PENNSYLVANIA OIL + GAS LITIGATION UPDATE (2020)

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I. INTRODUCTION

A. In the past year, the oil and gas industry has faced many challenges from an already distressed marketplace for natural gas due to over-supply and drops in demand to attacks on gas pipeline infrastructure projects to the devastating economic effects engendered by the COVID-19 pandemic.

B. The past year also yielded about 50 or so cases that dealt with a variety of issues affecting oil and gas companies.

C. This outline discusses cases in Pennsylvania since mid-July 2019 to present involving oil and gas ownership (including the rule of capture); oil and gas lease disputes (including government challenges to oil and gas leasing activities, lease expiration, delay rentals, and disputes over royalties); disputes over oil and gas transactions (such as gas purchase agreements, drilling contracts and MSAs); regulatory litigation (including challenges to oil and gas regulations, claims under the "Environmental Rights Amendment," local zoning of oil and gas wells, DRBC litigation, and RTKL issues); labor and employment issues (such as wage/hour disputes and workers' compensation issues); and oil and gas pipeline litigation (including SCOTUS cases, challenges to condemnation authority, just compensation issues, and state water quality certifications for interstate pipeline projects under Section 401 of the Clean Water Act).

II. PENNSYLVANIA OIL + GAS LITIGATION – YEAR IN REVIEW

A. Oil + Gas Ownership and Related Issues

1. Rule of Capture.

a) The rule of capture provides that landowners and their lessees engaged in oil and gas development on the leased premises are not liable for damages for the value of drainage of oil or gas underlying adjacent unleased properties.

b) In *Briggs v. Southwestern Energy Production Company*, 184 A.3d 153 (Pa. Super. 2018), *appeal granted*, No. 63 MAP 2018, 197 A.3d 1168 (Pa. 2018), unleased landowners sued Southwestern for trespass, alleging that hydraulic fracturing operations near adjacent leased boundaries created cracks in the shale that crossed the plaintiffs' subsurface boundary and drained gas from beneath their property. The trial court granted summary judgment in favor of Southwestern based on the rule of capture.

c) The Superior Court held that the rule of capture does not preclude an action for trespass for damages resulting from fracture-stimulation operations on the leased premises that allegedly drain adjacent unleased tracts. Among other things, the court reasoned that fracture-stimulation is a new technique and the fractures that may cross subsurface boundaries constitute an actionable trespass.

d) The Supreme Court of Pennsylvania granted SWN's petition for allowance of appeal. Numerous *amici* supported SWN's petition and opening brief, arguing (among other things) that the Supreme Court of Pennsylvania should reverse and reinstate the rule of capture as a bedrock tenet of Pennsylvania oil and gas law that applies whether or not fracture-stimulation techniques are involved.

e) On appeal, the Pennsylvania Supreme vacated the opinion below and held that the rule of capture immunizes a lessee from liability in trespass where the developer uses hydraulic fracturing on the property it owns or leases and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land, at least where no physical intrusion is involved. The court acknowledged that plaintiffs will have difficulty pleading particular facts demonstrating an actual physical incursion in the subsurface sufficient to state a claim and, if so, to later prove that claim with expert testimony.

f) The court left open the possibility that a subsurface incursion into boundary lines miles beneath the surface can never be an actionable trespass, just like airlines flying planes over air space miles above the earth cannot commit actionable trespasses. The court also acknowledged the traditional "self-help" remedy of drilling offset wells or leasing property to achieve the same result that a damage award would yield, noting that the judiciary is not

well-equipped to investigate the continued feasibility of that remedy and deferring to the legislature if it elects to modify it. *Briggs v. Southwestern Energy Company*, --- A.3d ---, No. 63 MAP 2018, 2020 WL 355911 (Pa. Jan. 22, 2020).

2. Title

a) Title is often overlooked as one of the more important parts of the oil and gas business from the perspective of both landowner and company.

b) Title issues can sometimes cause lessees to back away from oil and gas leases.

c) Pre-Existing Oil + Gas Leases

(1) In *Bastin v. Bassi*, --- A.3d ---, No. 682 WDA 2019, 2019 WL 6840606 (Pa. Super. Dec. 16, 2019), a gas company terminated a lease with landowners whose title reflected a pre-existing lease on the property. The lessors sued their lawyer for failing to discover the pre-existing lease.

(2) The Superior Court held that although the lawyer running title did not advise his client about a pre-existing lease burdening the property in question, that alleged failure to notify the client did not proximately cause the lessee's refusal to lease with the plaintiffs and they therefore suffered no damages.

(3) The court reasoned that the gas company would have backed away from the deal because of the pre-existing lease notwithstanding the lawyer's omissions.

d) Pre-Existing Mortgages

(1) In *Neff v. PNC Bank*, --- A.3d ---, No. 28 WDA 2019, 2020 WL 838363 (Pa. Super. Feb. 20, 2020), a bank customer sued its bank for altering a mortgage document that allegedly caused a gas company to back out of an oil and gas lease.

(2) The Superior Court denied the claim and concluded that the gas company didn't enter into a new lease with the plaintiff

due to a mortgage foreclosure, not because of any alleged alteration to the mortgage.

e) Constructive Notice of Oil + Gas Leases

(1) In *McDonald v. CNX Gas Co., LLC*, --- A.3d ---, No. 83 WDA 2020, 2020 WL 5423948 (Pa. Super. Sept. 10, 2020), a landowner purchased property, the chain of title to which referred to a pre-existing oil and gas lease.

(2) The Superior Court held that the landowner could not claim bona-fide purchaser status because he had ample notice of a 1977 oil and gas lease that was recorded repeatedly in the chain of title, and he had a duty to investigate whether the oil and gas lease covered his property as he is charged with notice of everything of record affecting his title.

3. Conveyance/Reservation of Oil + Gas Interests

a) Streambed Oil + Gas Rights

(1) The Department of Conservation and Natural Resources ("DCNR") has a policy unilaterally claiming presumptive ownership of oil and gas underlying all streambeds of "navigable waters" in the Commonwealth, which DCNR purports to define as any waterway classified by statute as a "public highway."

(2) A threshold question in cases involving streambed oil and gas ownership is where those disputes should be resolved.

(3) In *Beishline v. PADEP*, --- A.3d ---, No. 719 CD 2019 (Pa. Cmwlth. June 12, 2020), the Commonwealth Court of Pennsylvania held that the Board of Property has jurisdiction to determine the "navigability" of a stream, which determines ownership of streambeds and underlying oil and gas.

b) Tax Sales and Title Wash

(1) In *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), the Pennsylvania Supreme Court explained that,

under a former statute, if a purchaser of unseated land failed to report a severance to the county commissioners, a subsequent tax sale would effectively "wash" the title of the severance and vest the tax sale purchaser with all right, title, and interest in both the surface and the subsurface rights, as if the severance had never occurred.

(2) Since *Herder Springs*, a number of federal and state courts have issued conflicting decisions involving the "Proctor Heirs" who claim title to oil and gas rights that current putative owners claim have been washed out by prior tax sales pursuant to *Herder Springs*.

(3) In *Keta Gas & Oil Co. v. Proctor*, --- A.3d ---, No. 1975 MDA 2018, 2019 WL 6652174 (Pa. Super. Dec. 6, 2019), the Pennsylvania Superior Court relied on *Herder Springs* to conclude that a 1908 tax sale extinguished subsurface rights and merged them with the surface such that the purchaser acquired both the surface and oil and gas estate previously reserved by the grantor, rejecting various arguments that in 1908 the assessor mischaracterized the land as unseated, the 1908 tax sale rested on mistaken facts, and that the sale violated due process rights to notice of the tax sale.

(4) By contrast, the Commonwealth Court of Pennsylvania in *Commonwealth v. Thomas E. Proctor Heirs Tr.*, No. 493 M.D. 2017, 2020 WL 256984 (Pa. Cmwlth. Jan. 16, 2020), Commonwealth Court held that there are genuine issues of fact precluding summary judgment in favor of a state agency (the Pennsylvania Game Commission) as to whether a title wash occurred. The court stated that "several, interrelated factual issues remain in this matter, including: whether the severance of the Surface and Subsurface Estates was reported to the County Commissioners; whether Mr. McCauley and Mr. Jones acted as agents of CPLC at the time they purchased the Premises; and whether the 1908 and 1924 Tax Sales operated as valid purchases or only as redemptions for unpaid taxes. The record does not provide clear answers to these questions."

(5) In federal court, the Middle District of Pennsylvania has issued conflicting decisions.

(a) In *Commonwealth, Pa. Game Comm'n v. Thomas E. Proctor Heirs Trust*, --- F. Supp. 3d ---, No. 1:12-CV-1567, 2019 WL 6893205 (M.D. Pa. Dec. 18, 2019), the federal court first concluded that the Game Commission, not the Proctor Heirs, held title to oil and gas rights the Proctors purported to reserve given that a 1908 tax sale merged the surface and subsurface estates and washed out title to the underlying oil and gas, rejecting claims that the tax sale was faulty and that the lands at issue were "seated" lands exempt from title washing..

(b) Despite the earlier ruling to the contrary, the court reversed course and held instead that fact issues such as the nature of the interests sold at the 1908 tax sale that purportedly washed out title as well as whether the successor's agent acquired the property interests at that tax sale. *Pennsylvania Game Comm'n v. Thomas E. Proctor Heirs Trust*, ---F. Supp. 3d ---, No. 1:12-CV-1567, 2020 WL 1922628 (M.D. Pa. Apr. 21, 2020)

c) Taking of Subsurface Estates

(1) An oil and gas estate is a separate estate that may be owned and transferred separately from the surface. *Belden & Blake v. DCNR*, 969 A.2d 528 (Pa. 2009).

(2) Although not an oil and gas case, the Pennsylvania Supreme court granted allowance of appeal from a Commonwealth Court decision that PennDOT activities rendered a coal estate landlocked without alternative access and resulted in a *de facto* taking of the coal estate regardless of whether the coal was mineable and permittable, reserving those

questions for the board of view to decide at the just compensation stage.

(3) The Commonwealth Court decision is *PBS Coals, Inc. v. Dep''t of Transportation*, --- A.3d ---, No. 140 C.D. 2018, 2019 WL 1387883 (Pa. Cmwlth. March 28, 2019).

d) Rights to Oil + Gas Proceeds in Bankruptcy

(1) In light of COVID-19 hitting during a time when gas markets already are in distress, industry bankruptcies are on the rise.

(2) Oil and gas payment rights often arise in the context of bankruptcy proceedings.

(3) In *PAPCO, Inc. v. Oleum Exploration, LLC*, --- F. Supp. 3d ---, No. 3:19-CV-00589, 2019 WL 3252416 (M.D. Pa., July 19, 2019), a bankruptcy judge concluded that certain oil proceeds are property of the bankruptcy estate.

(4) On appeal to the Middle District of Pennsylvania, a district judge vacated the order and concluded that the parties' rights to oil proceeds in bankruptcy must be decided through an adversary proceeding.

B. Oil + Gas Leases

1. Oil + Gas Leasing Activities

a) Oil and gas leasing activities may be subject to the consumer protection provisions of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") if a recent Commonwealth Court decision stands.

b) In *Anadarko Petroleum Corp. v. Commonwealth of Pennsylvania*; --- A.3d ---, No. 58 C.D. 2018, 2019 WL 1211892 (Pa. Cmwlth., Mar. 15, 2019), the attorney general brought a civil action under the statute on behalf of landowners against two lessees, alleging that, during leasing activities with landowners, the lessees engaged in deceptive conduct under the "catchall" provision of the statute. The lessees filed preliminary objections, arguing (among other things) that the statute does not apply to an oil and gas lease transactions as a

matter of law. The trial court overruled the preliminary objections but certified the order for immediate appellate review.

c) In a case of first impression, the Commonwealth Court majority concluded that the Attorney General alleged enough to state a claim under the statute that oil and gas leasing activities constituted "trade or commerce" under dictionary definitions of those terms and rejected the lessees' argument (endorsed by the dissent) that the statute only applies to protect buyers in consumer transactions – not landowners who essentially sell their oil and gas rights under a lease. The lessees have asked for allowance of appeal.

d) The Pennsylvania Supreme Court granted allowance of appeal. The parties and numerous *amici* supporting the gas companies filed their respective briefs.

e) The court held oral argument in May 2020. Following argument, the court excused Chesapeake from the case in view of its Chapter 11 filing, but the case will proceed as it relates to Anadarko's appeal.

2. Oil + Gas Lease Brokers

a) Gas companies often hire brokers to acquire oil and gas leases.

b) Questions sometimes arise whether the company is vicariously liable for their broker's activities.

c) In *Wiedenhoft v. Chief Exploration & Development LLC*, --- A.3d ---, No. 910 WDA 2019, 2020 WL 3057989 (Pa. Super. June 8, 2020), the Pennsylvania Superior Court upheld a trial court's order granting summary judgment in favor of a lessee and rejected arguments that the lessee's broker improperly backdated and notarized the parties' lease outside the lessor's presence. The court held that the jury would be speculating about vicarious liability because there was no dispute that the lessee ultimately had to approve the lease and therefore could not be liable for a broker's alleged misconduct based on master-servant or agency theories.

3. Oil + Gas Lease: Granting Clause

a) The granting clause of a typical oil and gas lease conveys a number of rights to the lessee, including surface and subsurface rights and

the right to produce and move oil and gas from and under the leased premises and from other properties.

b) Most oil and gas lessees give the lessee the ability to lay pipelines on and under the leased premises to move gas produced from the leasehold and from other properties.

(1) In *Walls v. Repsol Oil & Gas USA, LLC*, No. 4:20-CV-00782, 2020 WL 5502151 (M.D. Pa. Sept. 11, 2020), the landowners alleged that the construction and installation of a pipeline on their property was not authorized by their lease with the gas company, they never granted the company the right to construct the pipeline, and the lease does not authorize the company to transport gas from non-unitized and non-neighboring lands.

(2) The federal court dismissed the claim. The court invoked the granting clause of the oil and gas lease and invoked contract-interpretation principles to conclude that the lease expressly granted the gas company the right to lay pipelines and move gas from "neighboring lands."

c) A typical granting clause gives a lessee authority to drill cross-unit wells, i.e., a lateral that traverses unit boundaries to produce gas from multiple units without additional surface locations and related costs and disturbances.

(1) Recognizing the benefits of cross-unit wells, the General Assembly enacted Act 85 as an amendment to the Oil and Gas Lease Act, which provides that a lessee has a right to develop multiple units using cross-unit laterals provided the lessee reasonably allocates production from both units and the lease does not expressly prohibit cross-unit laterals. 58 P.S. § 34.2.

(2) Act 85 is similar to a provision in the Oil and Gas Lease Act that authorizes lessees to use horizontal drilling to produce from one or more leased properties unless otherwise expressly prohibited by a lease. 58 P.S. § 34.1.

(3) In a pending case captioned *Hordis v. Cabot Oil & Gas Corporation*, --- F. Supp. 3d ---, No. 3:19-CV-296, 2020 WL

2128968 (M.D. Pa. May 5, 2020), landowners have challenged the right to use cross-unit wells.

4. Habendum Clause

a) A typical oil and gas lease sets forth (a) a primary, fixed term of years during which lessees (if they so elect) can engage in activities or operations to secure production and (b) a secondary term that lasts as long as production continues or other express limitations are satisfied.

b) Many cases involve claims that a lease has expired either in the primary term for lack of payments or operations or during the secondary term for lack of production or other express requirements. George A. Bibikos, *Five Steps for in-House Counsel Facing Oil and Gas Lease Expiration Claims*, 29 Widener Commonwealth L. Rev. 171, 172 (2020).

c) Delay Rentals.

(1) Delay rentals keep a lease alive for the primary term. *Hite v. Falcon Partners*, 13 A.3d 942 (Pa. Super. 2011). Most leases are "paid up," meaning the lessee has paid the delay rentals upon execution of the lease to maintain the rights for the duration of the primary term; sometimes delay rentals may be paid periodically during the primary term. The failure to pay may cause a lease to expire.

(2) The Superior Court in *Barton v. Graham*, --- A.3d ---, No. 1704 WDA 2018, 2020 WL 1488440 (Pa. Super. Mar. 26, 2020), reaffirmed *HIte* and concluded that a lease expired for lack of any production (since 1993) or operations (since 2008) despite the lessee's payment of delay rentals for the period of non-production which the lessor did not cash.

(3) By contrast, in *Wilson v. Snyder Bros., Inc*., --- A.3d ---, 2020 PA Super 113, 2020 WL 2313813 (Pa. Super. May 11, 2020), the Pennsylvania Superior Court upheld an order denying claims that an oil and gas lease expired, holding that the lessee properly made annual delay rental payments, the parties ratified the lease before drilling and production ensued, the ratification essentially mooted out any lease

expiration claims, and the lessor had no evidence that the wells failed to produce in paying quantities during the secondary term.

(4) Finally, a federal court declined to reverse an arbitrator's decision that a lessee owed delay rentals even after the lessee surrendered the lease during the primary term. *Northeast Natural Energy LLC v. Larson*, --- F. Supp. ---, No. 3:18-CV-240, 2019 WL 4575845 (W.D. Pa., Sept. 20, 2019).

d) Operations

(1) Some leases provided that a lease will not expire after the primary term so long as the lessee is pursuing operations with "due diligence."

(2) A federal court in Pennsylvania held that "due diligence" is a fact question reserved for trial, relying on dictionary definitions to define that phrase and overlooking largely undisputed facts that the lessee in that case complied with its operations schedule, completed a productive well, and only incurred delays for lack of pipeline infrastructure to move gas. *Butters Trust v. SWN*, --- F. Supp. 2d ---, No. 4:17-CV-797, 2020 WL 1503657 (M.D. Pa. Mar. 30, 2020).

e) Abandonment.

(1) An oil and gas leases governs the rights and obligations of the parties if and when a lease expires by its terms.

(2) In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1258 (Pa. Super. 2019), however, the Pennsylvania Superior Court applied principles of abandonment under the common law to conclude that a lessee abandoned an oil and gas lease after years of non-production and failing to pay delay rentals or shut-ins or any other payment for 16 years even though the lessee had otherwise retained rights pursuant to the lease and the lessor did not invoke the notice/cure provisions.

(3) The Supreme Court of Pennsylvania agreed to hear the appeal involving issues of abandonment, the implied

covenant of development, and production in paying quantities. *See* Docket No. 6 WAP 2020, 2020 WL 1862111 (Pa.) (pending). The briefing has closed.

f) Evidence

(1) If a lease requires actual production to prevent expiration, the first date of production is relatively easy to demonstrate.

(2) However, a federal judge in Pennsylvania denied a lessee's attempt to rely on publicly available production data demonstrating that a well timely produced natural gas in a case alleging a lease expired for lack of production, holding instead that the report is outside the pleadings and constitutes hearsay such that the judge could not rely on it to dismiss the claim. *Earnshaw v. Chesapeake Appalachia, L.L.C.*, No. 3:19-CV-1479, 2019 WL 7172165 (M.D. Pa. Dec. 23, 2019).

5. Implied Covenants

a) In the absence of express covenants to the contrary, courts sometimes imply certain covenants into oil and gas leases, including an implicit covenant, upon production from a proven formation, to further develop the leasehold provided, among other limitations, that it would be reasonable to do so and the lessee would not be forced into operating at a loss. *See* George A. Bibikos, *A Review of the Implied Covenant of Development in the Shale Gas Era*, 115 W. Va. L. Rev. 949 (2013); George A. Bibikos, *Implied Covenants, Chapter 6 in The Law of Oil & Gas in Pennsylvania*, 99-109 (PBI 2d ed. Sept. 2016).

b) In *Diehl v. SWN Production Company, LLC*, --- F. Supp. 3d ---, No. 3:19-CV-1303, 2020 WL 1663342 (M.D. Pa. Apr. 3, 2020), a federal court dismissed without prejudice a claim by landowners that SWN breached an implied covenant of further development.

c) The court reasoned that "during the production phase of operations, absent express development terms in the lease, the terms of the habendum clause represent the only bargain of the

parties and no implied duty to develop reasonably can be imposed upon the lessee thereafter."

6. Royalties

a) Class Arbitration

(1) Most oil and gas leases include an arbitration clause in which the parties agree to resolve their disputes by arbitration, but not many such clauses authorize or contemplate class arbitrations.

(2) Consistent with settled precedent, the Third Circuit held that, when leases are silent regarding class arbitration, the courts will conclude that the parties did not consent to class arbitration. They must expressly say so. *Marbaker v. Statoil USA Onshore Properties, Inc.*, --- F.3d ---, No. No. 18-3067, 2020 WL 733049 (3d Cir. Feb. 13, 2020).

b) Class Actions

(1) Given the wide variety of royalty clauses in leases, class action certifications often turn on whether common questions of law or fact lend themselves to class resolution versus resolution on a case-by-case basis.

(2) In *Slamon v. Carrizo (Marcellus) LLC*, --- F. Supp. 3d ---, No. 3:16-CV-2187, 2020 WL 2525961 (M.D. Pa. May 18, 2020), royalty owners sued for underpaid royalties.

(3) The court concluded that a lessee using the same methodology to calculate royalties – i.e, basing the royalty on the price received despite the various other alleged calculation obligations required in the class leases – justified class certification.

c) Removal to Federal Court

(1) Federal courts can exercise jurisdiction over disputes if the parties are from different states and the amount in controversy exceeds $75,000.

(2) In *Kopko v. Range Resources – Appalachia, LLC*, --- F. Supp. 3d ---, No. 2:20-CV-00423-MJH, 2020 WL 3496277 (W.D. Pa. June 29, 2020), a federal court in Pennsylvania held that courts should determine the amount in controversy in oil and gas cases based on, among other things, bonus and royalty payments.

(3) Likewise, in a multi-count action involving breach of contract, trespass, and specific performance, the court concluded that the value of (a) royalties in dispute, (b) the trespass claims, (c) the possible reversion of working interests, (d) the plugging costs, and (e) the costs to drill additional wells satisfied the amount in controversy requirement of $75,000. *Earnshaw v. Chesapeake Appalachia, L.L.C.*, --- F. Supp. 3d ---, No. 3:19-CV-1479, 2019 WL 6839305 (M.D. Pa. Dec. 16, 2019).

d) Motions to Dismiss; Additional Discovery

(1) Many royalty disputes can be decided as a matter of law based on the pleadings and the terms of the parties' oil and gas lease.

(2) However, a federal court in Pennsylvania denied a motion to dismiss a claim that a gas company improperly applied a negotiated cap on its lessor's share of post-production costs for wet gas vs. a lower cap on such costs for dry gas, reasoning that the issues are "too complex" for disposition on preliminary motions without developing a factual record. *Pflasterer v. Range Resources – Appalachia, LLC*, --- F. Supp. 3d ---, No. 2:18-CV-1437-SPB, 2019 WL 4242057 (W.D. Pa., Sept. 6, 2019).

(3) Finally, a royalty claimant does not have an unfettered right to all payment information regarding royalty claims. For example, a federal judge in Pennsylvania denied access to

third-party royalty statements in a dispute involving royalties based on the value of wellhead sales, holding that those documents would contain information regarding downstream sales, not the wellhead sales that are at issue in the lease. *Elbow Energy, LLC v. Equinor USA Onshore Properties, Inc.*, --- F. Supp. 3d ---, No. 4:19-CV-01873, 2020 WL 2526008 (M.D. Pa. May 18, 2020).

C. Oil + Gas Transactions

1. Gas Purchase Agreements

a) There are very few contemporary cases involving disputes over gas purchase contracts in Pennsylvania.

b) In one case, a federal judge in Pennsylvania denied a bid to dismiss a claim that a hospital breached a gas purchase and supply agreement by not paying for certain agreed-upon quantities of natural gas the hospital received and used during 2018 and 2019. *Snyder Bros., Inc. v. East Ohio Regional Hospital at Martin's Ferry, Inc.*, --- F. Supp. 3d ---, No. CV 19-1238, 2020 WL 3104056 (W.D. Pa. June 11, 2020).

2. Drilling Contracts

a) Standard drilling contracts and their addenda negotiated by production companies and their drilling contractor typically include provisions regarding the supply and safe use of equipment at the well site.

b) In *Orion Drilling Co. LLC v. EQT Production Co.*, No. 2:16-cv-1516 (W.D. Pa., January 29, 2019), a production company terminated a drilling contract after discovering that one of two rigs suffered from faulty and unsafe conditions that the contractor didn't resolve within the cure period.

c) A jury concluded that the company did not breach the drilling contract when it stopped using the faulty rig. Although the company breached the contract by not using other rigs per the agreement, the drilling contractor also breached the deal by failing to maintain its equipment in a safe condition such that the

contractor could not recover liquidated or other damages for the company's breach.

d) The Third Circuit upheld the judgment in favor of EQT that relieved the company of paying liquidated damages after an alleged breach of contract, concluding that EQT ended its agreement with its contractor after repeated unsafe equipment failures. *Orion v. EQT Production Co.*,--- F.3d ---, No. 19-3307, 2020 WL 5089437 (3d Cir. August 28, 2020).

3. Master Service Agreements

a) Production companies and contractors sometimes agree in their MSAs to some form of mutual indemnity obligations.

b) A federal judge upheld an MSA with mutual indemnity obligations supported by insurance, holding that the parties to the MSA must indemnify one another and concluding that the unspecified coverage amounts for the insurance that supported the mutual indemnity obligations did not render those provisions unenforceable. *Williams v. Inflection Energy, LLC*, --- F. Supp. 3d ---, No. 4:15-CV-00675, 2019 WL 3202176 (M.D. Pa., July 16, 2019).

4. Operating Agreements

a) Joint operating agreement disputes are rare in Pennsylvania.

b) In *Bradford Energy Capital LLC v. SWEPI, LP and Rockdale Marcellus*, --- F. Supp. 3d ---, No. 17-1231 (W.D. Pa. Sept. 25, 2020), a federal court granted summary judgment in favor of the operators under a joint operating agreement for allegedly failing to place a well into production by a certain time, holding that the plaintiffs failed to assert their claim that had accrued more than four years earlier under Pennsylvania's four-year statute of limitations and that, in any event, the plaintiffs failed to establish the operator's gross negligence or willful misconduct as required by the JOA in order to recover.

D. Oil + Gas Fee Awards and Sanctions

1. Gas company defendants had a difficult time obtaining fee awards or sanctions following victories in 2020.

2. In *Delaware Riverkeeper v. Sunoco Pipeline L.P.*, No. CV 18-2447, 2020 WL 5653451 (E.D. Pa. Sept. 23, 2020), the court denied Sunoco's bid for fees after concluding that the motion rested on the Riverkeeper's "mistaken view" on the law versus any improper litigation conduct on the Riverkeeper's part.

3. Similarly, a federal court in Pennsylvania denied Range's bid to impose sanctions on a plaintiff for lack of evidence that he instituted an action against the company for an improper purpose. *Kopko v. Range Resources – Appalachia, LLC*, --- F. Supp. 3d ---, No. 2:20-CV-00423-MJH, 2020 WL 4877368 (W.D. Pa. Aug. 20, 2020).

E. Oil + Gas Labor and Employment

1. Oil and gas companies often face a number of employment claims involving workplace incidents, workers' compensation, and wage/hour disputes.

2. Workers' Compensation Immunity from Tort Liability.

a) When workplace injuries occur on the well site, workers' compensation statutes generally provide immunity from tort suits for those injuries.

b) In *Jones v. SWEPI LP*, No. 2:19-cv-00050 (W.D. Pa. Jan. 16, 2020), a federal judge held that Pennsylvania workers' compensation laws apply in a wrongful-death lawsuit alleging that a falling piece of the defendant's equipment killed a worker, reasoning that the law of the state in which the worker died applied and PA has a strong public interest in applying PA law that immunized employers from tort suits for workplace injuries that trumped the parties' choice of TX law to govern their affairs.

c) Despite the strong presumption in favor of applying state workers' compensation laws, the Superior Court of Pennsylvania held that neither EQT nor Halliburton are immune from tort liability for injuries sustained by their contractor's employee because the contractor engaged in moving and unloading materials instead of removing/excavating/drilling soil or rocks/minerals and therefore did not qualify as a subcontractor of a "statutory employee" for purposes of the Workers Compensation Act. *Dobransky v. EQT*

Production Company, --- A.3d ---, No. 900 WDA 2019, 2020 WL 4592099 (Pa. Super. Aug. 11, 2020).

3. Calculating Compensation for Overtime Under FLSA.

a) Gas companies sometimes offer bonus payments to the employees of their contractors. When calculating overtime payment obligations a one-and-one-half the "regular rate" of employment, do those bonuses count?

b) In *Sec'y United States Dep't of Labor v. Bristol Excavating, Inc*., 953 F.3d 122, No. 17-3663, 2019 WL 3926937 (3d Cir., Aug. 20, 2019), the Third Circuit held that incentive bonuses provided by gas companies to the employees of their contractors are part of the regular rate of pay only when the employer and employee agree that it would be part of the employees compensation for FLSA purposes.

F. Oil + Gas Regulatory Litigation

1. Legislative Standing

a) State senators and representatives have attempted to intervene in a number of regulatory litigation matters over the past year, with varying degrees of success.

b) In *Scarnati v. Dep't of Envtl. Prot.*, No. 186 M.D. 2019, 2019 WL 5876443 (Pa. Cmwlth. Nov. 12, 2019), the Commonwealth Court of Pennsylvania concluded that two state senators lacked standing to compel the Environmental Quality Board to propose new water quality regulations regarding manganese as required by new law, holding that the agency's inaction didn't affect the senators' ability to introduce or vote on legislation for purposes of "legislative standing."

c) Likewise, the Commonwealth Court of Pennsylvania concluded that a Pennsylvania senator lacked legislative standing and personal standing to file a complaint with the Public Utilities Commission for emergency interim relief against Sunoco to stop the construction of Mariner East pipelines and reversed the PUC's contrary order, remanding with instructions to dissolve the PUC's interim emergency order and dismiss the senator's complaint. *Sunoco*

Pipeline L.P. v. Dinniman, --- A.3d ---, No. 1169 C.D. 2018, 2019 WL 4248071 (Pa. Cmwlth. Sept. 9, 2019).

d) Finally, the Third Circuit in *Wayne Land & Mineral Grp., LLC v. Delaware River Basin Comm'n*, --- F.3d ---, No. 19-2354, 2020 WL 2530823 (3d Cir. May 19, 2020), remanded an appeal from an order denying an intervention bid by three state senators aligned with challengers to the DRBC's regulations that prohibit oil and gas well "projects" within the basin, concluding that the senators must establish standing to bring a claim that the Delaware River Basin Compact among Pennsylvania and other states cannot be interpreted as conferring authority on DRBC to regulate hydraulic fracturing in the basin.

2. Chapter 78a

a) The Environmental Quality Board promulgated Chapter 78a in 2016, followed by a lawsuit challenging several provisions. That lawsuit has lasted several years.

b) The Marcellus Shale Coalition challenged (a) the new definition of "public resources" that require well operators to protect certain privately owned property and certain unlisted species of special concern; (b) the new "area of review" ("AOR") regulations that require well operators to survey and plug/abandon wells within a certain radius of a well proposed in a permit application; (c) new requirements to upgrade water impoundments or shut down previously permitted impoundments; and (d) new requirements to conduct pre- and post-construction stormwater runoff analyses that are exempt in other regulations.

c) The court enjoined (a) the definition of "public resources" to the extent it treated certain privately owned property as "public" property; (b) the definition of "public resources" to the extent it imposed obligations on well operators to protect "special concern species" that are not classified as such by regulation as required by law; (c) part of the AOR regulations to the extent they require a well operator to monitor and then plug all wells within a given area even if well operator cannot access them or does not own or operate those wells; (d) part of the regulations that penalized well operators for failing to upgrade previously permitted impoundments; and (e) the new site-restoration regulations to the extent they require well

operators to conduct pre- and post-construction stormwater runoff analyses that are exempt under current law.

d) In *Marcellus Shale Coalition Marcellus Shale Coalition v. DEP*, 185 A.3d 985 (Pa. 2018), the Supreme Court of Pennsylvania agreed that the Commonwealth Court did not err in issuing its temporary preliminary injunction except with respect to (a) the contested regulations relating to existing well-development impoundments and (b) the purported abrogation of an exemption under the Clean Streams Law/Chapter 102 regarding PCSM activities. On those issues, the Court concluded that the MSC did not carry its burden to demonstrate a clear right to relief and, as such, reversed the grant of preliminary injunctive relief in that respect while the Commonwealth Court continues to consider the case on its merits.

e) In *MSC v. DEP*, --- A.3d ---, No. 573 M.D. 2016, 2019 WL 3268820 (Pa. Cmwlth., July 22, 2019), the Commonwealth Court issued the latest decision in the MSC litigation enjoining some but not all of the challenged provisions, concluding that

(1) DEP had authority to (a) require operators to identify abandoned wells within certain areas near their proposed wells, (b) impose some additional site restoration requirements, (c) regulate certain impoundments, and (d) require additional reporting for some waste activities.

(2) However, the court struck down regulations requiring well operators to (a) plug and abandon wells that don't belong to them and (b) restore sites to original contours within 9 months of completing certain drilling activities even if operators receive a two-year extension to do so.

f) The court deferred ruling on other challenges to regulations involving freshwater impoundments and spill remediation.

3. Article I, § 27 of the Pennsylvania Constitution

a) Since the Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"), several more cases have made their way to the appellate courts over the past year involving a variety of claims.

b) Corpus of the Trust

(1) When DCNR leases oil and gas rights, do the bonus and royalty payments both become part of the "corpus" of the trust to be used for environmental protection and conservation?

(2) In *Pennsylvania Envtl. Def. Found. v. Commonwealth*, --- A.3d ---, No. 228 M.D. 2012, 2019 WL 3402922 (Pa. Cmwlth., July 29, 2019), the Commonwealth Court rejected a challenge under Article I, sec. 27 to the Commonwealth's use of bonus and royalty payments from the state's Oil and Gas Lease Fund for non-conservation purposes, holding that (by statute) one-third of the proceeds constituting bonuses and rental payments are not part of the corpus of the trust created by Article I, sec. 27 and concluding that the challenged fiscal enactments transferring lease funds to the general fund are facially constitutional subject to an accounting.

(3) The case is pending before the Pennsylvania Supreme Court.

c) DCNR Oil and Gas Leases and Forest Management Plan

(1) The Pennsylvania Environmental Defense Foundation ("PEDF") is challenging DCNR's forest management plan that now requires DCNR to balance the economic benefits of oil and gas development with forest preservation.

(2) In its petition, PEDF argues, among other things, that DCNR has no authority to lease state forests for oil and natural gas development for the general economic benefit of the Commonwealth.

(3) The parties argued DCNR's preliminary objections in September 2020. The case is pending at *PEDF v. DCNR*, No. 609 MD 2019 (Pa. Cmwlth.)

d) ERA and Zoning Ordinances

(1) Since *Frederick v. Allegheny Township*, --- A.3d ---, No. 2295 C.D. 2015 (Pa. Cmwlth., October 26, 2018), parties

challenging zoning ordinances under the ERA have been unsuccessful.

(2) In *Protect PT v. Penn Twp. Zoning Hearing Bd.*, No. 1632 C.D. 2018, 2019 WL 5991755 (Pa. Cmwlth., Nov. 14, 2019), the Commonwealth Court of Pennsylvania rejected a local environmental group's challenge to an ordinance that authorized oil and gas development in a resource zone, holding (among other things) that (a) the municipality considered the environment when enacting the ordinance, (b) the objectors failed to establish under Article I, sec. 27 of the Pennsylvania Constitution that the ordinance authorizing development unreasonably impairs the environment, and (c) the municipality did not have the authority to go beyond its statutory powers to enact environmental protections left to the PADEP.

(3) In a separate case, the Commonwealth Court rejected various arguments by environmental groups that zoning approvals subject to numerous conditions violated Article I, sec. 27 of the Pennsylvania Constitution. *Protect PT, Appellant v. Penn Twp. Zoning Hearing Bd. & Olympus Energy LLC*, --- A.3d ---, No. 575 C.D. 2019, 2020 WL 3640001 (Pa. Cmwlth. July 6, 2020).

4. Permits

a) Gas and pipeline companies have face many challenges to their permit authorizations brought by various environmental groups, though not all have been very successful.

b) In *Delaware Riverkeeper Network v. Sunoco Pipeline LP*, --- F. Supp. 3d ---, No. CV 18-2447, 2020 WL 1888954 (E.D. Pa. Apr. 16, 2020), for example, a federal judge sharply rejected an invitation from the Riverkeeper to impose a "pointless requirement" on Sunoco Pipeline, L.P. to obtain a federal permit that EPA would never issue because the company secured the state-law equivalent permit.

c) Similarly, the Third Circuit rejected a challenge by the Delaware Riverkeeper to the PADEP's decision to authorize Transco's Atlantic Sunrise Pipeline to discharge water used to conduct hydrostatic testing of the pipeline following the company's notice of intent to comply with a general permit, holding that PADEP did not violate

any public notice obligations. *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*, --- F.3d ---, No. 17-3299, 2019 WL 3822247 (3d Cir., Aug. 15, 2019).

5. DRBC

a) The Delaware River Basin Commission, a quasi-federal agency comprised of several states (including Pennsylvania) has jurisdiction over water withdrawals from the Delaware River. However, the DRBC has long attempted to exercise jurisdiction over natural gas wells and has banned the activity within the basin.

b) The Wayne Land and Mineral Group has led the battle against the DCNR's attempt to exercise jurisdiction over natural gas wells within the basin, arguing that natural gas wells are not "projects" under the Interstate Compact such that the DRBC cannot exercise jurisdiction to authorize (or prohibit) natural gas wells.

c) The case is in discovery. In recent decisions, the federal court has ordered the agency to produce various documents over the agency's objections based on privilege and deliberative-process. *Wayne Land and Mineral Group, LLC v. Delaware River Basin Commission*, --- F. Supp. 3d ---, No. 3:16-CV-00897, 2020 WL 527987 (M.D. Pa. Jan. 31, 2020); *Wayne Land and Mineral Group, LLC v. Delaware River Basin Commission*, --- F. Supp. 3d ---, No. 3:16-CV-00897, 2020 WL 762835 (M.D. Pa. Feb. 14, 2020)

6. Impact Fee – Stripper Wells

a) Pennsylvania's "impact fee" does not apply to "stripper wells."

b) In *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, --- A.3d ---, No. 47 WAP 2017, 2018 WL 6817092 (Pa., Dec. 28, 2018), the Pennsylvania Public Utility Commission assessed the impact fee on various well operators whose wells did not exceed 90,000 cubic feet of natural gas per day in each month of a calendar year. The well operators challenged the assessment, arguing that the impact fee only applies if a well exceeds 90,000 cubic feet of natural gas per day in each month of a calendar year. The Commonwealth Court agreed.

c) The Pennsylvania Supreme Court reversed, concluding that the state's impact fee applies to wells that exceed 90,000 cubic feet of

natural gas per day in any one month of the year. The court remanded to determine whether the well operator must pay interest and penalties.

d) On remand from the Pennsylvania Supreme Court, the Commonwealth Court held that the company on the hook for impact fees on low-producing wells is not responsible for interest and penalties for lack of due process because the statute failed to include "constitutionally necessary provisions allowing companies to challenge assessments or to receive refunds for charges later determined to be invalid." *Snyder Bros., Inc., v. Pa. P.U.C.*, No. 1043 C.D. 2015, 2020 WL 587012 (Pa. Cmwlth. Feb. 6, 2020).

7. Right to Know Law

a) The Pennsylvania Right to Know Law provides that public records are subject to disclosure unless one of many exceptions apply. 65 P.S. § 67.708.

b) The courts have grappled with several public disclosure issues under the RTKL involving oil and gas activities.

c) *In re: Jennifer Clark and the Clean Air Council*, 2020 WL 5500539 (Pa. Off. Open Rec. Sept. 11, 2020), the Office of Open Records partially denied a request by a lawyer for an environmental group (the Clean Air Council) for records of communications and meetings between a municipality, MarkWest Liberty Midstream, and Range Resources, holding that access to certain records would disclose the location of critical systems including public utility and gas systems.

d) In *Pa. Dep't of Labor & Ind. v. Darlington*, --- A.3d ---, No. 1583 C.D. 2019, 2020 WL 3053980 (Pa. Cmwlth. June 9, 2020), the Commonwealth Court held that the Department of Labor's records of regular boiler and pressure vessel *inspections* are subject to public disclosure but its *investigation* records are non-criminal agency investigations that are exempt from public disclosure.

8. Climate Change Issues

a) There are a number of cases alleging that production companies and governments that support fossil-fuel development should be liable for damages caused by climate change.

b) So far, the following state or local governments have filed climate change cases against the majors: Baltimore, MD; Boulder, CO; the State of Delaware; Washington, D.C.; Honolulu, HI; the Commonwealth of Massachusetts; the State of Minnesota; the State of New York; the State of Rhode Island; and the State of Connecticut.

c) The oil companies so far have been largely unsuccessful removing these matters to federal court on the theory that climate change involves inherently federal interests as opposed to local or state interests alone.

G. Oil + Gas Pipelines

1. Public officials, environmental groups, and opponents of natural gas development waged war on pipeline infrastructure projects over the last year, including the Atlantic Coast Pipeline, Mountain Valley Pipeline, and PennEast Pipeline, with varying degrees of success.

2. Pipeline Rights-of-Way on Federal Lands

a) The sponsors of the Atlantic Coast Pipeline project planned to move gas from West Virginia to Virginia and North Carolina.

b) In *CowPasture River Pres. Ass'n v. Forest Serv.*, --- F.3d ---, No. 18-1144, 2018 WL 6538240 (4th Cir. Dec. 13, 2018), the Fourth Circuit rejected authorizations granted by the U.S. Forest Service to install the line under a minimal amount of land in the Appalachian Trail.

c) The Supreme Court of the United States reversed, holding that the U.S. Forest Service had authority under the Mineral Leasing Act to grant rights of way through federal lands.

d) Despite the victory, regulatory and litigation issues, cost overruns, and significant delays caused the sponsors to abandon the project.

3. Eminent Domain

a) Challenges to Pipeline Eminent Domain Authority

(1) The Natural Gas Act grants interstate pipeline companies the power of eminent domain upon obtaining a certificate of public convenience from the Federal Energy Regulatory Commission.

(2) When a certificated pipeline company condemns property in which a state has interests, what happens?

(3) In *In re PennEast Pipeline Co., LLC*, --- F.3d ---, No. 19-1191, 2019 WL 4265190 (3d Cir., Sept. 10, 2019), the Third Circuit held that PennEast could not condemn land in which New Jersey claimed interests under the condemnation authority bestowed to pipeline companies in the Natural Gas Act, holding that the NGA did not abrogate the state's 11th Amendment immunity from suit in federal court and that the NGA did not delegate the federal government's exemption from sovereign immunity defenses by the states.

(4) PennEast has filed a petition for a writ of certiorari that remains pending.

b) Just Compensation

(1) Although most of the cases involve challenges to a pipeline company's condemnation authority, several cases have addressed how the courts should determine just compensation for the condemned property.

(2) In *In re Tennessee Gas Pipeline Co., LLC, --- F.3d ---, No. 17-3700*, 2019 WL 3296581 (3d Cir., July 23, 2019), the Third Circuit concluded that state substantive law on just compensation applies in condemnation actions under the Natural Gas Act when companies acquire private property by eminent domain to construct, operate, and maintain natural gas pipelines.

(3) The Third Circuit has also confirmed that the admissibility of expert testimony in a condemnation proceeding under the Natural Gas Act under Rule 702 requires reliable expert testimony free of speculation and conjecture that fits the proceedings. *UGI Sunbury LLC v. A Permanent Easement for*

1.7575 Acres, --- F.3d ---, No. 18-3126, 2020 WL 628540 (3d Cir. Feb. 11, 2020).

(4) The court has rejected inflated fair market value estimates when pre-estimate assumptions for the use and value of condemned property would be barred by local zoning rules. In re *Rover Pipeline LLC*, --- F.3d ---, No. 19-1613, 2020 WL 2214132 (3d Cir. May 7, 2020).