

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBINSON TOWNSHIP, Washington )  
County, Pennsylvania, BRIAN COPPOLA, )  
Individually and in his Official Capacity as )  
SUPERVISOR of ROBINSON )  
TOWNSHIP, TOWNSHIP OF )  
NOCKAMIXON, Bucks County, )  
Pennsylvania, TOWNSHIP OF SOUTH )  
FAYETTE, Allegheny County, )  
Pennsylvania, PETERS TOWNSHIP, )  
Washington County, Pennsylvania, )  
DAVID M. BALL, Individually and in his )  
Official Capacity as COUNCILMAN of )  
PETERS TOWNSHIP, TOWNSHIP OF )  
CECIL, Washington County, )  
Pennsylvania, MOUNT PLEASANT )  
TOWNSHIP, Washington County, )  
Pennsylvania, BOROUGH OF )  
YARDLEY, Bucks County, Pennsylvania, )  
DELAWARE RIVERKEEPER )  
NETWORK, MAYA VAN ROSSUM, the )  
Delaware Riverkeeper, MEHERNOSH )  
KHAN, M.D., )

Petitioners, )

vs. )

COMMONWEALTH OF )  
PENNSYLVANIA, PENNSYLVANIA )  
PUBLIC UTILITY COMMISSION, )  
ROBERT F. POWELSON, in his Official )  
Capacity as CHAIRMAN of the PUBLIC )  
UTILITY COMMISSION, OFFICE OF )  
THE ATTORNEY GENERAL OF )  
PENNSYLVANIA, LINDA L. KELLY, in )  
her Official Capacity as ATTORNEY )  
GENERAL of the COMMONWEALTH )  
OF PENNSYLVANIA, )  
PENNSYLVANIA DEPARTMENT OF )  
ENVIRONMENTAL PROTECTION and )  
MICHAEL L. KRANCER, in his Official )  
Capacity as SECRETARY of the )  
DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION )

Respondents. )

Docket No. 284 MD 2012

TYPE OF PLEADING:

**MOTION FOR PRELIMINARY  
INJUNCTION**

Filed on behalf of:

Petitioners

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOWNSHIP OF ROBINSON, Washington )  
County, Pennsylvania, et.al. ) Docket No. 284 MD 2012  
)  
Petitioners, )  
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vs. )  
)  
COMMONWEALTH OF )  
PENNSYLVANIA, et al. )  
)  
Respondents. )

**MOTION FOR PRELIMINARY INJUNCTION**

AND NOW, Petitioners, Robinson Township, Washington County, Pennsylvania, Brian Coppola, Peters Township, Washington County, Pennsylvania, David M. Ball, Township of Nockamixon, Bucks County, Township of Cecil, Washington County, Mount Pleasant Township, Washington County, Borough of Yardley, Bucks County, Township of South Fayette, Allegheny County, Delaware Riverkeeper Network, and Maya Van Rossum, the Delaware Riverkeeper, and Mehernosh Khan, M.D., by and through their attorneys, file the within Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief against Respondents, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, Office of the Attorney General of the Commonwealth of Pennsylvania, Linda L. Kelly, Pennsylvania Department of Environmental Protection and Michael L. Krancer, and in support thereof set forth as follows:

**INTRODUCTION**

1. On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012. (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act

(hereinafter, “Oil and Gas Act”), 58 P.S. § 601.101 et seq., to establish, in part, a one-size-fits-all zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania.

2. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit without interference from the government. *See*, PA. CONST. Art. I, Sec 1. In certain limited circumstances, the Commonwealth may constitutionally employ its police powers in a manner that may infringe upon citizens’ property rights. However, the powers of the Commonwealth are not unlimited and will be deemed an arbitrary exercise of the Commonwealth’s police powers prohibited by Article I, Section 1 of the Pennsylvania Constitution if the enactment is not designed to protect the health, safety and welfare of the community. Moreover, if the law is designed to benefit or affect one industry or locality to the exclusion of others, it will be designated an unconstitutional “special law” in violation of Article III, Section 32 of the Pennsylvania Constitution. Article III, Section 32 of the Pennsylvania Constitution was adopted to end “[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals [corporations] or favored localities.” *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001).

3. The Pennsylvania General Assembly enacted Act 13, in part, to overturn the Pennsylvania Supreme Court’s 2009 decision in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009). The Court held that municipalities could use zoning powers to regulate the location of oil and gas development in their communities. The Pennsylvania Supreme Court was asked to consider whether the Oil and Gas Act preempted

municipalities from enacting zoning ordinances to plan for the development of oil and gas drilling in various parts of the Borough of Oakmont. *Id.*

4. The Supreme Court drew a “where versus how” distinction between zoning and land use classifications that were enacted to preserve the character of neighborhoods and to plan for community development and the technical regulations governing the manner in which an industry operates. *Id.* at 224-25, 865-66. The Court held that:

While the governmental interest involved in oil and gas development and in land-use control at times may overlap, ***the core interests in these legitimate governmental functions are quite distinct.*** The state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources of the state. A county’s ***interest in land-use control,*** in contrast, is one of more orderly development and ***use of land in a manner consistent with local demographic and environmental concerns.***

*Id.* at 225, 865. (emphasis added).

5. In response to the holdings of *Huntley & Huntley* and *Penneco Oil Company*, the Pennsylvania General Assembly specifically inserted § 3304 in Act 13 that constrains municipalities’ authority over “where” gas drilling operations may be located within the municipal borders.

6. Despite the General Assembly’s efforts, Act 13 cannot override Petitioners’ statutorily defined mandate of how zoning is implemented and approved at the local level, as defined in the Municipalities Planning Code (hereinafter, “MPC”), 53 P.S. § 10101 *et seq.* The MPC is the tool by which the Constitutional directives of the U.S. Supreme Court and Pennsylvania Supreme Court is are accomplished.

7. Through Act 13, the Pennsylvania General Assembly has mandated that Municipal Petitioners must:

- a. modify their zoning laws in a manner that fail to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality; 53 P.S. § 10603(a).

- b. modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners' comprehensive plans; 53 P.S. § 10605.
- c. modify zoning laws and create zoning districts that violate Petitioners' constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community; *See*, 53 P.S. § 10604.
- d. conduct Public Hearings to gather citizen comments regarding authorized oil and gas development in residential and commercial districts as a permitted use by right even though such comments and evidence cannot be considered by Petitioners who, by state law, must approve the state's zoning scheme regardless of the findings of the elected officials in violation of 53 P.S. § 10908.
- e. conduct Public Hearings negating citizens' due process rights to meaningful participation in proceedings involving the adoption of a zoning ordinance; *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010).
- f. pass zoning laws without affording its citizens due process that will result in the zoning laws being *void ab initio*; *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007).
- g. allow heavy industrial uses in all zoning districts, including residential areas, near homes, schools, churches and nursing homes in violation of 53 P.S. § 10605.
- h. must enact zoning laws that do not allow for the orderly development of their respective communities; and, *See*, 53 P.S. § 10605.
- i. adopt zoning laws that are an improper use of the Commonwealth's sovereign's police powers in violation of the U.S. Constitution and Pennsylvania Constitution.

### **STATUTORY AUTHORITY AND JURISDICTION**

8. Petitioners bring the instant Motion for Preliminary Injunction pursuant to 42 Pa.C.S. § 761 and Pennsylvania Rule of Appellate Procedure and Pennsylvania Rules of Civil Procedure § 311. The Commonwealth Court may assert trial jurisdiction over actions seeking injunctions against state, even with ancillary claims for damages, unless claim involves eminent domain, negligence or trespass. *Pastore v. Com. State System of Higher Educ. for Use of Edinboro University of Pennsylvania*, 618 A.2d 1118, 1120 (Pa.Cmwlt.1992)

9. The Petitioners have filed with this Honorable Court a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition for Review")

requesting that this Honorable Court declare that provisions of Act 13 violate the United States Constitution and the Pennsylvania Constitution and enjoin the implementation of the unconstitutional provisions of Act 13. A true and correct copy of the Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief is incorporated herein as if fully set forth.

10. In the underlying Petition for Review, Petitioners assert that:
  - a. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution as Act 13's zoning scheme is an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania;
  - b. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts.
  - c. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution as Act 13's allowance of oil and gas development activities as a permitted use by right in every zoning district renders it impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC resulting in an improper use of its police power;
  - d. Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry;
  - e. Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.
  - f. Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources, removing municipalities' constitutionally mandated duty to protect the environment;
  - g. Act 13 violates the doctrine of Separation of Powers because, through its provision that allows for advisory opinions, Act 13 permits an Executive

agency, the Pennsylvania Public Utility Commission, to play an integral role in the exclusively Legislative function of drafting legislation;

- h. Act 13 violates the doctrine of Separation of Powers because it entrusts an Executive agency, the Pennsylvania Public Utility Commission with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function. *See, Commonwealth v. Allshouse*, 33 A.3d 31 (Pa. Super. 2011);
- i. Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection without any definitive standards or authorizing language.
- j. Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.
- k. Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.
- l. Act 13 is an unconstitutional “special law” in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals’ ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry.
- m. Act 13’s restriction on health professionals’ ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution.

**PRELIMINARY INJUNCTION:**

- 11. The Petitioners seek to enjoin the enforcement of Act 13 as of its effective date of April 14, 2012.
- 12. The grounds for the requested preliminary injunctive relief are set forth in the Petition for Review and filed at the above captioned number and term, and are incorporated by reference herein.
- 13. In further support of this Motion, Petitioners allege the following:

a. Pursuant to Section 9 of the Act, the mandatory effective date of the Act is April 14, 2012 (the “Effective Date”); *i.e.* 60 days from the approval date of February 14, 2012.

b. Thereafter, pursuant to Section 3309 of the Act, a local government has 120 days from the Effective Date to review and amend its oil and gas ordinance to comply with the Act. Specifically, Section 3309 of the Act states:

§ 3309. Applicability.

(a) Ordinances. This chapter shall apply to the enforcement of local ordinances existing on the effective date of this chapter and to the enactment or enforcement of a local ordinance enacted on or after the effective date of this chapter.

(b) Local governments. A local government that has enacted a local ordinance relating to oil and gas operations prior to the effective date of this chapter shall have 120 days from the effective date of this chapter to review and amend an ordinance in order to comply with this chapter.

c. If the Act is not restrained, it will be impossible for municipalities to review and amend their zoning ordinances when considering the time constraints and requisites imposed by the Municipalities Planning Code. Act 13 requires that all zoning ordinances must be brought into conformity within 120 days of the Effective Date, which is April 14, 2012. *See*, Act 13, at § 3309(b)(4). However, industry has indicated that it will take action before that date in the event its permits or applications are denied under existing zoning ordinances. Act 13 imposes new, mandatory duties upon Municipal Petitioners that are radically different than and a complete departure from existing obligations imposed on the Municipal Petitioners by the MPC. For example, to implement the mandates of Act 13, Municipal Petitioners must completely re-write their comprehensive plans and zoning codes, including the existing zoning laws that are consistent with established municipal comprehensive plans. Such action is required because these enactments must be consistent with one



another and must be based on the protection of the health, safety, morals, general welfare and orderly development of the community. 53 P.S. §§ 10603(j); 10605.

14. Act 13 provides Municipal Petitioners *120 days* to expend significant time, monies and resources to:

- a. develop entirely new comprehensive plans and ordinances;
- b. consult with their respective planning commissions and county planning commissions;
- c. submit formal copies of proposed ordinances to municipal and county planning commissions;
- d. submit the proposed ordinance to the Public Utility Commission for its review and direction;
- e. advertise public notice of public hearings;
- f. conduct public hearings;
- g. submit revised formal copies of proposed ordinances to the appropriate planning commissions if public hearings resulted in any substantial changes to the proposal; and
- h. publicly advertise for passage of the instruments and approve final ordinances and comprehensive plans.

15. Regarding the amendment of a zoning ordinance, there is a considerable amount of time and taxpayer funds in order to effectuate the same. Specifically, there is a substantial amount of time needed to consider and draft a proposed amendment. Once a proposed amendment is drafted the requisites of the Municipalities Planning Code (53 P.S. § 10609) must be complied with which are as follows:

- (a) Before voting on the enactment of an amendment, the governing body must hold a public hearing pursuant to public notice.

- (b) If the proposed amendment involves a zoning map change, notice of said public hearing shall be conspicuously posted by the municipality and notice of the public hearing must also be mailed by the municipality at least 30 days prior to the date of the hearing by first class mail to the addressees all real property located within the area being rezoned,
- (c) If the municipal planning commission does not prepare the zoning amendment, the municipal governing body must submit the proposed zoning amendment to municipal planning commission for recommendation at least thirty (30) days prior to the municipal governing body's public hearing.
- (d) If a county planning agency has been created for the county in which the municipality proposing the amendment is located, then at least thirty (30) days prior to the public hearing on the amendment by the local governing body, the municipality shall submit the proposed amendment to the county planning agency for recommendations.
- (e) If, after any public hearing held upon an amendment, the proposed amendment is changed substantially, or is revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment.

16. A municipality **must** follow the requisites to the Municipalities Planning Code in order to amend its zoning ordinance. It will be impossible for a municipality to comply with the aforementioned procedure of the Municipalities Planning Code and its time constraints by the Effective Date, April 14, 2012. Any existing ordinance that does not already meet the terms of the Act will be considered non-complaint as of this date and will open municipalities up to the possibility of sanctions. With that said, it will be almost equally impossible to re-write a municipal zoning ordinance within the requisite 120 review period when considering the requisites imposed by the Municipalities Planning Code.

17. In order to pass zoning ordinances or approve applications, municipal officials are required to consider the evidence introduced from these review processes and base their decision off the information gathered. If approval or the zoning ordinance is mandated regardless of the evidence gathered, rather than base the decision of the considerations provided, municipalities will be forced to turn a blind eye to any evidence brought forth in by a landowner in a public hearing or otherwise.

Pennsylvania courts have generally held that landowners' property interests and due process rights may be violated by failing to give public notice or hold a public hearing in accordance with the zoning procedures mandated by the MPC. *See, Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007); *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033 (Pa. 2006); *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010).

18. Furthermore, a challenge mounted against Municipal Petitioners during the 120 day review period may also compromise the municipality's ability to receive funds collected under Chapter 23 of Act 13. If Municipal Petitioners do not meet this deadline, they are subject to challenge by a private party in front of the Pennsylvania Public Utilities Commission or this Court, which could result in Petitioners losing access to *any* funds collected under the impact fee until Petitioners are able to revise their ordinances. Act 13, at § 3308.

19. Even though a local government is granted 120 days from the effective date of the Act to review its ordinance for compliance and amend the same if deemed warranted, the oil and gas industry has taken the position that it has free reign for the installation of any and all of its infrastructure as of April 14, 2012. Said industry has taken the position that as of the Effective Date, it will in effect instruct the local government whether or not the local government's ordinance is proper or not. Industry has threatened local government officials that on the Effective Date, it may run to Commonwealth Court to invalidate said ordinance even if within the 120 day review period permitted by Act 13. Furthermore, within the 120 day review period, industry has further threatened via Act 13 that it will seek to punish government officials through the payment of its legal fees if enforcement or enactment of a local ordinance does not follow the terms of either Act 13 **or the Municipalities Planning Code**. [See Section 3307(1) of Act 13]. Although a local government may

have not completed its review during the 120 day period, industry has threaten to churn attorney fees and attempt to hold the taxpayers of the local government responsible for the same.

20. The oil and gas industry's position is illustrated in a March 12, 2012, correspondence sent by the legal counsel of MarkWest Liberty Midstream & Resources, LLC<sup>1</sup> to Cecil Township (a Petitioner herein). As stated therein, MarkWest takes the position that as of April 14, 2012, Cecil Township (a Petitioner herein) must authorize the MarkWest natural gas compressor as proposed. Specifically, it argues that the "proposed [MarkWest] facility will be a permitted use as a matter of law on April 14, 2012, the effective date of Act 13". MarkWest argues that even through there is 120 day review period, on April 14, 2012, it may institute a legal challenge in Commonwealth Court to invalidate the Cecil Township Ordinance and seek "attorneys fees in connection with such action". A true and correct copy of the March 12, 2012, MarkWest correspondence is attached hereto as Exhibit A.

21. Using Act 13 as their weapon, the oil and gas industry is attempting to bully and strong-arm local elected officials to basically invalidate existing zoning regulations and operate with no zoning on this issue whatsoever after the Effective Date.

22. Because the Constitution protects property rights, the Commonwealth can infringe upon those rights through zoning powers only when such zoning will benefit the individual community. The Commonwealth **must** undertake an analysis to determine how the zoning regulation will benefit the local community's health, safety, morals or general welfare before any zoning regulation may be justified as an enactment pursuant to the Commonwealth's police power.

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<sup>1</sup> MarkWest Liberty Midstream & Resources, L.L.C. operates in the natural gas midstream business. It provides natural gas gathering, transportation, and processing of natural gas, the transportation, fractionation, marketing, and storage of natural gas liquids; and the gathering and transportation of crude oil. It has extensive natural gas gathering, processing, and transmission operations in the northeast regions of the United States, including Pennsylvania and the Marcellus Shale region. It is the largest natural gas processor in the Appalachian region.

23. Any investigation into the individualized benefit of the law must encompass an accurate examination of the potential negative effects that inevitably come with introducing an industrial activity into varied residential, agricultural and commercial areas. Scientific evidence has shown that noise, odors, heavy truck traffic, open flames, workers living on-site, and potential harmful emissions may flow from those industrial sites into residential neighborhoods. For example, drilling elements including condensate tanks, compressor stations, flaring, and impoundments have all been associated with the release of benzene which is extremely toxic and is known to cause cancer in human beings or other acute health problems. In doing an evaluation on the effects of the health, safety, and general welfare of local communities while zoning, the Commonwealth failed to consider the localized concerns associated with oil and gas operations.

24. Petitioners further allege the following:

a) The Respondents have engaged in acts which are directly in violation of their Constitutional rights.

b) By virtue of said violations, Petitioners are without an adequate remedy at law and have suffered, and will continue to suffer, substantial and immediate irreparable harm or the threat of substantial and irreparable harm including, but not limited to the matters herein raised.

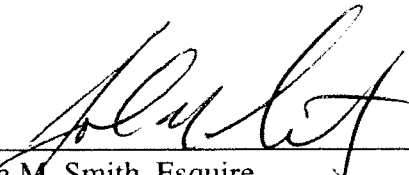
c) As set forth in greater detail, in Petitioners' Brief In Support of Injunction, Petitioners will likely succeed on the merits of its claims.

d) The balance of hardships tip decidedly in favor of Petitioners as set forth in greater detail of Petitioners' Brief in Support of Preliminary Injunction.


25. Based on the foregoing, the Petitioners seek enjoin the Act from becoming effective on April 14, 2012.

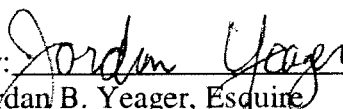
WHEREFORE, Petitioners, respectfully requests this Honorable Court:

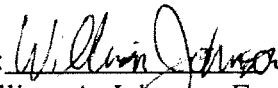
- I. Enter a Preliminary Injunction enjoining Act 13 becoming effective on April 14, 2012;
- II. Grant an expedited hearing on Petitioner's Preliminary Injunction prior to April 14, 2012; and
- III. Award the Petitioners any further relief, including attorneys' fees and costs, as this Court deems just and proper.

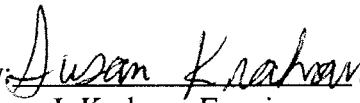
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March 1, 2012

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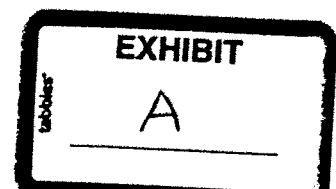
Re: MarkWest Liberty Midstream & Resources, LLC v. Cecil  
Township Zoning Hearing Board; Civil Division; No. 2011-2645  
Court of Common Pleas of Washington County

Dear Counsel:

On February 14, 2012, Governor Corbett signed into law Act 13 of 2012 ("Act 13"), which makes a series of reforms to Pennsylvania's Oil and Gas Act (the "old Act"). Chapter 33 of Act 13 amends the old Act with respect to uniformity of local ordinances and requires that local ordinances authorize natural gas compressor stations, such as MarkWest's proposed facility, as a permitted use in industrial zoning districts.<sup>1</sup> Consequently, the enactment of Act 13 is dispositive on this appeal, and obviates the need for the parties to proceed. Because Pennsylvania law now requires local ordinances authorize natural gas compressor stations as a permitted use in industrial areas, MarkWest proposes the following:

- The parties cancel the mediation scheduled for March 14, 2012;
- The board issue MarkWest a permit for the proposed facility, effective April 14, 2012; and
- The parties enter into a stipulation of dismissal, and request that the appeal be marked settled and discontinued.

<sup>1</sup> Chapter 33 of Act 13 takes effect on April 14, 2012. Act 13, Section 9.



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John M. Smith  
March 1, 2012  
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Chapter 33 of Act 13 provides that “. . . all local ordinances regulating oil and gas operations<sup>2</sup> shall allow for the *reasonable development of oil and gas resources*.” 58 Pa.C.S. § 3304(a) (emphasis added). “In order to allow for the reasonable development of oil and gas resources, a local ordinance . . . *shall* authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts . . .” if the natural gas compressor station (i) is located at least 750 feet from the nearest existing building, and (ii) the noise level does not exceed 60dbA at the nearest property line. 58 Pa.C.S. § 3304(7)(emphasis added).

The proposed facility meets both requirements. First, mapping data provided by the Township engineer establishes that proposed facility is at least 1,000 feet from the nearest existing building. (Hearings on special exception application, Exs. 9, 12; Tr. pp. 458-459, 467.) Second, MarkWest committed to a noise level at the property line that will not exceed 60 dbA. (Hearings on special exception application, Tr. pp. 42, 72, 74-75.)

Section 3309 of Act 13 specifically provides that Chapter 33 will apply to existing ordinances, such as the UDO. 58 Pa.C.S. § 3309(a) (“[t]his chapter shall apply to the enforcement of local ordinances existing on the effective date of this chapter and to the enactment or enforcement of a local ordinance enacted on or after the effective date of this chapter.”)

Act 13 recognizes that ordinances that do not provide for natural gas compressor stations as a permitted use in industrial zones will be non-compliant with Act 13 as of the effective date, April 14, 2012. Although section 3309(b) allows a local government 120 days to amend its ordinance to bring it into compliance, such an ordinance is, nevertheless, non-compliant with Chapter 33 of Act 13 as of the effective date. 58 Pa.C.S. § 3309(b). Moreover, on the effective date, an operator can bring an action in the Commonwealth Court to invalidate an ordinance that is enforced by a local government which runs afoul of Chapter 33 of Act 13. 58 Pa.C.S. § 3306(1). If the Commonwealth Court determines that the local government enforced an ordinance with willful or reckless disregard of Chapter 33 of Act 13, it may order the local government to pay the plaintiff’s attorneys’ fees in connection with such action. 58 Pa.C.S. § 3307(1).

Because MarkWest’s proposed facility will be a permitted use as a matter of law on April 14, 2012, the effective date of Act 13, it appears to be a fruitless exercise for the parties to proceed with the appeal in this matter.

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<sup>2</sup> “Oil and gas operations” includes the “construction, installation, use, maintenance and repair of natural gas compressor stations.” 58 Pa.C.S. § 3301.



# K&L|GATES

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Given the close proximity to the mediation, we request that the Township and/or Board convene special meetings to address this matter and that you respond to this letter on or before March 6, 2012.

Very truly yours,

  
Walter A. Bunt, Jr.

WAB:bdr

cc: Megan E. Smith Miller

**CERTIFICATE OF SERVICE**

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Motion for Preliminary Injunction was served via United States First-Class Mail on this 2nd day of April 2012, to the following:

Commonwealth of Pennsylvania  
c/o Linda L. Kelly, Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Pennsylvania Public Utility Commission  
c/o Robert F. Powelson, Chairman  
400 North Street, Keystone Building  
Harrisburg, PA 17120

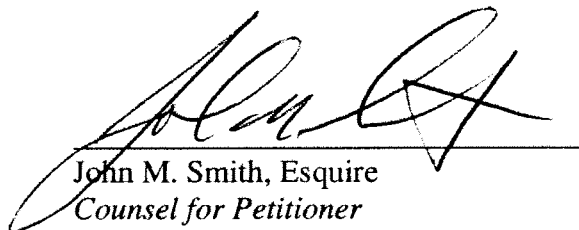
Robert F. Powelson  
Pennsylvania Public Utility Commission  
Chairman  
400 North Street, Keystone Building  
Harrisburg, PA 17120

Office of the Attorney General of Pennsylvania  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Linda L. Kelly  
Attorney General, Commonwealth of  
Pennsylvania  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Pennsylvania Department of  
Environmental Protection  
c/o Michael L. Krancer, Secretary  
400 Market Street  
Harrisburg, PA 17120

Michael L. Krancer  
Pennsylvania Department of Environmental  
Protection, Secretary  
400 Market Street  
Harrisburg, PA 17120

  
John M. Smith, Esquire  
*Counsel for Petitioner*

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