses that those include "historic and esthetic values,"[56] I doubt that anyone would believe that such values of the *environment*, however broadly defined, would encompass a steel truss bridge, a metal plant, or a country club. Yet, as demonstrated above, these and many more such "non-natural" structures nonetheless fall within Section 3215(c)(5).

After stuffing Section 3215(c) into the ERA's ill-fitting clothes, the Lead Opinion takes the next major analytical step with which I differ. It declares that the statutory construction doctrine of *ejusdem generis* "plays no role in the statutory analysis."[57] This follows from its previous conclusion, the Lead Opinion explains, because the term "'public resources' already has a defined meaning within the statutory framework of the Oil and Gas Act: public resources as understood by the ERA."[58], [59] The Lead Opinion jettisons

78

the ordinary tools of statutory interpretation in favor of the importation of a constitutional standard that, as I have explained above, fails to account for all of the items listed in Section 3215(c).

I would not be so quick to discard *ejusdem generis*. It is true that we have held that the doctrine "must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly when it was enacted."[60] This caveat is well-taken; however, we must remember that doctrines such as *ejusdem generis* are merely tools that we employ to ascertain legislative intent in the first place.[61] And as many of our precedents indicate, *ejusdem generis* is the preferred tool when we seek to determine whether a given item may be added to an "including but not limited to" list, like the one found in Section 3215(c).[62], [63]

The Lead Opinion states that Section 3215(c) contains "six specific items that do not share any obvious commonalities."[64] Although this is perhaps true if one seeks to

79

find one single commonality that all six items share, I do not view this as precluding an *ejusdem generis* analysis. It is true that the items listed in Section 3215(c) defy universal categorization as "public" or "private," as the

Lead Opinion aptly explains. And as I have shown above, they likewise cannot all be understood to be "natural resources" within the meaning of the ERA. But the doctrine of *ejusdem generis* expressly instructs us to view the statutory enumeration with a level of generality-that we must consider the "general nature or class" of the items enumerated.[65] As our Superior Court explained well over a century ago:

> But in applying this principle of construction, and in determining what things are *ejusdem generis*, regard must be had to the general subject to which the act relates. Things which plainly belong to the same class when one subject is being considered might belong to an entirely different class when considered with reference to another subject. The rule would be absurd if under the head "other" no thing can be included in the construction of the act which is not exactly the same in every particular as the thing specified. Nor has it been so applied.[66]

Moreover, I have found no precedent indicating that a court applying *ejusdem generis* necessarily must reduce a statutory list to a single commonality. Indeed, to do so may, in some circumstances, obscure the General Assembly's true intent by prioritizing superficial similarities over meaningful classifications. There is no requirement that the General Assembly confine its legislative efforts to precisely one category or class per statutory list. It follows that, where the statutory language so suggests, a court undertaking an *ejusdem generis* analysis may recognize that a statutory enumeration contains multiple classes of items, and may determine whether additional items are permissible by ascertaining whether they fall within one of the enumerated categories,

80

i.e., that they are "similar to those listed by the legislature and of the same general class or nature."[67]

This brings me to the challenged definitions contained within the regulations at issue. The Marcellus Shale Coalition ("MSC") challenged: the Agencies' inclusion of "common areas on a school's property" and "playgrounds" as "public resources"; the Agencies' definition of the statutory term "other critical communities"; and the Agencies' definition of "public resource agencies" as including "municipalities" and "playground owners."[68] As the Lead Opinion explains, these definitions are a part of the Agencies' regulatory scheme for implementing Section 3215(c). Under the regulations, an applicant proposing to drill an unconventional gas well within a specified distance of one of the listed "public resources" is obligated to provide notice to the "public resource agency" responsible for managing that public resource, as well as to the Department, which will consider, *inter alia*, the comments and recommendations of the "public resource agency" in connection with the application.[69]

As it concerns the definition that the Agencies provided for "other critical communities,"[70] as that term appears in Section 3215(c)(4), the question of the Agencies'

81

statutory authority is straightforward. This is a term that the General Assembly included within Section 3215(c), but did not define. As highlighted above, Section 3274 gives the EQB authority to promulgate regulations to implement, *inter alia*, Section 3215(c).[71] This enabling provision is "broad and encompasses the delegated legislative power to define by regulation terms otherwise undefined by the statute."[72] Plainly, providing a definition for such an undefined term is "within the agency's granted power."[73]

With regard to "common areas of a school's property" and "playgrounds," my views substantially align with the thoughtful Concurring and Dissenting Opinion authored in a previous iteration of this case, where this Court upheld a preliminary injunction that the

Commonwealth Court issued to enjoin the challenged portions of the regulations.[74] Importantly, the regulations define both "common areas of a school's property" and "playgrounds" such that only areas which are open to the "general public for recreational purposes" are included.[75] As discussed above, our task is, at least in part, to determine whether these items are consistent with the "public resources" listed in Section 3215(c). By *ejusdem generis*, we may conclude that "common areas of a school's property" and "playgrounds" are of the same general nature or class as at least one of the items listed

82

in Section 3215(c)-that of "publicly owned parks."[76] As the minority opinion cogently explained in *MSC II*, these "resources share common characteristics, as the general public utilizes them in precisely the same way (for recreation)."[77] To this I would add that other places listed in Section 3215(c) are commonly used by the public for recreation as well, namely publicly owned "forests," "game lands," and "scenic rivers," which the public uses for outdoor recreational activities such as hiking, camping, hunting, fishing, and boating.[78] Accordingly, inclusion of additional outdoor public recreational spaces falls within the Agencies' granted power to expand upon the nonexclusive list provided in Section 3215(c), as signaled through the phrase "including, but not limited to."[79]

And finally, the Agencies possessed the power to define a "public resource agency" as including "playground owners" and "municipalities."[80] As the Lead Opinion explains, the conclusion that the Agencies were authorized to include "playground owners" within the definition of a "public resource agency" follows from the determination that the Agencies were authorized to define "playgrounds" as "public resources."[81] With

83

regard to the inclusion of "municipalities," MSC's argument goes that, because this Court in *Robinson Township* struck down Section 3215(d),[82] which stated that the Department "may" consider the comments of municipalities in connection with a well permit (because such consideration was facially optional rather than mandatory), the regulation's provision mandating such consideration now lacks statutory authority. But the Agencies' power to promulgate binding regulations does not emanate from that now-invalidated subsection. Rather, the Agencies' power derives from the enabling provision, Section 3274. It is undisputed that the Agencies had the power to define "public resource agencies" to include, *e.g.*, the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, the United States Fish and Wildlife Service, etc.[83] The Agencies' authority to include these entities in the definition of a "public resource agency" follows from their general authority to implement the statute, which calls upon the Department to "consider the impact of the proposed well on public resources."[84] Soliciting the comments of these entities is merely the mechanism by which the Agencies seek to comply with this mandate. And just as the Agencies are empowered by the general grant of rulemaking authority to include the above-listed entities in the definition

84

of "public resource agencies," so too are they empowered to include "municipalities." The now-invalid Section 3215(d) effectively is irrelevant to the issue of the Agencies' authority. For these reasons, I conclude that all of the challenged definitions were "adopted within the agency's granted power," and thus satisfy the first prong of the *Tire Jockey* test.[85] All that remains is the final prong-whether those definitions are "reasonable."[86]

II. Reasonableness

Our test for the validity of a legislative rule frames the "reasonableness" inquiry in highly deferential terms:

In deciding whether an agency

> action, such as promulgation of a legislative regulation, is reasonable, we are not at liberty to substitute [our] own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action involved, it is not enough that [the agency's regulation] shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment.[87]

We have added that, "[r]egarding the reasonableness prong, 'appellate courts accord deference to agencies and reverse agency determinations only if they were made in bad faith or if they constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions."[88]

This standard appears to me to be more exacting than a mere inquiry into "reasonableness," and may be more accurately characterized as a test for "irrational"

85

agency action. "Reasonable" minds may sometimes differ as to whether a given action is "reasonable" under the circumstances. In asking instead whether a regulation is based upon a "whim," or "purely arbitrary," or "entirely at odds with fundamental principles," we seem to be asking for something more. Indeed, these characterizations echo the "arbitrary and capricious" standard by which the federal courts assess agency action, which contains a component of "rational connection" between an agency's choice and the facts upon which it is based.[89]

I find no indication that the challenged definitions reflect an expression of the Agencies' "whim," constitute a "flagrant abuse of discretion," are "purely arbitrary," or may be deemed "entirely at odds with fundamental principles." In this regard, my views align substantially with the reasoning offered by the Lead Opinion.[90] Much of MSC's arguments on this prong reduce to an assertion that it will be onerous to comply with the notice requirements established by the regulations. As the above-quoted standard makes abundantly clear, however, the mere fact that a regulation may impose a burden does not render it "unreasonable" for purposes of the *Tire Jockey* test.

III. The PNDI Problem

As noted above, I agree with the Lead Opinion that it was within the Agencies' granted authority to provide a definition for the undefined statutory term "other critical communities." But I also agree with Justice Mundy that the definition chosen is

86

problematic.[91] I quoted the definition in full above.[92] The offending portion defines "other critical communities" to include: "Species of special concern identified on a PNDI receipt . . . ."[93] The PNDI-the Pennsylvania Natural Diversity Inventory-is a database that other agencies use to list plant and animal species classified as threatened, endangered, or otherwise warranting special consideration or protection ("other critical communities," as the Agencies use the term).[94]

As MSC, the Commonwealth Court, and Justice Mundy explain, the defect in the procedure that the regulation envisions is that species can be added to or subtracted from the PNDI by entities other than the Agencies, without going through the formal notice-and-comment rulemaking process. By defining the term "other critical communities" to include "whatever the PNDI says," the Agencies have adopted what is, in effect, a method of backdoor regulating by which entries into a database are given the force of law without meeting the requirements necessary to become lawful

regulations.

87

Although it implicates a distinct legal doctrine, the challenged definition is reminiscent of the problem that we confronted in *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*.[95] There, we concluded that the statutory incorporation of the "most recent addition" of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, which was to be used to determine an injured employee's degree of impairment for purposes of workers' compensation, was a violation of the non-delegation doctrine because it outsourced the General Assembly's policy-making responsibility to the future discretion of another entity.[96] By adopting future editions of the *Guides* without knowing what they would even contain, the General Assembly allowed another entity to make the essential policy choices and, in effect, to write the law of this Commonwealth. Importantly, we clarified that "the non-delegation doctrine does not prevent the General Assembly from adopting as its own a particular set of standards which already are in existence at the time of adoption."[97] But it does prohibit the legislature from "incorporating, sight unseen, subsequent modifications to such standards without also providing adequate criteria to guide and restrain the exercise of the delegated authority."[98]

The issue before us here differs inasmuch as it concerns not the General Assembly's delegation of its lawmaking authority, but rather the Agencies' delegation of its rulemaking prerogative. The theory behind MSC's challenge, moreover, is not non-delegation, but rather an asserted violation of the procedural requirements for promulgating regulations. But a *Protz* analogy remains instructive. The definition of

88

"other critical communities" essentially represents a delegation of a delegation. The General Assembly delegated rulemaking power to the Agencies. The Agencies delegated that power to the PNDI database. In the language of *Protz*, the Agencies are "incorporating, sight unseen, subsequent modifications" to the PNDI database.[99] And, more to MSC's point, they are doing so without attending to the procedural requirements, prospectively transforming "each revision of the special concern species listed in the PNDI database [into] an unlawful amendment to the Chapter 78a regulation."[100]

The Agencies' rejoinder, which the Lead Opinion essentially adopts, is that although the PNDI database may vary over time and the results of its consultation may differ with respect to different sites, the *process* of using the PNDI database remains constant.[101] Thus, their argument goes, only that process needed to be formally promulgated. But this is not responsive to MSC's point. When any given species is added to the PNDI database as a species of special concern, the regulation imposes binding requirements upon applicants with respect to that species, notwithstanding the fact that the addition was not subject to notice-and-comment rulemaking.

IV. Conclusion

In light of the foregoing, although I differ with much of the Lead Opinion's rationale, I nonetheless agree with its decision to reverse the order of the Commonwealth Court with regard to all but one of the challenged definitions. As it concerns the definition of

89

"other critical communities" and its incorporation of the PNDI database, I find a fatal procedural defect, and I would thus affirm the Commonwealth's Court's decision on that narrow point.

I thus respectfully concur in part and dissent in part.

90

DISSENTING OPINION

MUNDY, JUSTICE

Pursuant to the Oil and Gas Act of 2012,[1] known as Act 13, the Department of Environmental Protection (the "Department") and the Environmental Quality Board (the "Board") (collectively, the "Agencies") promulgated rules regulating the development of unconventional oil and gas wells. *See* 25 Pa. Code §§ 78a.1-78a.314. The Marcellus Shale Coalition ("MSC") filed a complaint with the Commonwealth Court, in its original jurisdiction, challenging, *inter alia*, the validity of Section 79a.15(f) and (g) along with certain definitions in Section 78a.1. MSC asserted the Agencies exceeded their statutory authority in promulgating those specific regulations and, by doing so, created an entirely new pre-permitting process without statutory authority. After MSC filed an Application for

91

Summary Relief, the Commonwealth Court performed a statutory construction analysis of Act 13 and the regulations at issue and determined that, while the Agencies had statutory authority to promulgate regulations to implement Act 13, they lacked statutory authority to promulgate the challenged regulations and that those regulations were void and unenforceable. The Lead Opinion finds the lower court erred in its determination and holds the Agencies were within their authority in promulgating the challenged regulations and that those regulations are reasonable. I respectfully disagree. I find the Commonwealth Court correctly determined the Agencies exceeded their authority in promulgating the challenged regulations. In addition, I find that the requirements related to "species of special concern" identified on a PNDI[2] receipt violate the Documents Law and are, therefore, void and unenforceable outside of any questions of statutory authority. As such, I dissent.

Statutory Authority

I agree with the Lead Opinion that the Agencies clearly have authority to promulgate regulations pursuant to Act 13. *See* 58 Pa.C.S. § 3274 ("The Environmental Quality Board shall promulgate regulations to implement this chapter."). The role of the Court in this case is not to determine whether the General Assembly gave the Agencies authority to promulgate regulations to implement Act 13 generally, but rather to determine if the Agencies had the authority to promulgate the specific regulations challenged by MSC. In answering that question, the Lead Opinion apparently relies on the broad grant of rulemaking authority in Section 3274 to determine that the Agencies had such authority as long as the General Assembly has not specifically and explicitly restricted them from promulgating a specific rule. *See* Lead Opinion at 26 ("In the absence of other statutory language, the broad grant within Section 3274 may serve as the enabling statute,

92

arguably lessening the need to closely scrutinize what effect Section 3215 has within the broader legislative scheme."); *id.* at 27 ("The consequent question is whether Section 3215 operates as any limitation on the Agencies' powers to add 'public resources' other than those specified in subsection (c)"); *id*. at 28 ("That neither Section 3215 nor any other statutory provision explicitly binds the Agencies to a 'floor' invariably means that the Agencies were permitted to go farther."). In my view, however, the Lead Opinion has the question backwards. The Court must not ask if anything in an enabling statute **restricts** an agency from promulgating certain regulations, but rather if anything in the enabling statute **permits** an agency to promulgate the challenged regulations.

"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[.]" *Nw. Youth Servs. v. Commonwealth, Dep't of Pub. Welfare*, 66 A.3d 301, 210 (Pa. 2013). Reliance on general rule making authority would provide an agency with almost unlimited and unrestricted authority to promulgate rules even remotely related to the purpose of the statute. In the Lead Opinion's view this vast authority can only be restricted if

the General Assembly explicitly bars an agency from promulgating a specific rule. This proposition runs counter to the idea that the General Assembly's "delegation of [] rulemaking power [] must be 'clear and unmistakable' as a 'doubtful power does not exist.'" *Eagle Environmental II, L.P. v. Commonwealth, Dep't of Environmental Protection*, 884 A.2d 867, 878 (Pa. 2005) (quoting *Gilligan v. Pennsylvania Horse Racing Commission*. 422 A.2d 487, 490 (Pa. 1980)). An agency only has authority to promulgate rules that the General Assembly specifically gives them the authority to promulgate, and general rulemaking authority does not grant an agency authority to promulgate any rule that is remotely related to an

93

enabling statute unless the statute explicitly bars a specific rule. Authority beyond general rulemaking authority must be present.

The Lead Opinion states that this Commonwealth follows the approach set out by the United States Supreme Court in *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), "which asks at the outset whether the General Assembly 'has directly spoken to the precise question at issue. If the intent...is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent[.]'" Lead Opinion at 25 (quoting *Chevron*, 467 U.S. at 842-43.). Outside of the general rulemaking authority in Section 3274, however, the Lead Opinion only cites one section of Act 13 in support of the Agencies' authority to promulgate any of the challenged regulations, Section 3215(e) for the Agencies' authority to define "public resources." *Id.* at 26 (citing 58 Pa.C.S. § 3215(e)). Section 3215(e) states:

> **(e) Regulation criteria. -** The Environmental Quality Board shall develop by regulation criteria:
>
> (1) For the department to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.
>
> (2) For appeal to the Environmental Hearing Board of a permit containing conditions imposed by the department. The regulations shall also provide that the department has the burden of proving that the conditions were necessary to protect against a probable harmful impact of the public resources.

58 Pa.C.S. § 3215(e). According to the Lead Opinion, the presence of Section 3215(e) "requires the Agencies to develop specific regulatory criteria concerning 'the public resources identified under subsection (c)[.]'" Lead Opinion at 27 (quoting 58 Pa.C.S. § 3215(e)).

94

By its clear language, however, Section 3215 does not grant the Board authority to define "public resources" as it is used in Section 3215(c) or to add additional resources to those listed.[3] The Lead Opinion does not cite any authority beyond the general rulemaking authority that authorizes the Agencies to promulgate the other challenged regulations. As Act 13 does not specifically and explicitly authorize the Agencies to promulgate the challenged regulations, it cannot be said, in my view, that the General Assembly has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842-43.

In light of the lack of explicit authorization, the question remains whether the General Assembly, through anything in Act 13, authorized the Agencies to promulgate the challenged regulations. In answering this question, the Commonwealth Court conducted a thorough statutory construction analysis, including the application of the doctrine of *ejusdem generis*,[4] and determined that Act 13 did not authorize the Agencies to promulgate

any of the challenged regulations. *Marcellus Shale Coalition v. Department of Environmental Protection*, 193 A.3d 447, 469-85 (Pa. Cmwlth. 2018) ("*MSC*"). Specifically, the lower court determined that "[b]y defining 'other critical communities' to include 'species of special concern,'" the Agencies "expand[ed] on the list of public resources identified in Section 3215(c)" and did not track the statute. *Id*. at 476. As to "common areas of a school's property" and "playground," the panel determined they "do

95

not share the same attributes as the other public resources identified in the statute" and their inclusion in the regulatory definition of public resources was void and unenforceable. *Id.* at 481-82. Based on that holding, the Commonwealth Court determined that the regulations definition of "public resources agency," to the extent it includes owners of such recreational areas, fails by extension. *Id*. at 485. I concur with the Commonwealth Court's analysis, including its employment of the doctrine of *ejusdem generis*, which the Lead Opinion rejects, *see* Lead Opinion at 33-37, and therefore would adopt the Commonwealth Court's conclusions invalidating the challenged regulations.

Use of the PNDI Receipt[5]

In addition to finding the Agencies lacked statutory authority to promulgate all of the challenged regulations, the Commonwealth Court also determined that the "requirements related to 'species of special concern' identified on a PNDI receipt violate[d] the Documents Law because they create a binding norm through a changing PNDI database that is not populated through notice and comment procedures." *Id.* at 477. The Lead Opinion disagrees and holds that the lower court erred by concluding the regulatory definition of "other critical communities" violates the Documents Law. Lead Opinion at 45.

The regulations define "other critical communities" as

96

> Other Critical Communities -
>
> (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. The Documents Law requires an agency to give "public notice of its intention to promulgate, amend or repeal any administrative regulations" and must review and consider any comments submitted. 45 P.S. § 1201; 1202. The PNDI database contains resources that have not gone through this notice and comment process. Commonwealth Court Preliminary Injunction Hearing, 10/25/16, N.T. at 153. As the Commonwealth Court explained, "[t]he provisions tied to the PNDI receipt effectively allow third parties to make changes to the regulation without meeting the requirement of formal rulemaking. Indeed, species of special concern are placed in the PNDI database and designated as such by the jurisdictional agencies, that is, the agencies with 'statutory authority to protect those species,' including DCNR, the Game Commission, the Fish and Boat Commission, and the Pennsylvania field office of the United States Fish and Wildlife Service." MSC, 93 A.3d at 473 (citing N.T. at 153-54).

The Agencies argue the Commonwealth Court erred because, while the outcome of the PNDI receipt is unique to each individual site, utilization of the PNDI process to identify public resources is a requirement that was established through valid legislative rulemaking. Appellant's Brief at 45. They further argue the Commonwealth Court confused the changing

outcomes of the PNDI receipt with the process of utilizing the PNDI database. *Id.* at 46. For its part, the Lead Opinion observes that the Department

97

of Conservation and Natural Resources ("DCNR") is statutorily required to maintain an ecological survey of this Commonwealth, which DCNR accomplishes by, *inter alia*, maintaining the PNDI database. Lead Opinion at 43-44 (citing 71 P.S. § 1340.305(a)(10)). The Lead Opinion further argues that the Agencies gave public notice of the inclusion of the use of the PNDI receipt in the definition of "other critical communities" and did not change the manner in which the process works. *Id.* at 45. In the Lead Opinion's view it is the fact that "the basis for the statutorily mandated database does not" change that is determinative in holding the employment of the PNDI receipt does not violate the Documents Law, even though it recognizes that the results may vary over time. *Id.*

The Agencies' argument stems from a misunderstanding of why the Commonwealth Court found utilization of the PNDI receipt violated the Documents Law. The PNDI process itself is not what evades formal rulemaking. Rather, it is the inclusion in the database of resources that have not gone through formal notice and comment rulemaking. The inclusion of these resources within the Agencies' definition of "other critical communities" violates the Documents Law. The Lead Opinion's position is similarly flawed. Contrary to the Lead Opinion's position, DCNR's statutory obligations are irrelevant to the Agencies' requirement to comply with the Documents Law. The inclusion of the PNDI database itself is not the issue. It is the fact that, as the Lead Opinion observes, the results of the PNDI receipt may vary over time without going through the formal rulemaking process that causes the regulation to violate the Documents Law. It permits third parties to add to the regulations without going through the proper rulemaking process. Therefore, even if the Agencies had the statutory authority to define "critical communities" as they did, the employment of the PNDI receipt results in the definition render the regulation void and unenforceable.

98

For the above reasons, I would affirm the Commonwealth Court's grant, in part, of MSC's Application for Summary Relief. In my view, the Agencies exceeded their statutory authority in promulgating the challenged regulations and the employment of the PNDI receipt violates the Documents Law irrespective of the Agencies' statutory authority. Since the Lead Opinion holds otherwise, I respectfully dissent.

Notes:

[1] Dec. 19 P.L. 1140, No. 223.

[2] The MSC accompanied its petition with a request for expedited review and a stay. Then-Judge, now Justice, Brobson, sitting as the trial court, issued a single-judge opinion and order preliminarily enjoining some of the regulations. We addressed the Agencies' (continued…) appeal of that order in a decision issued on June 1, 2018. *See Marcellus Shale Coal. v. Dep't of Env't Prot. of Commonwealth*, 185 A.3d 985 (Pa. 2018).

Meanwhile, merits review proceeded in the Commonwealth Court. *Id*. at 994. On March 14, 2018, the MSC filed an application for partial summary relief on counts three, five, and six. Separately, on August 31, 2017, the MSC sought summary relief on count one. The Commonwealth Court addressed count one by opinion published August 23, 2018. *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 193 A.3d 447, 455 (Pa. Commw. 2018). That is the opinion and order at issue here. Previously, the Agencies appealed that order, and we quashed without prejudice to raise the claims on appeal from a final order. *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 198 A.3d 330 (Pa. 2018) (per curiam).

Thereafter, the parties filed cross applications for summary relief on counts two through seven.

Now-Justice Brobson authored the opinion dealing with those applications, which left several counts pending. *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 216 A.3d 448, 457 (Pa. Commw. 2019). The parties filed cross-appeals, and we quashed both appeals until a final order was entered. *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 223 A.3d 655 (Pa. 2019) (per curiam). The parties then filed a joint Stipulation for Settlement and Joint Application for Relief disposing of counts two through seven, leaving only count one.

[3] 58 Pa.C.S. §§ 2301-3504.

[4] The regulations define "PNDI" as follows:

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

25 Pa.Code § 78a.1. The regulations further define "PNDI receipt" as "[t]he results generated by the Pennsylvania Natural Diversity Inventory Environmental Review Tool containing information regarding threatened and endangered species and other critical communities." *Id.*

Stated more succinctly, "[r]unning a PNDI search on the Pennsylvania Conservation Explorer[, an online tool,] screens for potentially impacted threatened and endangered species, special concern species, and significant ecological features in the vicinity of a project area. The results of the search are summarized in the PNDI receipt." *See* Pennsylvania Natural Heritage Program website at *https://www.naturalheritage.state.pa.us/ApplyingPNHPInformation.aspx* (last visited Feb. 23, 2023).

[5] Legislative rulemaking broadly refers to agencies defining the meaning of statutes and regulations or establishing policy. *Nw. Youth Servs.*, 66 A.3d at 310 (citing Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents,* 90 Tex. L. Rev. 331, 335 (2011)). Some conferrals of legislative power are clear; agencies have authority to adopt rules "where the statute specifically empowers the agency to do so." *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 193 A.3d 447, 462 (Pa. Commw. 2018) (quoting *Bailey v. Zoning Bd. of Adjustment of Phila.*, 801 A.2d 492, 500 (Pa. 2002)). In the absence of express legislative authority, an agency can still create rules if "directed to operate under the statute," based on its interpretation of the statute. *Id*. (quoting *Bailey*, 801 A.2d at 500).

Agencies also act in non-legislative capacities. The catch-all term for this branch of administrative law is "guidance documents." *Nw. Youth Servs.*, 66 A.3d at 310. "These come in an abundance of formats with a diversity of names, including guidances, manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, press releases and others." *Id*. (internal quotation marks and citation omitted). These acts can serve to bind the public, too, because they dictate how the agency carries out its operations, but they lack the formal notice-and-comment procedures.

[6] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

[7] Interpretive rules, on the other hand, are afforded "a lesser quantum of deference[.]" *Nw. Youth Servs.*, 66 A.3d at 311-12 (quoting *Pa.*

Hum. Rels. Comm'n v. Uniontown Area Sch. Dist., 313 A.2d 156, 169 (Pa. 1973)). The lesser degree of deference in the guidance documents domain is attributable to the fact that these rules "may not rest on legislatively-conferred rulemaking powers ... [and] may depend 'upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets.'" *Id.*

[8] This Court has explained the term "binding norm" as follows:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. .. . A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
>
> A general statement of policy, on the other hand, does not establish a 'binding norm'. . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

Pennsylvania Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679 (1977) (footnote and internal quotation marks omitted) (quoting *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 41 (D.C.Cir. 1974)).

[9] This provision of the Pennsylvania Constitution states as follows:

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

Pa. Const. art. I, § 27. This Court has explained that "[Article I, Section 27] establishes the public trust doctrine with these natural resources (the corpus of the trust), and designates 'the Commonwealth' as trustee and the people as the named beneficiaries." *Robinson Township*, 83 A.3d at 956; *see also Pa. Env't Def. Found. V. Commonwealth*, 161 A.3d 911, 931-32 (Pa. 2017) ("The third clause of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.") (footnote omitted).

[10] For ease of reference, we repeat the six items:

> (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.
>
> (6) Sources used for public drinking supplies in accordance with subsection (b).

58 Pa.C.S. § 3215(c)(1)-(6).

[11] The dissent agrees with our conclusion that the General Assembly intended to imbue the Board with the authority to promulgate

regulations pursuant to Act 13. Dissenting Opinion at 2. Yet, despite that agreement and Section 3215(e)'s clear instruction that the Board must develop regulatory criteria for the Department "to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c)[,]" the dissent contends that, "[b]y its clear language, … Section 3215(c) does not grant the Board authority to define 'public resources' as it is used in Section 3215(c) or to add additional resources to those listed." *Id*. at 4-5 (footnote omitted). The dissent's position seems to ignore the statutory language "including but not limited to" in Section 3215(c).

[12] Nat'l Park Serv., *National Natural Landmarks Directory, https://www.nps.gov/subjects/nnlandmarks/nation.htm* (last visited Nov. 23, 2022).

[13] Edgar Kauffman Jr.'s remarks on why the family donated the property eloquently describe the transformation of a private residence to a "public resource."

> Such a place cannot be possessed. It is a work of man for man; not by a man for a man. Over the years since it was built, Fallingwater has grown ever more famous and admired, a textbook example of modern architecture at its best. By its very intensity it is a public resource, not a private indulgence.

W. Pa. Conservancy, *Fallingwater*, *https://waterlandlife.org/entrusted-wpc-1963/* (last visited Nov. 23, 2022).

[14] Stated differently, the Commonwealth Court failed to recognize that the term "public resources" has acquired a peculiar and appropriate meaning in Pennsylvania constitutional jurisprudence. Accordingly, the Statutory Construction Act instructs that this term must "be construed according to such peculiar and appropriate meaning or definition." 1 Pa.C.S. § 1903(a).

[15] Simultaneously, the ERA does not foreclose industrial development. "[R]ather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development." *Robinson Township*, 83 A.3d at 958. Act 13's declaration of purpose, 58 Pa.C.S. § 3202(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."), and the regulation codified in Section 78a.15(g)(5) (listing optimal development of the gas resources and the property rights of gas owners as factors to be considered before issuing a permit), reflect that goal.

[16] The doctrine also applies to situations where the generic words precede the list. "Where the opposite sequence is found, i.e., specific words following general ones … the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated." *McClellan*, 686 A.2d at 806.

[17] Because we find that the application of the ejusdem generis principle is not appropriate, we express no view on whether the Commonwealth Court's ejusdem generis analysis of Section 3215 is correct.

[18] In this regard, we note that when analyzing "species of special concern[,]" the Commonwealth Court applied ejusdem generis to determine "whether the regulatory term 'species of special concern' is of the same general nature or class as the statutory items listed." *Marcellus Shale Coalition*, 193 A.3d at 473. The "statutory items listed" for that purpose were "rare and endangered flora and fauna and other critical communities." 58 Pa.C.S. § 3215(c)(4). The ejusdem generis analysis thus asked if the General Assembly intended for "other critical communities" to fit **within** Section 3215(c)(4). Yet, even if the "included, but not limited to" language was eliminated, the Agencies would still be entitled to protect "other critical communities." This illustrates that the ejusdem generis analysis is misplaced because we are not addressing a statute that purports to

define a term.

[19] As a result, in the Oil and Gas Act, the General Assembly did not delegate the power to define "public resources" for every conceivable purpose. Instead, the Agencies' definitions are limited to the regulatory scheme at issue.

[20] The Commonwealth Court observed that by excluding "threatened species" the Agencies' regulation "is illogical and seems contrary to the intention of the General Assembly to protect at risk species." *Marcellus Shale Coalition*, 193 A.3d at 475 (emphasis omitted). Aside from the fact that the purported illogical nature of a regulation speaks to whether the regulation is reasonable and not whether it was statutorily authorized, the Commonwealth Court overlooked that other portions of the regulations already extend protections to threatened and endangered species. First, the definitions section separately defines "threatened or endangered species," and thus the definition merely clarifies that the two definitions refer to different things. Second, the Section 78a.15 regulations require that a "well permit application must include a detailed analysis of the impact of the well, well site and access road on threatened and endangered species[.]" 25 Pa. Code § 78a.15(a).

[21] In his Concurring and Dissenting Opinion ("CO/DO"), Justice Wecht concludes that the regulatory definition of "other critical communities" "is contained in a regulation that was properly promulgated." CO/DO at 4. The CO/DO, however, disagrees with our conclusion that the Commonwealth Court erred by holding that this definition violates the Documents Law. *Id.* at 22-25. In so doing, the CO/DO relies on an analogy to this Court's decision in *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), in which we enforced the Pennsylvania constitutional requirement that the Commonwealth's legislative powers rest exclusively in the General Assembly. *See* Pa. Const. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."). Justice Mundy reaches a similar conclusion in her Dissenting Opinion, wherein she asserts that the regulatory definition of "other critical communities" (continued…) violates the Documents Law because the PNDI "database of resources [has] not gone through formal notice and comment rulemaking." Dissenting Opinion at 8.

Here, we are not asked to determine whether the General Assembly improperly delegated lawmaking power nor, in our view, are we tasked with deciding whether the Agencies similarly violated some corollary tenet applicable to state agencies. Rather, this appeal requires us to examine whether the Commonwealth Court erred by finding that the regulation at issue violated the Documents Law. We respectfully submit that our straightforward application of the explicit requirements of the Documents Law demonstrates that the Commonwealth Court erred by finding that the regulatory definition of "other critical communities" violates the Documents Law.

[22] The MSC also cites *Rand v. Pennsylvania State Board of Optometry*, 762 A.2d 392 (Pa. Commw. 2000), as a case establishing that an agency must be clearly authorized to wield a specific power. That case is readily distinguishable. There, optometrist Lawrence Rand completed a course in 1987 for prescribing therapeutic agents while in optometry school. In 1999, he applied to the Pennsylvania State Board of Optometry ("PSBO") for a certificate to administer therapeutic agents. The PSBO had promulgated regulations stating that an applicant could not do so unless he or she obtained their optometry license on or after April 1, 1993. It therefore denied his application. Rand appealed, claiming that the PSBO lacked authority to promulgate that regulation because the relevant statute did not authorize it.

The Commonwealth Court agreed and struck the regulation as exceeding the agency's legislative powers. The Commonwealth Court observed that the April 1, 1993 "is a date frozen in time." *Id*. at 395. As a result, the "regulation does nothing to advance the intent of the Act, which is to ensure the optometrists' knowledge regarding pharmaceutical agents is current." *Id*. We are not bound by *Rand*, and its criticisms appear to

be directed at the reasonableness of the chosen date. *See Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.*, 983 A.2d 1231, 1242 (Pa. 2009) (stating that a regulation is not reasonable if it is "so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment"). In any event, the case is not comparable to this dispute because the Commonwealth Court did not conclude that the PSBO was powerless to devise regulations to ensure that optometrists' knowledge remained current.

[1] 58 Pa.C.S. § 3215(c). *See* Act of February 14, 2012, P.L. 87, No. 13 ("Act 13").

[2] Pa. Const. art. I, § 27 (the "ERA") ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the (continued…) people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

[3] Herein, I refer to the Department of Environmental Protection as "the Department" and to the Environmental Quality Board as "the EQB," and I refer collectively to these entities as "the Agencies."

[4] *See Woodford v. Ins. Dep't*, 243 A.3d 60, 86-87 (Pa. 2020) (Wecht, J., concurring); *SEDA-COG Joint Rail Auth. v. Carload Express, Inc.*, 238 A.3d 1225, 1248-49 (Pa. 2020) (Wecht, J., concurring); *Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 686-95 (Pa. 2020) (Wecht, J., concurring); *Harmon v. Unemployment Comp. Bd. of Rev.*, 207 A.3d 292, 310-11 (Pa. 2019) (Wecht, J., concurring); *Cnty. of Butler v. CenturyLink Commc'ns, LLC*, 207 A.3d 838, 853-54 (Pa. 2019) (Wecht, J., concurring); *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1083 (Pa. 2018) (Wecht, J., concurring).

[5] As this Court has explained:

> 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, which is, as a general rule, by way of recourse to procedures prescribed in the Commonwealth Documents Law, [45 P.S. §§ 1102-1602; 45 Pa.C.S. §§ 501-907,] the Regulatory Review Act, [71 P.S. §§ 745.1-745.14,] and the Commonwealth Attorneys Act[, 71 P.S. §§ 732-101-732-506]. When an agency acts under the general rule and promulgates published regulations through the formal notice, comment, and review procedures prescribed in those enactments, its resulting pronouncements are accorded the force of law and are thus denominated "legislative rules."

Nw. Youth Servs., Inc. v. Dep't of Pub. Welfare, 66 A.3d 301, 310 (Pa 2013).

[6] *Tire Jockey Serv., Inc. v. Dep't of Env't Prot.*, 915 A.2d 1165, 1186 (Pa. 2007). Although this legal standard predates this Court's decision in *Tire Jockey*, both the Agencies and several of our previous opinions refer to it as the "*Tire Jockey* test." I do the same herein.

[7] *Snyder Bros.*, 198 A.3d at 1083 (Wecht, J., concurring) (citing *Bucks Cnty. Servs., Inc. v. Phila. Parking Auth.*, 195 A.3d 218, 242 (Pa. 2018) (Wecht, J. concurring)).

[8] As noted by both the Lead Opinion and Justice Mundy, and as discussed further below, one facet of the challenge to the regulatory definition of "other critical communities" involves a contention that the definition runs afoul of the Commonwealth Documents Law by effectively adding substantive material without going through the proper notice-and-comment procedure. But it is undisputed that the definition is contained in a regulation that was properly promulgated.

[9] *Tire Jockey*, 915 A.2d at 1186.

[10] *Id.*

[11] Lead Op. at 26.

[12] An "enabling statute" is "law that permits what was previously prohibited or that creates new powers; esp., a congressional statute conferring powers on an executive agency to carry out various delegated tasks." *Enabling statute*, Black's Law Dictionary (11th ed. 2019).

[13] 313 A.2d 156 (Pa. 1973) (plurality).

[14] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-63.

[15] *Uniontown Area Sch. Dist.*, 313 A.2d at 170.

[16] *Id.*

[17] *Id.*

[18] 884 A.2d 867 (Pa. 2005).

[19] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

[20] Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §§ 4000.101-4000.1904.

[21] *Eagle Env't*, 884 A.2d at 878 (citing 35 P.S. § 6018.105; 53 P.S. § 4000.302).

[22] *Id.* at 879.

[23] 983 A.2d 1231 (Pa. 2009).

[24] *Id.* at 1235 n.4 (citing 34 Pa. Code § 65.161).

[25] *Id.* at 1239 (quoting 43 P.S. § 761(a)).

[26] *Id.*

[27] *See Bucks County Services*, 195 A.3d at 233-39.

[28] *Id.* at 237.

[29] *Slippery Rock Area Sch. Dist.*, 983 A.2d at 1241 (citation modified).

[30] *W. Virginia v. Env't Prot. Agency*, 142 S.Ct. 2587, 2609 (2022) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)).

[31] *Slippery Rock Area Sch. Dist.*, 983 A.2d at 1241.

[32] *Accord Tire Jockey*, 915 A.2d at 1186 ("To demonstrate that the agency has exceeded its administrative authority, 'it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or lack of wisdom in exercising agency power is not equivalent to abuse.'" (quoting *Hous. Auth. of Cnty. of Chester v. Pa. State Civil Ser. Comm'n*, 730 A.2d 935, 942 (Pa. 1999)).

[33] *Eagle Env't*, 884 A.2d at 877.

[34] *See supra* n.4 and the cases cited therein.

[35] *Snyder Bros.*, 198 A.3d at 1083 (Wecht, J., concurring).

[36] *See id.* (Wecht, J., concurring) ("Statutory interpretation is an important part of the work that we do. We do not subcontract that interpretive enterprise to administrative agencies.").

[37] 58 Pa.C.S. § 3215(c).

[38] 58 Pa.C.S. § 3274.

[39] As the Lead Opinion highlights, another subsection of Section 3215 also specifically directs the EQB to "develop by regulation criteria" for the Department to utilize when "conditioning a well permit based on its impact to the public resources identified under subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners." 58 Pa.C.S. § 3215(e)(1); *see* Lead Op. at 29.

[40] Although the Lead Opinion twice reproduces the Section 3215(c) list of public resources in its

Opinion, *see* Lead Op. at 3-4 & 28 n.10, I likewise include it here for ease of reference:

> **(c) Impact.--**On making a determination on a well permit, the department shall consider the impact of the proposed well on public resources, *including, but not limited to*:
>
> (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.
>
> (6) Sources used for public drinking supplies in accordance with subsection (b).

58 Pa.C.S. § 3215(c)(1)-(6) (emphasis added).

[41] *See Dep't of Env't Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014) ("[I]t is widely accepted that general expressions such as 'including,' or 'including but not limited to,' that precede a specific list of included items are to be considered as words of enlargement and not limitation.").

[42] Lead Op. at 31.

[43] *Id.*

[44] *Id.* at 36.

[45] *Id.* at 33.

[46] *Id.* at 34, 36, 41.

[47] *See* Pa. Const. art. I, § 27 (emphasis added); *supra* n.2.

[48] 58 Pa.C.S. § 3215(c)(5).

[49] *See* National Register of Historic Places, National Register Database and Research, *https://www.nps.gov/subjects/nationalregister/database-research.htm* (last visited April 14, 2023).

[50] Pa. Const. art. I, § 27. *See also Robinson Township v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013) (plurality) (stating that the ERA's "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").

[51] Lead Op. at 34.

[52] *Id.* (concluding that the Section 3215(c) list "does not neatly break down into 'purely private' and 'purely public' categories").

[53] The Lead Opinion expresses shock that I might suggest that Fallingwater is not a "natural resource" within the meaning of the ERA. *Id.* at 35-36. Heretic though I may be, it cannot escape my notice that Fallingwater is a house. It is a beautiful house, indeed, but scenic beauty does not transform a house into a "natural resource."

[54] The Lead Opinion contends that the constitutional meaning of "public natural resources" is not "cabined by natural or man-made categories." *Id.* at 35. It is puzzling, to say the least, to suggest that "natural resources" need not be "natural."

[55] To be clear, I do not, as the Lead Opinion surmises, suggest that the ERA has absolutely nothing to do with the items listed in Section 3215(c). *See id.* I recognize that protection of natural resources "secured by the Constitution of Pennsylvania" is one of the legislative purposes specified in Act 13. 58 Pa.C.S. § 3202(4). Where I differ with the Lead Opinion is that I merely recognize that Section 3215(c) is broader than the ERA, because it clearly contains items that are not, in any sense, natural resources.

[56] Lead Op. at 34 (quoting *Robinson Twp.* 83

A.3d at 951).

[57] *Id.* at 39.

[58] *Id.* at 40.

[59] Even under the Lead Opinion's account of Section 3215(c) and the ERA, the utility of its approach is questionable given its acknowledgment that the constitutional term "public . . . resources" is "broad and undefined" and perhaps incapable of comprehensive definition. Pa. Const. art. I, § 27; Lead Op. at 33, 36. If the constitutional standard is too broad to effectively define, then query what is gained by incorporating this purportedly "defined meaning" into Section 3215(c). Lead Op. at 40.

[60] *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020).

[61] *Id.* (describing *ejusdem generis* as a "useful tool of statutory construction" which is "used for the sole purpose of determining the intent of the General Assembly").

[62] *See Cumberland Coal Res.*, 102 A.3d at 976.

[63] In its effort to reject *ejusdem generis*, the Lead Opinion makes an additional comment that could prove perilous for future cases, and from which I must distance myself. It cites *Cumberland Coal Resources* for the proposition that *ejusdem generis* applies to "definitional" sections, and rejects its use here because "[t]his is not a situation where Section 3215(c) can plausibly be interpreted as a definitional section . . . ." Lead Op. at 40. But the application of *ejusdem generis*, to my knowledge, has never been limited strictly to statutory language that defines a term. Rather, the doctrine applies "where general words follow the enumeration of particular classes of persons or things," such that additional items must be "of the same general nature or class as those enumerated." *McClellan v. Health Maint. Org. of Pennsylvania*, 686 A.2d 801, 806 (Pa. 1996). Such "enumeration" need not be in the form of a definition, and the Lead Opinion's suggestion of the contrary poses a risk of introducing substantial confusion into our statutory construction jurisprudence.

[64] Lead Op. at 33.

[65] *Cumberland Coal Res.*, 102 A.3d at 976; *McClellan*, 686 A.2d at 806.

[66] *Weiss v. Swift & Co.*, 36 Pa. Super. 376, 386-87 (Pa. Super. 1908).

[67] *Cumberland Coal Res.*, 102 A.3d at 976.

[68] *See* 25 Pa. Code §§ 78a.1, 78a.15(f)-(g).

[69] *See* 25 Pa. Code § 78a.15(f)-(g).

[70] The regulatory definition of "other critical communities" is:

> *Other critical communities* --
>
> (i) Species of special concern identified on a [Pennsylvania National Diversity ("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.

[71] 58 Pa.C.S. § 3274.

[72] *Slippery Rock Area Sch. Dist.*, 983 A.2d at 1239.

[73] *Tire Jockey*, 915 A.2d at 1186.

[74] *See Marcellus Shale Coal. v. Dep't of Env't Prot.*, 185 A.3d 985, 1009-11 (Pa. 2018) (*MSC II*) (Donohue, J., concurring and dissenting).

[75] *See* 25 Pa. Code § 78a.1 (defining "common areas of a school's property," in relevant part, as "[a]n area on a school's property accessible to

the general public for recreational purposes"); *id*. (defining "playground," in relevant part, as "[a]n outdoor area provided to the general public for recreational purposes").

[76] 58 Pa.C.S. § 3215(c)(1).

[77] *MSC II*, 185 A.3d at 1009 (Donohue, J., concurring and dissenting).

[78] *See* 58 Pa.C.S. § 3215(c)(1) (including publicly owned "forests" and "game lands"); *id*. § 3215(c)(2) (including "National or State scenic rivers").

[79] 58 Pa.C.S. § 3215(c).

[80] *See* 25 Pa. Code § 78a.1 (defining "public resource agency" as "[a]n entity responsible for managing a public resource identified in § 78a.15(d) or (f)(1) (relating to application requirements) including the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, the United States Fish and Wildlife Service, the United States National Park Service, the United States Army Corps of Engineers, the United States Forest Service, counties, *municipalities* and *playground owners*.") (emphasis added).

[81] *See* Lead Op. at 59 ("[O]ur determination that a 'playground' is a valid public resource effectively resolves this legal challenge because the 'owner' of that resource is responsible for it.").

[82] Section 3215(d) provided:

> **(d) 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) (emphasis added). This subsection was held unconstitutional under the ERA in *Robinson Township*. *See Robinson Twp.*, 83 A.3d at 984.

[83] *See* 25 Pa. Code § 78a.1.

[84] 58 Pa.C.S. § 3215(c).

[85] *Tire Jockey*, 915 A.2d at 1186.

[86] *Id*.

[87] *Slippery Rock Area Sch. Dist.*, 983 A.2d at 1242 (quoting *Uniontown Area Sch. Dist.*, 313 A.2d at 169).

[88] *Tire Jockey*, 915 A.2d at 1186 (quoting *Rohrbaugh v. Pennsylvania Pub. Util. Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999)).

[89] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[90] *See* Lead Op. at 56-58.

[91] *See* Diss. Op. at 6-8 (Mundy, J.)

[92] *See supra* n.70.

[93] 25 Pa. Code § 78a.1.

[94] The regulation defines "PNDI" as:

> The Pennsylvania Natural Heritage Program's database containing data identifying and describing this Commonwealth's ecological information, including plant and animal species classified as threatened and endangered as well as other critical communities provided by the Department of

> Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission and the United States Fish and Wildlife Service. The database informs the online environmental review tool. The database contains only those known occurrences of threatened and endangered species and other critical communities, and is a component of the Pennsylvania Conservation Explorer.

25 Pa. Code § 78a.1. A PNDI receipt is defined as: "The results generated by the Pennsylvania Natural Diversity Inventory Environmental Review Tool containing information regarding threatened and endangered species and other critical communities." *Id.*

[95] 161 A.3d 827 (Pa. 2017).

[96] *Id.* at 833-38.

[97] *Id.* at 838.

[98] *Id.* at 839.

[99] *Id.*

[100] MSC's Br. at 51.

[101] *See* Agencies' Br. at 42 ("The *process* set forth in subsection 78a.15(f) requiring use of the PNDI tool is not 'ever-changing.' It is static.") (emphasis in original); Lead Op. at 45 ("[T]he Agencies gave appropriate public notice of the manner in which species of special concern were to be identified for purposes of information gathering in the pre-permitting stages of unconventional oil and gas wells. While the PNDI receipt information may vary by site and over time, the basis for inclusion in the statutorily mandated database does not.").

[1] Act of Feb. 14, 2012, P.L. 87, No. 13 (as amended 58 Pa.C.S. §§ 2301-3505).

[2] *See* Footnote 4, *infra*.

[3] The Lead Opinion appears to recognize Section 3215(e) does not provide the Agencies any express authority to add additional resources as it states "[t]he consequent question is whether Section 3215 operates as any limitation on the Agencies' powers to add 'public resources' other than those specified in subsection(c)." LeadOpinion at 27.

[4] Under the doctrine of *ejusdem generis* ("of the same kind or class") "where specific terms setting forth enumeration of particular classes of persons or things following general terms, the general words will be construed as applicable only to person or things of the same general nature or class as those enumerated." *Department of Environmental Protection v. Cumberland Coal Resources, LP*, 102 A.3d 962, 976 (Pa. 2014).

[5] PNDI stands for the Pennsylvania Natural Diversity Inventory and is defined by the regulations as "[t]he Pennsylvania Natural Heritage Program's database containing data identifying and describing this Commonwealth's ecological information, including plant and animal species classified as threatened and endangered as well as other critical communities provided by the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission and the United States Fish and Wildlife Services. The database informs the online environmental tool. The database contains only those known occurrences of threatened and endangered species and other critical communities, and is a component of the Pennsylvania Conservation Explorer." 25 Pa.Code § 75a.1. The Code defines a PNDI receipt as "[t]he results generated by the [PNDI] Review Tool containing information regarding threatened and endangered species and other critical communities." *Id.*
