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Environmental Regulations of Hydraulic Fracking Industry Upheld by Commonwealth Court

On July 22, 2019, the Commonwealth Court of Pennsylvania ruled that the Pennsylvania Department of Environmental Protection along with the Environmental Quality Board (collectively, the “Agencies”) have the statutory authority to require permitting for the storage of residual waste produced during the hydraulic fracturing process. The decision in *Marcellus Shale Coal. v. Dep’t of Env’tl. Prot. of Pa.*, 2019 Pa. Commw. LEXIS 672 (Commw. Ct. July 22, 2019), comes as part of an ongoing legal dispute initiated by the Marcellus Shale Coalition (“MSC”) following the publication of Title 25, Chapter 78a of the Pennsylvania Code (Unconventional Well Regulations) in 2016; several provisions of which were barred by virtue of a preliminary injunction upheld by the Pennsylvania Supreme Court in 2018. The Commonwealth Court has since been considering motions for summary relief pertaining the Chapter 78(a) regulations.

The most recent decision by the Commonwealth Court addressed several challenges to the Chapter 78(a) regulations, which established “new registration, construction, security, and restoration standards for well development impoundments,” including whether the Agencies had the authority to require operators of centralized impoundments, which store wastewater generated from drilling activities, to obtain specialized permits. Central to the MSC’s argument was that Act 13, 58 Pa.C.S. §§ 2301-3504, as the source of the Agencies’ authority to promulgate unconventional well regulations, does not reference centralized impoundments and consequentially cannot serve as a grant of authority.

Under Pennsylvania law, “[t]o determine whether a regulation is adopted within an agency’s granted power, a court looks for statutory language authorizing the agency to promulgate the legislative rule and examines that language to determine whether the rule falls within the grant of authority” *Id.* at 9 (internal citation omitted). In this regard, the Commonwealth Court disagreed with MSC’s interpretation and narrow construction stating that “[t]he Agencies promulgated the Unconventional Well Regulations as a means to regulate a particular method of natural gas extraction, not to implement a particular statute” and highlighted that they were authorized to require permitting for storage wells under The Clean Streams Law, which authorizes the enactment of permitting requirements on activities that may result in the pollution of Commonwealth water sources, and Chapter 299 of the Residual Waste Management Regulations, which pertains to the storage of residual waste.

While the Commonwealth Court held that the regulations surrounding the centralized impoundments were statutorily authorized, it did not fully address MSC’s argument that the regulations unlawfully target the Marcellus Shale industry, inviting future challenges.

For a copy of *Marcellus Shale Coal. v. Dep’t of Env’tl. Prot. of Pa.*, analysis of the other regulations challenged therein, or questions regarding Unconventional Well Regulations, please contact the Energy Group at Dickie, McCamey & Chilcote, P.C.



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