BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act	M-2012-2288561

JOINT COMMENTS OF
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION,
MARCELLUS SHALE COALITION
and
ASSOCIATED PETROLEUM INDUSTRIES OF PA

The Pennsylvania Independent Oil and Gas Association (PIOGA),[1] Marcellus Shale Coalition (MSC)[2] and Associated Petroleum Industries of PA, a division of API (API)[3] (collectively, "Producers") submit these joint comments to the Commission's March 15, 2012 Tentative Order implementing Act 13 of 2012, the Unconventional Gas Well Impact Fee Act. The Producers are willing to discuss the issues addressed in these comments with Commission staff as staff deems necessary or appropriate.

I. Introduction

As relevant to the PUC's duties, Act 13 amends Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes to provide for a local impact fee on wells producing from

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[1] Effective April 1, 2010, the Independent Oil and Gas Association of Pennsylvania (IOGA of PA) and the Pennsylvania Oil and Gas Association (POGAM) merged and the name of the organization changed to Pennsylvania Independent Oil and Gas Association. PIOGA's more than 900 members include oil and natural gas producers, drilling contractors and service companies, as well as various professional firms, individuals and royalty owners. PIOGA members are involved in producing natural gas from conventional and unconventional formations.

[2] Founded in 2008, the MSC is an organization committed to the responsible development of natural gas from the Marcellus Shale geological formation and the enhancement of the region's economy that can be realized by this clean-burning energy source. Coalition members work with its partners across the region to address issues with regulators, local, county, state and federal government officials and communities about all aspects of producing clean-burning, job-creating natural gas from the Marcellus Shale.

[3] API is the only national trade association that represents all aspects of America's oil and natural gas industry. Its more than 400 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry: producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

unconventional formations, uniform statewide standards for local government ordinances concerning oil and gas operations, and PUC review to ensure that local government ordinances allow for the reasonable development of oil and gas resources in accordance with the Act. The Producers commend the Commission for its straightforward proposed procedures to carry out its administrative responsibilities under the Act. The Producers' few concerns are addressed below.

II. Stripper Well Determination

The Producers agree with the PUC's decision to determine "stripper well" production by dividing a well's annual production by the number of days the well is in production in the calendar year (Order, p. 6). This simple methodology is consistent with the "stripper well" definition and will facilitate other "stripper well" related determinations.[4]

III. Denominator of Fraction for Local Share Distributions and PUC Assessments

As stated in the Commission's order, Sections 2314(d), (d)(1), (d)(2) and (d)(3) of the Act require that the 60% local share funds remaining in the Unconventional Gas Well Fund, after the specified distributions, be allocated to counties and municipalities by a formula whose denominator is "the number of spud unconventional gas wells in this Commonwealth." The Producers agree with the PUC's determination (Order, p. 12) that the General Assembly intends the entire 60% amount to be distributed to the entities described in these provisions and that, to carry out this intent, these provisions refer to the total number of spud unconventional wells *subject to the Act 13 impact fee*.

The Producers suggest that the same denominator should be used to determine the allocation of any PUC assessment under Sections 2303(c)(2) and (c)(3) to recover its Act 13 administration and enforcement costs not covered by the $50 administrative fee.

IV. PUC Review of Local Ordinances

The Producers' primary concerns relate to the PUC's tentative determinations relating to the Commission's review of local ordinances under Chapter 33 of the Act. The Producers'

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[4] *See, e.g.*, Sections 2301 "Vertical gas wells.", 2302(b.1) "Nonproducing unconventional gas wells.", and 2302(d) "Restimulated unconventional gas wells.".

overall concern is that the Commission's descriptions of Act 13's preemption provisions and their scope is too limited. The Order (p. 14) describes the Chapter 33 generally:

> Chapter 33 governs the enactment by local governments of local ordinances that impose conditions, requirements or limitations on those aspects of oil and gas operations regulated by Chapter 32 (relating to development of oil and gas operations). More specifically, Chapter 33 preempts and supersedes the local regulation of oil and gas operations that are inconsistent with Act 13 standards. Accordingly, no local ordinances adopted pursuant to the Municipalities Planning Code (MPC), 53 P.S. § 10101 et seq., or the Flood Plain Management Act (FPMA), 32 P.S. § 679.101 et seq., can contain provisions that impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32.

The Order (p. 15) then describes Section 3302 as preempting "all local ordinances purporting to regulate 'oil and gas operations' except with respect to local ordinances adopted pursuant to the MPC or the FPMA" while stating that Section 3303 "further preempts and supersedes local ordinances that are inconsistent with existing state or federal environmental statutes regulating environmental aspects of oil and gas operations." While the Producers understand the need for brevity, that should not sacrifice accuracy. The Section 3302 description omits references to "supersedure" and the phrases "impose conditions, requirements or limitations on the same features" and "accomplish the same purposes", which are necessary to understand the scope of the conflict preemption provision, which is explained in the next section of these comments.[5]

The problem with the description of Section 3303 is more fundamental – it misstates the preemptive scope of the provision, as explained below in the section of the comments entitled "Field Preemption".

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[5] While the term "supersedes" has been interpreted as applying to **existing** rules and the term "preempts" as applying to **future** rules, *Miller & Son Paving, Inc. v. Wrightstown Township*, 451 A.2d 1002, 1005 (1982), Justice Saylor's concurring opinion in *Hoffman Mining Company, Inc. v. Zoning Hearing Board of Adams Township*, 32 A.3d 587, at 612-13 (Pa. 2011), notes that with respect to preemption, "these terms are commonly employed as synonyms. For example, the pervasively applicable federal conflict preemption provision under Section 514(a) of the Employee Retirement Income Security Act is phrased in terms of supersedure, although it is widely understood to embody preemption. *See* 29 U.S.C. §1144(a)." Accordingly, the omission of reference to supersedure in the PUC's order may be akin to "harmless error" as it cannot change the scope of the statutory provision, which contains both terms.

Conflict Preemption – Section 3302

The PUC's descriptions quoted above refer only to "conflict" preemption, one of the two types of express preemption contained in Act 13. Conflict preemption is the same type of preemption that was contained in the Oil and Gas Act.[6] "Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible."[7]

Although Section 3302 is very similar to the repealed Oil and Gas Act preemption, Section 3302 has modified the Pennsylvania Supreme Court's decisions in *Huntley & Huntley* and *Hoffman Mining* by including well location and setbacks within the "features of oil and gas operations" preempted by this provision. This legislative change to the scope of the conflict preemption of local regulation of oil and gas operations is directly responsive to (i) the Pennsylvania Court's twice-stated concern in *Huntley & Huntley* of the correctness of its determination of the General Assembly's intended scope of the Oil and Gas Act conflict preemption and (ii) the *Hoffman Mining* decision. This is apparent by reference to these discussions in *Hoffman Mining*:

> Not only the Commonwealth Court, but also this Court, has recognized that questions regarding mining or drilling operations are distinct from questions regarding the proper location for such operations. . . . **While the preemption clauses of the Oil and Gas Act and the Surface Mining Act are very similar**, the former contains **an added sentence that substantially curtails MPC-enabled ordinances**. *Id.* at 864-65 n.8. Nonetheless, even given the stricter preemption clause, we held in *Huntley* that the Oil and Gas Act does not preempt an ordinance restricting oil and gas wells **in a residential district**.

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[6] 58 P.S. § 601.602 (repealed); *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 862-63 & n.6, 864, 866 (Pa. 2009): "**[A]bsent further legislative guidance**, Section 602's reference to 'features of oil and gas well operations regulated by this act' pertains to technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well's location." (p. 864); "Accordingly, **and again, absent further legislative guidance**, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment." (p. 866) (emphasis added); *Hoffman Mining Company, Inc. v. Zoning Hearing Board of Adams Township*, 32 A.3d 587, 596-97 (Pa. 2011).

[7] *Hoffman Mining*, 32 A.3d at 594, 602; *see also Range Resources–Appalachia, LLC v. Salem Township*, 964 A.2d 869, 877 (Pa. 2009)(overlap of local ordinance's stated purposes with goals in Oil and Gas Act involves principles of conflict preemption and the "same purposes" Oil and Gas Act basis for express preemption of MPC-enabled local ordinances, which is in addition to the "features" basis for preemption).

. . . .

> **In the absence of explicit language barring local zoning authorities from establishing reasonable setbacks** to address local conditions and needs, we cannot conclude that the balance struck by the General Assembly in the Surface Mining Act was intended to remove this traditional and historical prerogative of local zoning authorities, **as it applies to the location and siting of surface mining**.[8]

Section 3304(b)(11) of Act 13 states that a local ordinance "[m]ay not increase setback distances set forth in Chapter 32 (relating to development) or this chapter . . . [but] may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government." This provision provides the "explicit language" required by *Hoffman Mining* with respect to oil and gas operation setbacks.[9] Sections 3304(b)(5),(5.1) and (6) of Act 13 authorize certain oil and gas operations as a permitted use in all zoning districts, including residential districts, subject to Chapter 33's increased setback distances. These provisions provide the "explicit language" required by *Hoffman Mining* concerning the location of the specified oil and gas operations in zoning districts.

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8 *Hoffman Mining*, 32 A.3d at 600, 605 (emphasis added).

9 "Oil and gas operations." The term includes the following:
(1) well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
(2) water and other fluid storage or impoundment areas used exclusively for oil and gas operations;
(3) construction, installation, use, maintenance and repair of:
(i) oil and gas pipelines;
(ii) natural gas compressor stations; and
(iii) natural gas processing plants or facilities performing equivalent functions; and
(4) construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that:
(i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and
(ii) the activities are authorized and permitted under the authority of a Federal or Commonwealth agency. Section 3301.

Field Preemption– Section 3303

On the other hand, Section 3303 of the Act provides for express "field", or total, state preemption of local ordinances from regulating oil and gas operations regulated by the "environmental acts":

> **Notwithstanding any other law to the contrary**, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, **occupy the entire field of regulation, to the exclusion of all local ordinances**. The Commonwealth by this section, **preempts and supersedes** the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter. (Emphasis added).

By comparing the statutory language quoted above with the PUC's description of Section 3303 in the Commission's order (p. 15 – "Section 3303 further preempts and supersedes local ordinances that are inconsistent with existing state or federal environmental statutes regulating environmental aspects of oil and gas operations."), it is clear that the Commission's description misstates the type of preemption provided by Section 3303, which is not conflict preemption, but field preemption.

Hoffman Mining also discusses the statutory language required for field preemption:

> Turning to Hoffman Mining's arguments as to field preemption, we likewise cannot conclude that the General Assembly implicitly intended the Surface Mining Act to be exclusive with respect to the location or siting of surface mining within a municipality. As discussed above, in our conflict preemption analysis, an explicit objective of the Surface Mining Act is "to enhance land use management and planning," 52 P.S. § 1396.1, and "enhance" must be accorded its ordinary meaning. **Had the General Assembly intended to assume total responsibility and authority over local land use management and planning as they apply to surface mining, the wording of the Surface Mining Act would surely have reflected such an intent.** We recognize that the Surface Mining Act sets forth certain parameters with respect to where surface mining may not be conducted. However, we do not interpret these provisions to indicate that **the statute has implicitly forbidden all local zoning enactments concerning the location and siting of surface mining**.
>
> Hoffman Mining also asserts that the field of surface mining reflects **a need for uniformity which is reflected in the comprehensive statutory scheme** of the Surface Mining Act. Hoffman Mining argues that a "lack of uniformity would stand as an obstacle to the comprehensive regulatory scheme of the [Surface Mining Act]." Hoffman's Brief at 24. The comprehensive regulatory scheme set forth in the Surface Mining Act concerns surface mining activities and conservation and reclamation procedures and protocols, including licensing,

> permitting, reclamation, blasting, notice, bonding, pollution control, remedies, penalties, *etc*. As we have discussed supra, the location and siting of surface mining within a municipality are not included within the statutory definition of surface mining activities, and **we do not discern an intent on the part of the General Assembly to deprive local zoning authorities of their MPC-enabled power and responsibility** to consider local conditions when deciding where surface mining should be sited within their communities.[10]

Section 3303 expresses the General Assembly's intent "to assume total responsibility and authority over local land use management and planning" as they apply to aspects of oil and gas operations regulated by the environmental laws. Chapters 32 and 33, particularly Sections 3303-3306, express the "need for uniformity which is reflected in the comprehensive statutory scheme" of Act 13.[11] Finally, Section 3303 expresses the General Assembly's intent "to deprive local zoning authorities of their MPC-enabled power and responsibility" concerning the regulation of oil and gas operations regulated by the environmental laws. *Accordingly, Section 3303 expressly preempts the field of local regulation of the aspects of oil and gas operations regulated by the environmental acts* (defined below).

As stated repeatedly and most recently in *Hoffman Mining*, the Pennsylvania Supreme Court "has determined that the General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking."[12] The General Assembly has now provided the fourth area in Section 3303.

The statutory language that expressly preempts the field of anthracite strip mining is Section 10 of the Anthracite Strip Mining and Conservation Act:

> [A]ll coal stripping operations coming within the provisions of this act shall be within the exclusive jurisdiction of the department and shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by the secretary . . . . The secretary . . . shall have the authority and

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10 *Hoffman Mining*, 32 A.3d at 605-06 (emphasis added).

11 Section 3304 is titled "Uniformity of local ordinances." While Producers believe that the General Assembly's intent to create uniformity of regulation of oil and gas operations is apparent from Act 13's comprehensive statutory scheme, such that no statutory construction is necessary, headings prefixed to "sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof." 1 Pa. C.S. § 1924.

12 *Id*., 32 A.3d at 593 (citations omitted).

> power to enforce the provisions of this act and the rules and regulations promulgated thereunder by him.[13]

On its face, the express preemption language of Section 3303 is even more definite than the preemption language in the Anthracite Strip Mining and Conservation Act that the Pennsylvania Supreme Court interpreted as express field preemption:

> Neither argument [exclusive jurisdiction intended only for rules and regulations affecting the health and the safety of industry workers or for to administer the provisions of a prior statute] of the Borough has merit. . . . Giving these words [exclusive jurisdiction] their plain meaning it is clear beyond question that the legislature, by the employment of such words, intended that the Commonwealth, and only the Commonwealth, shall regulate the anthracite strip mining industry. **These words, clear and plain in meaning, preclude legislative action in the same field by any political subdivision such as the Borough. The Commonwealth in § 10 of the statute has expressly preempted the field** to the exclusion of the Borough and, in so ruling, the court below was correct.[14]

Long ago the Pennsylvania Supreme Court made clear the import of the type of language used in Section 3303: "Of course, it is obvious that where a statute specifically declares it has planted the flag of preemption in a field, all ordinances on the subject die away as if they did not exist."[15]

With respect to the field preempted – regulation of oil and gas operations regulated by the environmental acts – Chapter 33 defines "environmental acts" as "[a]ll statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations."[16]

Although the Flood Plain Management Act,[17] the repealed Oil and Gas Act and new Chapter 32 of Act 13 come within the definition of "environmental acts", the more specific express conflict preemption of Section 3302 applies by its terms to new Chapter 32 instead of the

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13 52 P.S. §§ 681.20c; *Harris-Walsh, Inc. v. Dickson City Borough*, 216 A.2d 329, 336 (Pa. 1966).

14 *Harris-Walsh, Inc.*, 216 A.2d at 336.

15 *Department of Licenses v. Weber*, 147 A. 2d 326, 327 (Pa. 1959).

16 58 Pa. C.S. § 3301.

17 32 P.S. §§ 679.101 *et seq*.

more general field preemption applicable to environmental acts other than the Flood Plain Management Act and new Chapter 32 of Act 13. The Commonwealth environmental acts include[18] but are not limited to the following:

- The Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*
- Air Pollution Control Act, 35 P.S. §§ 4001 *et seq.*
- Delaware River Basin Compact, 32 P.S. §§ 815.101 *et seq.*
- Oil and Gas Conservation Law, 58 P.S. §§ 401 *et seq.*
- Susquehanna River Basin Compact Law, 32 P.S. §§ 820.1 *et seq.*
- Storm Water Management Act, 32 P.S. §§ 680.1 *et seq.*
- Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.*
- Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq.*; 53 P.S. §§ 4000.101 *et seq.*; 27 Pa. C.S. §§ 6201 *et seq.*
- Wild Resource Conservation Act, 32 P.S. §§ 5301 *et seq.*
- Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 *et seq.*
- Radiation Protection Act, 35 P.S. §§ 7110.101 *et seq.*
- Worker and Community Right-to-Know Act, 35 P.S. §§ 7301 *et seq.*
- Coal and Gas Resource Coordination Act, 58 P.S. §§ 501 *et seq.*
- Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 3301 *et seq.*
- Hazardous Sites Cleanup Act, 35 P.S. §§ 6020.101 *et seq.*
- Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 *et seq.*
- Hazardous Material Emergency Planning and Response Act, 35 P.S. §§ 6022.101 *et seq.*
- Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 *et seq.*
- Great Lakes-St. Lawrence River Basin Water Resources Compact, 32 P.S. §§ 817.1 *et seq.*
- 27 Pa. C.S. Ch. 31 (provisions relating to water resources planning)
- 27 Pa. C.S. Ch. 41 (provisions relating to environmental laboratory accreditation)
- 27 Pa. C.S. Ch. 62 (provisions relating to waste transportation safety)
- 30 Pa. C.S. (provisions relating to fish)
- 34 Pa. C.S. (provisions relating to game)
- Conservation and Natural Resources Act, Chapters 1 & 3, 71 P.S. §§ 1340.101-1340.322

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[18] *See, e.g.*, HB 1950, PN 2689, Section 3203, pp. 23-25.

A. Producers' Specific Preemption Issue Concerns

1. Commission determinations under Section 3303

The Commission states (Order, p. 16):

> Section 3303 further preempts and supersedes local ordinances that are inconsistent with existing state or federal environmental statutes regulating environmental aspects of oil and gas operations. **However, because the environmental regulation of oil and gas operations are exclusively regulated by the DEP under environmental acts, the Commission will render no determinations in this area**. (Emphasis added).

In addition to stating incorrectly the scope of this preemption provision, this language misstates the PUC's exclusive authority under Act 13 with respect to local ordinances. Upon proper request, Act 13 requires the PUC to issue an opinion [§ 3305(a)(2) – proposed ordinances] or determine [§ 3305(b)(1) – existing ordinances] whether the ordinance "violates the MPC, this chapter or Chapter 32." As Section 3303 is part of Chapter 33, the PUC is required to render determinations under Section 3303.

However, unlike areas where the PUC is called upon to render determinations within its jurisdiction that may involve the resolution of matters within DEP's jurisdiction,[19] the General Assembly's clear directive in Act 13 to review local ordinances for compliance with the Act is to the PUC alone, and does not implicate DEP's jurisdiction in any way. The question for the PUC under Section 3303 is whether the local ordinance attempts to regulate *in any way* the environmental aspects of oil and gas operations regulated by the environmental laws – not whether a local ordinance is inconsistent with an environmental act provision regulating oil and gas operations. There is no basis or reason for the PUC to refrain from making, or to defer to DEP in making, the determinations required by Section 3305(a)(2) and (b)(1) of the Act.

2. Commission determinations of uniformity under Section 3304

The Commission states (Order, p. 16):

> Section 3304 provides that all local ordinances addressing development of oil and gas operations "must allow for the reasonable development of oil and gas resources" based on the standards set forth in Sections 3304(b)(1) through (b)(10). **These provisions, as well as standards established in Chapter 32**, provide the

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[19] *Pickford v. Pa. P.U.C.*, 4 A.3d 707 (Pa.Cmwlth. 2010).

> guidelines against which the Commission will evaluate local government ordinances presented to it for issuance of either an advisory opinion or request for review as described in Section 3305. (Emphasis added)

This description of Section 3304 does not recognize the broad scope of the General Assembly's directive in Section 3304, but this is understandable given the Commission's tentative view of the limited scope of its authority under Section 3305 with respect to Section 3303. Section 3304 states that *"[i]n addition to* the restrictions contained in sections 3302 (relating to oil and gas operations regulated pursuant to Chapter 32) *and 3303 (relating to oil and gas operations regulated by environmental acts)*, all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources." The italicized language makes the broad scope of the Commission's authority and responsibility clear. Also, the Commission's description above omits reference to Sections 3304(b)(11), which prohibits a local ordinance from increasing setback distances set forth in Chapter 32. As shown by the discussion of conflict preemption above, this is a significant provision that must be recognized and implemented by the Commission.

3. Participation in Commission review of enacted local ordinances under Section 3305(b)(1)

The Commission states (Order, p. 17) states that "[p]articipation in the Commission review under this provision will be limited to the owner or operator of *the gas well*, the resident who brings the action and the local government." The italicized language does not reflect the scope of the applicable statutory provisions, which provide that an aggrieved owner or operator of "an oil or gas operation" may participate in the review.[20]

4. Commission advisory opinions on enacted ordinances under Section 3305(a)(1)

The Commission (Order, p. 17) states that "[a]lthough not required by statute, the Commission will also accept, as resources permit, requests for advisory opinions regarding *previously enacted* local ordinances." (Emphasis in original). The Producers respectfully suggest that no matter how laudable the Commission's intent, the Commission simply does not have the authority to do so.

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[20] 58 Pa. C.S. § 3305(b)(1),(2).

The Commission correctly states earlier in its Order (p. 16) that "two procedures for Commission review of local government ordinances "are contemplated under Section 3305, depending on which entity seeks review." These two procedures also depend upon whether the ordinance is *proposed* or *enacted* – Section 3305(a)(2) authorizes the PUC to issue nonappealable advisory opinions on *proposed* ordinances, while Section 3305(b)(1) authorizes the PUC to issue appealable determinations on *enacted* ordinances. The General Assembly explicit differentiation between the types of review based on both the entity seeking review *and* whether the ordinance is proposed or enacted cannot be ignored by the Commission on the basis that these are "minimum requirements" rather than absolute limitations on the PUC's authority.

The Commission's rationale would also permit an *owner* or *operator* of an oil or gas operation, or a *person* residing within the geographic boundaries of the municipality, to request PUC advisory review of a municipality's *proposed* ordinance, by ignoring the limitation in Section 3305(a)(1) of such advisory review to "municipalities" just as the Commission would ignore the limitation in that provision to "proposed" local ordinances. The principle *expressio unius est exclusio alterius* – "the explicit mention of one thing is the exclusion of another" – squarely applies here. Where the Election Code stated that the only time a special election to fill a vacancy may be held in a different year than that prescribed for a regular term election is when the vacancy has occurred in the office of U.S. Senator or Congressman, or a Pennsylvania Senator or Representative, or a councilmanic or municipal legislative office, the Pennsylvania Supreme Court applied this principle to determine that the Election Code precluded an election to fill a vacancy in the Philadelphia mayor's office in a year that was not prescribed for a regular term election.[21] In an earlier case, the Pennsylvania Supreme Court applied this principle in concluding that a statutory provision providing for a preliminary determination regarding any claim on funds in the hands of the secretary of banking with respect to technical or continuing trusts "excludes the idea of a right to so proceed in any other instance."[22]

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21 *Cali v. City of Philadelphia*, 177 A.2d 824, 833-35 (1962).

22 *Cameron v. Carnegie Trust Co.*, 140 A. 768, 770 (Pa. 1928).

5. *De novo* judicial review and supplementing a Commission record under Section 3305(b)(1)

The Commission's Order (p. 19) acknowledges that its order resolving a request for review of an existing local ordinance is subject to *de novo* review by the Commonwealth Court, but then states that the court may "supplement the Commission record as needed." The Producers respectfully point out that under *de novo* review, there is no Commission record for the Commonwealth Court to supplement because the record for the court's review is made before the court. For example, determinations of the Board of Finance and Revenue are subject to *de novo* review in Commonwealth Court's appellate jurisdiction in accordance with Pa.R.A.P. 1571(f).[23] Accordingly, a correct legal statement of this point in the Commission's order would be "[t]his allows the Court to make its own determination, based on the record made before the Court."

V. Impact Fee Issues

A. PUC Reporting Forms

1. Attachment A Instructions

The instructions for Attachment A, the annual well report form, states the following:

> Column (1) Spud date is the begin date of actual drilling of an unconventional gas well. However for the purposes of reporting under this Act all wells spud prior to January 1, *2011* is considered spud in Calendar year *2010*. For reporting purposes these wells should all have a spud date of 12/31/2011. The year a well is restimulated is considered first year of spud if done after the 10th year of operation *or* if the restimulation results in a substantial increase in production. Please see Section 2302 regarding Unconventional gas well fee.

The italicized language is inconsistent with the Commission's Order and contrary to the Act. The Commission's Order (p. 6) correctly states that "all unconventional wells spud in calendar year 2011 or before 2011 will be treated as if they were spud in calendar year 2011. Section 2302(d)(2) of the Act provides as follows:

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[23] *Graham Packing Co. v. Com.*, 882 A.2d 1078 (Pa.Cmwlth. 2005) (Commonwealth Court's *de novo* review means the court's review is based upon either a record created before the court or stipulated facts).

The year in which the restimulation occurs shall be considered the first year of spudding for purposes of imposing the fee under this section if:

(i) a producer restimulates a previously stimulated unconventional gas well following the tenth year after being spud by:

(A) hydraulic fracture treatments;
(B) using additional multilateral well bores;
(C) drilling deeper into an unconventional formation; or
(D) other techniques to expose more of the formation to the well bore; **and**

(ii) the restimulation results in a substantial increase in production. (Emphasis added)

Accordingly, this instruction should be changed as follows:

Column (1) Spud date is the begin date of actual drilling of an unconventional gas well. However for the purposes of reporting under this Act all wells spud prior to January 1, **2012** is considered spud in Calendar year **2011**. For reporting purposes these wells should all have a spud date of 12/31/2011. The year a well is restimulated is considered first year of spud if done after the 10th year of operation **and** if the restimulation results in a substantial increase in production. Please see Section 2302 regarding Unconventional gas well fee.

The instructions for Attachment A also state: "Column (8) A- Active and producing more than 90,000 cf of gas on any given day in any one calendar month of the reporting year." This statement is in direct conflict with the Commission's Order (p. 6) where it was determined that the stripper well determination would be based on the well's annual production divided by the days of the year the well was in production. The instructions should be conformed to match the Order.

2. Attachment B Form & Instructions

The Commission's Order (p. 9) correctly states that producers must provide monthly updates "regarding: (1) the spudding of additional wells; (2) the initiation of production at an unconventional well; and (3) the removal of an unconventional gas well from production." This is the information required by Section 2304(b) of the Act. However, the instructions for Attachment B, the monthly update form, contains two requirements for stripper well information:

Production Level: B = An unconventional well **that now meets** the definition of Striper Well

Production Level Notes: B = Date that the well production dropped meeting stripper well definition.

These two requirements are not in the statute and are inconsistent with the Commission's methodology for determining "stripper well" production – dividing a well's annual production by the number of days the well is in production in the calendar year (Order, p. 6). Moreover, this information will not be available on a date certain. Accordingly, these requirements should be deleted.

These instructions also contain the following definition of "Producer": "The Legal Name of the Entity currently authorized to engage in the business of severing natural gas." However, Attachment A uses the term "Company Name" rather than producer and defines it as "the legal entity responsible for the operation and oversight of well production and listed on the Department of Environmental Protection (DEP) permit application or well registration as of December 31 of the reporting Calendar Year." The Producers suggest that the Commission harmonize these forms and instructions to facilitate accurate reporting by requiring "Company Name" on Attachment B as defined for Attachment A.

B. <u>Wells Subject To The Fee</u>

During informal discussions with stakeholders concerning the implementation of Act 13, the PUC was asked whether the impact fee is imposed on: (1) a well drilled into an unconventional formation for purposes other than producing natural gas; and (2) a well drilled with the intent to produce natural gas from an unconventional formation that does not in fact produce natural gas and is plugged ("dry hole").

The Producers believe the answer to the first question is answered by the definition of "unconventional well", which excludes any well not drilled for the purpose of recovering gas. To dispel any confusion on this point, the Producers request the Commission to make clear that the fee applies only to wells that meet the definition of "unconventional wells" and that wells drilled for monitoring, geologic logging or the like are not subject to the fee.

The answers to the issues raised by the second question may be less clear but, in view of the initial minimum 3-year period for which the fee applies to unconventional wells exceeding

the stripper well quantity of production,[24] are the more significant ones. The other provision relevant to these issues is Section 2302(e), which provides that payments of the fee cease upon certification by the producer to DEP "that the unconventional gas well has ceased production and has been plugged according to" DEP regulations. On these issues, the Commission's Order (p. 6) states that:

> Under Section 2302(b.1), for an unconventional well that begins paying the impact fee and is subsequently capped or is producing less than a stripper well, the Commission's initial interpretation is that the unconventional well will pay the impact fee for at least the first three years of production; if the well then qualifies as a stripper well or is capped after the third year of paying the fee, the fee shall be suspended.

The issues raised by the second question are:

- Is a dry hole well spud and plugged prior to 2012 subject to the impact fee at all?
- Is a dry hole well spud prior to 2012 but plugged during 2012 subject to the impact fee at all?
- Is a dry hole well spud during 2012 but plugged after 2012 subject to the impact fee at all?

The Producers suggest the following answers:

Any well plugged or in the process of being plugged properly in accordance with DEP regulations prior to January 1, 2012 owes no fee. Any well spud after January 1, 2012 and in the process or properly plugged prior to the date that payment of the fee for that year is due do not owe the fee. For example, a well spud in 2012 and plugged, or in the process of being plugged, in accordance with DEP regulations prior to April 1, 2013 would pay no fee.

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[24] "If a spud unconventional gas well begins paying the fee imposed under this section and is subsequently capped or does not produce natural gas in quantities greater than that of a stripper well within two years after paying the initial fee, then the fee shall be suspended . . . ." 58 Pa. C.S. § 2302(b.1).

VI. Conclusion

The producing industry appreciates the informal meetings the PUC has provided to discuss implementation of Act 13 and the opportunity to submit these comments to the Commission's Tentative Implementation Order. The industry commends the Commission for its efforts to ensure an orderly transition to the new Act 13 regulatory regime and requests that the Commission adopt the industry's comments in the PUC's implementation of the Act.

Respectfully submitted,

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Dated: April 4, 2012